

ADAPTING TO ADAPTIVE REUSE: COMMENTS AND CONCERNS ABOUT THE IMPACTS OF A GROWING PHENOMENON

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I. INTRODUCTION

Around the halls and courtyards of Los Angeles' historic City Hall, one will frequently overhear rumors and conversations alleging that the future of the City of Los Angeles ("the City") will most likely revolve around "adaptive reuse." Adaptive reuse is the process of redeveloping older, often dilapidated or abandoned, structures into buildings that will be used for purposes other than those originally intended for the building.¹ In most cases, old office buildings, high-rises, or hotels are converted into developments with retail establishments occupying the street-level space and residential units occupying the higher levels. The Los Angeles Adaptive Reuse Ordinance ("the Ordinance") encourages developers to convert older buildings into new developments by providing incentives such as faster entitlements and reduced development fees.² This Note will examine and scrutinize those particular incentives that are made available to developers in the residential-to-residential building conversion context (i.e. the conversion of residential hotels to luxury lofts). The major argument voiced by opponents of this scheme is that it 1) defeats the underlying purpose of providing adaptive reuse incentives in the first place and 2) displaces a large number of lower income tenants willing to live in such "slum hotels" for the sake of catering to more affluent tenants.³

The intention of this Note is to provide the reader with a thorough background of the adaptive reuse phenomenon and to consider what the implications of adaptive reuse mean for the residents of Los Angeles, especially those living in Downtown. Although this Note focuses on events occurring in Los Angeles, the issues and topics discussed herein can certainly be abstracted and applied to cities nationwide. Section I introduces the reader to the concept of adaptive reuse via illustrative

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¹ CITY OF LOS ANGELES, ADAPTIVE REUSE PROGRAM SUMMARY (2d ed. Feb. 2006) [hereinafter PROGRAM].

² L.A., CAL., MUN. CODE § 12.22-A(26)(h) (2003).

³ LivablePlaces.org, Los Angeles City Council Expands Adaptive Reuse Incentives, <http://www.livableplaces.org/node/33> (last visited May 1, 2009) [hereinafter Livable Places].

examples, a history of the Ordinance's origins, and a discussion of how adaptive reuse relates to and facilitates the City's goal of "smart growth." Section II delves into the Ordinance itself, explaining the various building incentives given to developers of adaptive reuse projects, and examining the objections and controversy arising out of certain applications of the Ordinance. Section III explores and criticizes existing methods used to promote affordable housing and relocation assistance in Los Angeles. Section IV recommends several solutions to the potential displacement problem created by the Ordinance. Finally, Section V proposes a revision to the Los Angeles Adaptive Reuse Ordinance for purposes of alleviating negative impacts on affordable housing.

II. AN OVERVIEW OF ADAPTIVE REUSE IN LOS ANGELES

Stated simply, adaptive reuse means "adapting an existing economically obsolete building for a new more productive purpose."⁴ Many buildings intended to be used in an adaptive reuse project undergo substantial improvement to allow for new residential purposes, including use as apartments, condominiums, and hotels.⁵ Since the City views adaptive reuse as an engine for economic growth and the revitalization of neighborhoods,⁶ the City readily grants numerous incentives to developers pursuing such projects.⁷ Discussed in further detail below, these incentives include the streamlining of project approval and entitlement processes and allowing developers greater flexibility in meeting zoning requirements.⁸ Don Spivack, deputy chief of operations for the Los Angeles Community Redevelopment Agency, sums up the benefits of the ordinance: "Before the ordinance, it took a very large institution with institutional money or substantial public money to get it done. The changes in the code took away a lot of the cost and time in having to meet the preexisting code."⁹ Since adaptive reuse encourages developers to use existing building stock, reserving special additional incentives for projects involving historic buildings,¹⁰ the response by historic preservation societies in the Los Angeles area has been one of celebration.¹¹

The phenomenon of adaptive reuse is well illustrated in the case of Downtown Culver City, a neighboring city of Los Angeles. The area where Culver and Washington Boulevards meet was recently "the closest thing to a slum in the entire Westside."¹² Where the streets were once dominated by "thrift shops and sad hamburger stands, shuttered movie theaters and empty parking lots . . ." one would be hard-pressed to recognize that same area

⁴ PROGRAM, *supra* note 1, at Program Summary.

⁵ *Id.*

⁶ *Id.*, at Forward.

⁷ *Id.*, at Introduction.

⁸ *Id.*; *see infra* Part III.

⁹ Don Spivack, *quoted in* Daniel Miller, *Adaptive Reuse Has Changed the Look of L.A.*, L.A. BUS. J., Feb 12, 2007, at 17.

¹⁰ PROGRAM, *supra* note 1, at Appendix.

¹¹ PreserveLA.com, Citywide Adaptive Reuse, <http://www.preservela.com/archives/000031.html> (last visited May 1, 2009).

¹² Jonathan Gold, *Station Identification*, L.A. WEEKLY, May 17, 2006, *available at* <http://www.laweekly.com/2006-05-18/eat-drink/station-identification/>.

today.¹³ The Downtown Culver City of today is one of the trendiest dining and entertainment destinations in the Los Angeles area. On any Saturday evening, the sidewalks are filled with hundreds of pedestrians, packing into various new wine bars, boutiques, restaurants, and cafés.¹⁴ One particular adaptive reuse project in that neighborhood has transformed an old subway station (which long ago, in a time before freeways, serviced Southern California's fabled "Red Cars")¹⁵ into a new performing arts center.¹⁶ The situation in Culver City provides only one example of a revitalized regional economy owing itself to adaptive reuse. The story that occurred there has repeated itself in a multitude of locales across the United States.

Southern California is not alone in experiencing a sweeping influx of adaptive reuse projects. Farther up the Pacific Coast, in San Jose, California, a shopping center now resides on the site of a former General Electric factory.¹⁷ The RiverEast Center in Portland, Oregon sits on a site once occupied by a warehouse.¹⁸ The Midwest has also seen its share of adaptive reuse projects. The historic Reese Peters Mansion in Lancaster, Ohio now houses the Decorative Arts Center of Ohio.¹⁹ In Maysville, Kentucky, a small Southern town which was once an important stop on the Underground Railroad, developers converted a historic restaurant, The Bishop's Table, into a private residence.²⁰ The sheer geographical reach of these projects alone warrants a closer look into the factors that have influenced this growing trend.

A. FACTORS CONTRIBUTING TO ADAPTIVE REUSE'S RAPID RISE IN POPULARITY

The most obvious contributor to the rise of adaptive reuse projects is the cost of land.²¹ Real estate can be divided into two components—land and structure. While the real price of structures has risen only moderately since the 1980s, the real price of land has taken a relative leap.²² This implies that sprawling suburban developments, which take up expansive parcels of land, will inevitably involve higher costs than projects undertaken in urban cores.²³ As a result, new construction in the suburbs will be less attractive to certain developers than renovations of existing buildings in downtown areas. Alex Ferrini, a real estate attorney, states that

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *The Red Cars of Los Angeles*, Jan. 15, 2002, available at <http://www.usc.edu/libraries/archives/la/historic/redcars>.

¹⁶ Gold, *supra* note 12.

¹⁷ Michael Ware, *New Wine, Old Bottle*, RETAIL TRAFFIC, Jan. 1, 2007, available at http://retailtrafficmag.com/mag/retail_new_wine_old.

¹⁸ Brian Libby, *LEED Gold Resurrection*, ARCHITECTURE WEEK, Jan. 9, 2008, at B1.1, available at http://www.architectureweek.com/2008/0109/building_1-1.html.

¹⁹ DurableRestoration.com, Rehabilitation & Adaptive Reuse, <http://www.durable restoration.com/reuse.html> (last visited May 1, 2009).

²⁰ DurableRestoration.com, Portfolio Bishop's Table, <http://www.durable restoration.com/portfolio-bishops-table.html> (last visited May 1, 2009).

²¹ Ware, *supra* note 17.

²² See Morris A. Davis & Michael G. Palumbo, *The Price of Residential Land in Large U.S. Cities* 1–2 (Feb. 2007), available at <http://www.morris.marginalq.com/2007-02-Davis-Palumbo.paper.pdf>, reprinted in 63 J. URBAN ECON. 352 (2008).

²³ Ware, *supra* note 17.

“land costs alone are turning what were profitable projects ten years ago into projects that are difficult to keep in the black [W]hen you take land costs into consideration, adaptive reuse makes your overall capital investment work.”²⁴

Next, adaptive reuse has also come into favor among cities wishing to rejuvenate the industrial regions devastated by the decline of American manufacturing.²⁵ If cities are desperate to revitalize their less affluent areas, developers can gain leverage in the bargaining arena. Cities are more willing to give economic incentives and special permit approvals to developers wanting to breathe life back into economically depressed areas.²⁶ The incentives granted to developers by the Los Angeles Adaptive Reuse Ordinance provide a prime example of this scenario. These incentives are an especially lucrative bonus because they are intended to ease the painfully challenging permit requirements and rezoning processes developers are forced to endure.²⁷

Finally, an assortment of abandoned factories, industrial sites, and historic buildings has been left open to redevelopment due to general economic decline in urban cores.²⁸ This state of affairs complements cities’ attempts at persuading developers to bring projects to these locations. Undoubtedly, urban real estate becomes harder to come by as time passes.²⁹ Developers are beginning to realize that it makes sense to utilize post-industrial sites that local governments are eager to revitalize.³⁰

B. PIONEERS OF THE ADAPTIVE REUSE MOVEMENT IN LOS ANGELES: A BRIEF HISTORY

Influenced by common desires, artists were at the forefront of the movement towards loft-living.³¹ In the 1980s, many artists started moving to the eastern edge of Downtown Los Angeles assumedly because they prized the unpartitioned, open space that abandoned warehouses provided.³² By 1999, when the Adaptive Reuse Ordinance came into effect, their loft-living way of life finally became legal.³³

The impetus behind the Ordinance was the City’s desire to make renovation projects more cost efficient and accessible to developers.³⁴ It all began in the late 1990s, when Tom Gilmore, a celebrated real estate developer, sat down with Mayor Richard Riordan to discuss a new idea that would eventually evolve into the Adaptive Reuse Ordinance.³⁵ Shortly

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See id.*

²⁹ Ware, *supra* note 17.

³⁰ *Id.*

³¹ Robert Greene, *Revising Los Angeles’ DNA*, L.A. WEEKLY, April 28, 2005, available at <http://www.laweekly.com/2005-04-28/news/revising-los-angeles-dna>.

³² *Id.*

³³ *Id.*

³⁴ Miller, *supra* note 9.

³⁵ Dan Cox, *Redefining the Renovation Game*, L.A. BUS. J., Feb. 12, 2007.

thereafter, Gilmore completed the San Fernando Building, the first adaptive reuse project in Downtown Los Angeles.³⁶

Carol Schatz, President of the Downtown Center Business Improvement District, was another pioneer of the Ordinance.³⁷ In the mid 1980s, Schatz helped implement the Downtown Strategic Plan, thereafter leading the Los Angeles Central City Association to formulate the “Downtown Development Strategy,” with an eye towards the “revitaliz[ation] of Downtown from the creation of mixed-use/mixed income projects to new transportation amenities.”³⁸

Lastly, there is architect Wade Killefer, who has designed numerous projects Downtown.³⁹ Killefer may well be the “brains” behind the promotion of adaptive reuse in Los Angeles. In 2000, he conducted a survey on housing possibilities in the Downtown Historic Core District which uncovered the potential for the conversion of nearly fifty buildings into five-thousand new residential units.⁴⁰ Since that study was released, close to four-thousand units have undergone conversion, and as of the time of this Note’s drafting, many more are scheduled for development.⁴¹ On the whole, these innovators were driven with the desire to turn Downtown Los Angeles into the next “city that never sleeps.”⁴²

C. ADAPTIVE REUSE’S CONNECTION TO AND FACILITATION OF MIXED-USE AND “SMART GROWTH”

Perhaps the most significant impact that the Ordinance will have is the facilitation of “smart growth” in Los Angeles. For years, smart growth has been the vision of countless politicians and leaders, dreaming of an alternative to the Southland’s nightmarish and intimidating traffic congestion problem. In a nutshell, smart growth is the creation of “a ‘denser city’ via a plan to concentrate multistory, ‘mixed use’ housing—stores and restaurants on the ground, apartments or condos above—on or near transit corridors.”⁴³ In effect, smart growth aims to relieve Los Angeles’ traffic problem by planning and implementing projects that would set workers’ residences closer (oftentimes within walking distance) to their jobs. Consequently, an influx of retail shops and restaurants would fill leftover vacant lots, as companies start to realize that the increase in an area’s “walkability” can translate into business opportunity. Soon, with jobs and shops in one central location, people would once again find it convenient to walk from place to place, a proposition previously unheard of in Los Angeles.

³⁶ *Id.*; Miller, *supra* note 9; *see also* Greene, *supra* note 31.

³⁷ Central City Association of Los Angeles, Carol E. Schatz, http://www.ccala.org/new/ccca_staff_carol.asp (last visited May 1, 2009) [hereinafter Central City].

³⁸ *Id.*

³⁹ Kathryn Maese, *Adaptive Reuse Revisited*, L.A. DOWNTOWN NEWS, May 28, 2007, available at <http://www.ladowntownnews.com/articles/2007/05/28/news/news01.txt>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See* L.A., CAL., MUN. CODE § 12.22-A(26)(a) (2007); *see also* Central City, *supra* note 37.

⁴³ David Zahniser, *A Denser L.A.*, L.A. WEEKLY, May 31, 2007, available at <http://www.laweekly.com/2007-05-31/news/a-denser-l-a>.

[S]mart growth relies on a few major precepts. One is that the car is bad. Another is that cities should be composed of villages, where residents walk to their amenities—shops, restaurants, a decent dry cleaner. To make those places walkable, housing and businesses are concentrated in the same multistory buildings, according to the smart-growth doctrine. And to discourage cars further, those “mixed use” buildings are placed on big streets with frequent public transit, like Santa Monica Boulevard.⁴⁴

Alluding to the hopes of Los Angeles City Councilman Jack Weiss, neighborhoods like Century City, towering with skyscrapers, may one day “behave like [villages].”⁴⁵

The implementation of adaptive reuse projects in a region enables smart growth. In fact, the connection between adaptive reuse and smart growth is made plainly visible in the Adaptive Reuse Ordinance itself. The stated purpose of adaptive reuse is,

to revitalize the Greater Downtown Los Angeles Area and implement the General Plan by facilitating the conversion of older, economically distressed, or historically significant buildings to apartments, live/work units or visitor-serving facilities. This will help to reduce vacant space as well as preserve Downtown’s architectural and cultural past and encourage the development of a live/work and residential community Downtown, thus creating a more balanced ratio between housing and jobs in the region’s primary employment center. This revitalization will also facilitate the development of a “24-hour city” and encourage mixed commercial and residential uses in order to improve air quality and reduce vehicle trips and vehicle miles traveled by locating residents, jobs, hotels and transit services near each other.⁴⁶

As adaptive reuse works to facilitate the gentrification of surrounding neighborhoods, new businesses and restaurants are likely to find themselves attracted to the area. The natural progression involves an increase in consumer spending, translating to a rise in the area’s prosperity. As a result, tax revenues will soon grow and extra funds may be available for social works. One important implication of this is the possibility for future programs to be funded using Tax Increment Financing, a technique which will be discussed in further detail below.⁴⁷

Proponents of smart growth subscribe to the notion that transit-based land use design can enhance economic rehabilitation and the overall livability of a community.⁴⁸ Commentator James Kushner reasons that since a significant portion of the general population is unable to afford cars, “requiring automobiles for access to employment is inconsistent with the

⁴⁴ David Zahniser, *What’s Smart about Smart Growth*, L.A. WEEKLY, May 30, 2007, available at <http://www.laweekly.com/news/features/whats-smart-about-smart-growth/16507>.

⁴⁵ *Id.*

⁴⁶ L.A., CAL., MUN. CODE § 12.22-A(26)(a) (2007); L.A., CAL., MUN. CODE § 12.22-A(26)(g), Zoning Administrator’s Interpretation, Case No. ZA 2004-7710(ZAI) (Dec. 21, 2004) (defining Downtown Project Area).

⁴⁷ See *infra* Part V.A.

⁴⁸ James A. Kushner, *A Comparative Vision of the Convergence of Ecology, Empowerment, and the Quest for a Just Society*, 52 U. MIAMI L. REV. 931 (1998).

notion of a just society.”⁴⁹ Additionally, safety-based policy arguments can be found to support smart growth’s discouragement of automobiles. Arguably, the greater usage of cars makes life in the suburbs more dangerous than in the inner city.⁵⁰ Support for this proposition rests in the fact that “risk of early death is greater in the suburbs than in the central city.”⁵¹

On the other hand, critics counter that the increasing degree of suburbanization and sprawl found in the United States is a matter of society’s preference, and the push towards centralized communities is an exercise in futility.⁵² They argue that new transit systems merely replace “flexible bus routes with costly fixed-route services to a few downtown areas, while the growth in jobs and population has been in the suburbs”⁵³ One observer has opined that this “squandering” of funds⁵⁴ on renewal projects is even more frustrating because the need for a suburb-to-downtown commute is becoming less of a reality.⁵⁵ In Los Angeles, decentralization is perhaps more of an inescapable way of life than concepts like “smart growth” and “urban village” let on.⁵⁶

Furthermore, not everyone is convinced that the proponents of smart growth sincerely harbor the same concerns that the concept was designed to address. In other words, some are concerned that certain projects tend to behave like a wolf in sheep’s clothing—a sprawling environmental disaster that merely happens to be adorned with the name of “smart growth.”⁵⁷ Critics recognize that local decision-makers are impressed by the terminology, and developers can easily garner public support by throwing those two little words around.⁵⁸ Some have argued that developers have in effect been given a license to “perpetuate rather than limit the sprawl” simply by sprinkling a handful of businesses and shops around a proposed development and calling it “smart growth.”⁵⁹

Illustrative of the above point is the “Playa Vista Project,” the first major smart growth project in Los Angeles,⁶⁰ where Steven Spielberg once envisioned his DreamWorks campus to reside.⁶¹ Naturally, the Los Angeles City Council, voters, and the State Coastal Commission eagerly approved the plan to develop the nearly one-thousand acre property encompassing the Ballona Wetlands,⁶² apparently excited over the revenue prospects that

⁴⁹ *Id.* at 939.

⁵⁰ *Id.* at 940.

⁵¹ *Id.*

⁵² Peter Gordon & Harry W. Richardson, *Are Compact Cities a Desirable Planning Goal?*, 63 J. AM. PLAN. ASS’N 95–96 (1997).

⁵³ *Id.* at 98.

⁵⁴ *Id.* at 100.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ David Zahniser, *Peddling Smart Growth*, L.A. WEEKLY, May 31, 2007, available at <http://www.laweekly.com/news/features/peddling-smart-growth/16508> [hereinafter Zahniser, *Peddling*].

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ David Ferrell, *Spielberg Notes Hollywood Twist for Dream Works*, L.A. TIMES, Dec. 14, 2005 at sec. Metro, pt. B.

⁶² DANIEL P. SELMI & JAMES A. KUSHNER, *LAND USE REGULATION: CASES AND MATERIALS* 36–37 (2d ed. 2004).

such a development promised to bring to the City—especially if a major movie production studio were to become the development’s main tenant. In the end, the massive parcel, which once housed billionaire Howard Hughes’ airplane hangar where the “Spruce Goose” was constructed,⁶³ never did attract DreamWorks.⁶⁴ Though it did manage to do something else: despite seemingly endless litigation by a number of environmentalist organizations and citizen groups (i.e. Friends of the Ballona Wetlands),⁶⁵ the project “gobbled up a portion of the Ballona Wetlands but was billed as smart growth—largely because it combines homes, workplaces, shops and restaurants.”⁶⁶

Former Los Angeles City Councilman Mike Woo has gone as far as to say that “[t]here’s no smart-growth police So in the absence of smart-growth police, it’s the Wild West out there, with people using whatever name they want.”⁶⁷ While it is true that, unlike in some states such as Oregon,⁶⁸ site plan reviews in California are quasi-legislative in nature⁶⁹ (a characterization that would usually allow public agencies greater deference to consider their own policy biases when formulating decisions on whether to approve development projects),⁷⁰ the critics’ cries may nevertheless be somewhat exaggerated. All public agency determinations in California must comply with the California Environmental Quality Act [CEQA],⁷¹ a mandate that requires (through the filing of Environmental Impact Reports) findings of fact and analyses to be made regarding the mitigation of environmental impacts that a proposed project may produce.⁷² Furthermore, under *Western States Petroleum Association v. Superior Court*, a 1995 case out of the California Supreme Court, all public agencies are confined by this record in making quasi-legislative decisions.⁷³ Therefore, California courts have found that it is unnecessary to further regulate the decision-making processes of local government officials, trusting that the requirements imposed by CEQA and *Western States* provide sufficient procedural protections against “arbitrary and capricious” actions.

On the other hand, the protections of site plan review fail to quiet all concerns. As mentioned below, many smart growth developments in Los Angeles are exempt from site plan review to the extent that adaptive reuse techniques are implemented in the final scheme.⁷⁴

⁶³ *Id.* at 36.

⁶⁴ *Id.* at 41.

⁶⁵ *Id.* at 37–41.

⁶⁶ Zahniser, *Peddling*, *supra* note 57.

⁶⁷ Mike Woo, *quoted in id.*

⁶⁸ *Fasano v. Board of County Comm’rs*, 507 P.2d 23, 30 (Or. 1973).

⁶⁹ *See Western States Petroleum Ass’n v. Superior Court*, 9 Cal. 4th 559, 568 (1995).

⁷⁰ *SELMI & KUSHNER*, *supra* note 62, at 23–24.

⁷¹ CAL. PUB. RES. CODE § 21168.9(a).

⁷² *Id.* § 21100(a)–(b).

⁷³ *Western States*, 9 Cal. 4th at 577.

⁷⁴ L.A., CAL., MUN. CODE § 12.22-A(26)(h)(5) (2007).

III. THE LOS ANGELES ADAPTIVE REUSE ORDINANCE AND ITS FAULTS

Developers enjoy many perks from undertaking adaptive reuse projects.⁷⁵ Such projects are entitled to unique incentives and are exempt from certain regulatory compliances.⁷⁶ For instance, developers of adaptive reuse projects need not be concerned with increasing the number of available parking spaces in their developments beyond the number of spaces that existed in 1999.⁷⁷ Also, the rooms, quarters, and offices within an adaptive reuse building are exempt from compliance with the lot area requirements of the zone or height district in which the project is located.⁷⁸ Perhaps the most significant of all these incentives is that “Adaptive Reuse Projects shall be exempt from the requirements for Site Plan Review”⁷⁹ Site plan review serves the function of allowing local governments a chance to examine and scrutinize the details of a development project (and address its impact on the surroundings) before approving it.⁸⁰ These reviews can be used to deny projects even when their proposed use is permitted.⁸¹ Many Downtown adaptive reuse projects, such as rental projects in buildings constructed before 1974,⁸² are permitted “by right” and do not require environmental clearance, discretionary review, nor compliance with CEQA.⁸³ Contrastingly, the granting of nearly all permits related to the development of *all other* residential buildings in Downtown is contingent on those projects obtaining site plan approval.⁸⁴ Presumably, since adaptive reuse leaves the existing building virtually unchanged, the City believes that site plan review is unnecessary. However, the fallacy here is apparent: although adaptive reuse may do little to the physical structure of a building, projects nevertheless could consequentially impact the surrounding region with respect to matters such as potentially increased traffic or the need for adequate educational facilities. For this very reason, site plan review should be required to “ensur[e] that development projects are properly related to their sites, . . . traffic circulation, . . . infrastructure and environmental setting.”⁸⁵ Since zoning requirements are severely relaxed and the project approval process is expedited for adaptive reuse projects, it is clear why these projects have become so popular in recent years.

⁷⁵ *Id.* § 12.22-A(26)(h).

⁷⁶ *Id.*

⁷⁷ *Id.* § 12.22-A(26)(h)(3).

⁷⁸ *Id.* § 12.22-A(26)(h)(2).

⁷⁹ *Id.* § 12.22-A(26)(h)(5); *id.* § 12.24-X(1)(2007) (stating a few de minimus exceptions to this rule concerning Downtown adaptive reuse projects. For instance, projects in areas zoned for manufacturing and projects in buildings constructed after 1974 require the approval of a Zoning Administrator.).

⁸⁰ SELMI & KUSHNER, *supra* note 62, at 103.

⁸¹ *See, e.g.*, Wesley Inv. Co. v. County of Alameda, 198 Cal. Rptr. 872, 876 (Ct. App. 1984).

⁸² For a detailed description of all review-exempted buildings, consult L.A., CAL., MUN. CODE § 12.22-A(26)(d) (2007).

⁸³ L.A., CAL., MUN. CODE § 12.22-A(26)(h)(5) (2007); PROGRAM, *supra* note 1, at Planning and Land Use: Frequently Asked Questions.

⁸⁴ L.A., CAL., MUN. CODE § 16.05-C(1) (2007).

⁸⁵ *Id.* § 16.05-A.

What stands out about the Ordinance is that the definition of adaptive reuse varies depending on the location of the project.⁸⁶ Consequently, whether a project is to be constructed Downtown may be determinative of whether the project will be entitled to receive the incentives outlined above. The Ordinance defines adaptive reuse generally as “any change of an existing *Non-Residential Use* to new dwelling units, guest rooms, or joint living and work quarters in all or any portion of any eligible building.”⁸⁷ Though notably, the Ordinance carves out a special exception to this definition for projects slated for the Downtown project area. According to the Ordinance, “*Downtown* adaptive reuse” is defined as “any change of use to dwelling units, guest rooms, or joint living and work quarters in all or any portion of any eligible building.”⁸⁸ There is a glaring implication stemming from the differences between these two definitions—it is that if a project is set for Downtown, the project may still be eligible to receive the adaptive reuse incentives even if the existing building were of residential use.⁸⁹ Allegedly, this “oversight” initially was the result of a drafting error in the original ordinance.⁹⁰ When lawmakers attempted to correct the problem, they finally wound up precluding residential-to-residential conversion incentives all over the City—*except* in Downtown.⁹¹ One must assume an explanation for this. Most likely, the success enjoyed by the original ordinance created an atmosphere of excitement and zeal in the Los Angeles City Council. This excitement probably was so great that it induced lawmakers to want to retain a level of ease for developers to fall within the provision and be eligible for the incentives.

Critics are quick to point out that (as currently drafted) the Ordinance has the potential to displace a number of low-income families residing in Downtown buildings that offer cheap, affordable housing.⁹² Offering incentives to encourage such projects raises not only moral issues, but also economic and political issues. “Livable Places,” an organization that has joined with housing and homeless advocates in Los Angeles, argues that “[t]he Adaptive Reuse Ordinance was clearly intended to add to the housing stock by converting underutilized, non-residential properties to housing—not by reducing the number of units affordable to very low income people.”⁹³ Interestingly, the California Legislature has explicitly recognized and lent credibility to this contention:

Significant amounts of housing built to serve lower income households and families is [sic] disappearing from the housing market. This phenomenon is due to *government policies* that allow prepayment of mortgages, *termination of use restrictions* and nonrenewal of subsidy contracts and to changes in market forces which increase property values and *create pressure to convert to middle or upper income housing* or other

⁸⁶ *Id.* §§ 12.22-A(26)(c), 12.24-X(1)(a).

⁸⁷ *Id.* § 12.24-X(1)(a) (emphasis added).

⁸⁸ *Id.* § 12.22-A(26)(c).

⁸⁹ PROGRAM, *supra* note 1, at Planning and Land Use: Frequently Asked Questions.

⁹⁰ Livable Places, *supra* note 3.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

commercial uses. These conversions displace lower income tenants who have very limited options for relocating in comparable affordable housing.⁹⁴

One commentator goes as far as to say that the consequences will leave no one in the metropolitan areas of America unaffected.⁹⁵ Speaking in the context of smart growth and gentrification, Gerald Frug reasons that if poor people are driven out of their inner-city homes because of escalating housing prices, they will be forced to move to the outer areas of the metropolitan region.⁹⁶ Therefore, those currently living in the suburbs “will need to learn to live with the very kinds of people that they are now running away from.”⁹⁷ Although the rationale behind Frug’s rather extreme prediction may be questionable, his article puts forth the reasonable suggestion that the affordable housing problem could have implications far beyond what the comfortable suburban homeowner might have imagined.

IV. THE INADEQUACIES OF EXISTING AFFORDABLE HOUSING INCENTIVES AND RELOCATION ASSISTANCE PROGRAMS

To be fair, provisions do exist elsewhere in the Municipal Code to offset the Ordinance’s negative impacts on affordable housing; but, many of these provisions are inadequate. Four years before the Ordinance became effective, the City implemented an ordinance to provide developers with incentives for pursuing affordable housing projects.⁹⁸ Depending on the percentage of affordable housing units a developer sets aside in its project, the developer may benefit from a handful of modest incentives such as deferred payment of fees and relaxed parking requirements.⁹⁹ Similarly, the State of California provides deferred payment loans to eligible developers out of the Department of Housing and Community Development’s Housing Rehabilitation Loan Fund.¹⁰⁰ Priority for this limited type of financial assistance is given to projects that “are located in areas where the housing need is great as determined by the department, taking into consideration, among other factors, low vacancy rates, high market rents, long waiting lists for subsidized housing, the stock of substandard housing, and the potential loss of subsidized rental housing to market-rate housing through demolition, foreclosure, or subsidy termination”¹⁰¹

Unfortunately, due to factors like the availability of alternative funding sources and the imposition of strict requirements for eligibility, these affordable housing incentives do not suffice to address the severity of the problem. Los Angeles has declined to follow the lead of over 130 other California cities that actually *require* developers to set aside a number of

⁹⁴ CAL. HEALTH & SAFETY CODE § 51475 (2008) (emphasis added).

⁹⁵ Gerald E. Frug, *Euphemism as a Political Strategy*, 30 ENVTL. L. REP. 11189 (2000), reprinted in SELMI & KUSHNER, *supra* note 62, at 513–14.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ L.A., CAL., MUN. CODE § 12.22-A(25) (2007).

⁹⁹ *Id.*

¹⁰⁰ CAL. HEALTH & SAFETY CODE § 50668.6 (2008).

¹⁰¹ *Id.* § 50668.6(a)(1).

low-income housing units in each of their projects.¹⁰² Los Angeles City Controller Laura N. Chick has been very vocal in pleading with the City to implement such a mandate.¹⁰³ No less than five times in her recent audit of the Los Angeles Housing Department, Chick recommends “adopting a mandatory inclusionary zoning ordinance that would require developers to set-aside affordable units or pay a fee for their creation, thereby ensuring more affordable units are built or providing additional monies to help fund more projects.”¹⁰⁴ San Francisco enacted an ordinance which did exactly that, and as mentioned below, the California Supreme Court upheld its validity.¹⁰⁵

Alternatively, based on section 42 of the Internal Revenue Code, another method available to alleviate the affordable housing problem is the use of Low Income Housing Tax Credits (LIHTCs).¹⁰⁶ The federal government grants federal tax credits to states, and in turn, state housing agencies award the tax credits to qualifying affordable housing developers.¹⁰⁷ For the taxpayer, the LIHTC offsets the amount of federal income tax payable on a dollar-for-dollar basis.¹⁰⁸ The developers sell off the LIHTCs to investors in order to generate equity capital for their projects.¹⁰⁹ By creating high levels of equity and lessening their need for debt, developers find themselves with lower debt service, which translates into lower rents for eligible low-income tenants.¹¹⁰ LIHTCs provide a decent incentive for affordable housing, but their practicality is limited for a number of reasons. First, competition among developers to receive LIHTCs is extremely fierce.¹¹¹ Oftentimes, the amount of developer requests for LIHTCs outnumbers their availability three-to-one.¹¹² Additionally, this method may prove undesirable to adaptive reuse developers since the Internal Revenue Code imposes stringent rent restrictions and tenant income limitations for qualification.¹¹³ In fact, the code is so strict that a failure to comply with any of the requirements may result in “recapture” of credits previously taken.¹¹⁴ The time has come for a more solid approach to mitigating the problems associated with the lack of low-income housing units.

¹⁰² Douglas Ring & Diane Donoghue, Op-ed, *Down-to-Earth Housing: City Hall Has to Change Course or Downtown Will Become a Gilded Ghetto*, L.A. TIMES, July 24, 2007, at 17.

¹⁰³ LAURA N. CHICK, PERFORMANCE AUDIT OF THE LOS ANGELES HOUSING DEPARTMENT'S AFFORDABLE HOUSING & OCCUPANCY MONITORING ACTIVITIES (July 9, 2007).

¹⁰⁴ *Id.* at v, viii, 11, 14, app. 1 at 1.

¹⁰⁵ See *infra* notes 157–164 and accompanying text.

¹⁰⁶ I.R.C. § 42 (2008).

¹⁰⁷ OFFICE OF THE COMPTROLLER OF THE CURRENCY, LOW INCOME-HOUSING TAX CREDITS: AFFORDABLE HOUSING INVESTMENT OPPORTUNITIES FOR BANKS 1 (Feb. 2008) [hereinafter TAX CREDITS].

¹⁰⁸ KIM BRIGHT, LOW-INCOME HOUSING TAX CREDITS: HELPING MEET THE DEMAND FOR AFFORDABLE RENTAL HOUSING (AARP Pub. Pol'y Inst. 2006), available at http://www.aarp.org/research/housing-mobility/affordability/fs74r_lihtc.html.

¹⁰⁹ TAX CREDITS, *supra* note 107, at 1, 6.

¹¹⁰ *Id.*

¹¹¹ *Id.*; BRIGHT, *supra* note 108.

¹¹² BRIGHT, *supra* note 108.

¹¹³ I.R.C. § 42(g)(2).

¹¹⁴ *Id.* § 42(j).

Adaptive reuse's potential displacement problem may be exacerbated by the tendency of "relocatees" to stay in the immediate vicinity of their prior dwellings, making the displacement experience likely to reoccur a few years down the line if the development that initially caused displacement is successful.¹¹⁵ In 1970, Congress passed the Uniform Relocation Assistance and Real Property Acquisition Policies Act.¹¹⁶ The legislation is intended to provide displaced persons with compensation for the costs involved in moving.¹¹⁷ The Act, however, assists only those displaced from their homes by federal or federally funded state projects¹¹⁸ Therefore, tenants who are forced to vacate not because of federal redevelopment programs, but rather due to private developers acquiring the rights to build or rehabilitate the buildings where they reside, are out of luck and cannot benefit from the relocation assistance provided by the Act.¹¹⁹ In addition, the Act does not apply to displaced illegal aliens.¹²⁰ The fact that adaptive reuse "victims" and illegal aliens are not eligible for support under the Act means that there may potentially be many Angelinos who are displaced by redevelopment projects in their neighborhoods and left without any relocation assistance.

V. PROPOSED SOLUTIONS TO ADAPTIVE REUSE'S DOWNTOWN DISPLACEMENT PROBLEM

A. TAX-INCREMENT FINANCING

One option may be to implement an obligation at the city level to assist those displaced and in need of financial aid in relocating. The downside of such a plan is that 1) city funds might be too scarce to allow for an expansion of social assistance of this magnitude and 2) there may be equitable concerns in forcing tax-payers to foot the bill for a mess that private developers have caused for their own benefit. Surely, the question exists as to whether a private project which revitalizes the local economy should be deemed as having a public purpose,¹²¹ perhaps making it worthier of tax-payer contribution, but that is an issue for a separate analysis. In any event, when analyzed through comparison to other popular city practices, a plan for city-based relocation assistance seems attainable and reasonable.

¹¹⁵ Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745, 746 (1971).

¹¹⁶ 42 U.S.C. §§ 4601 *et seq.* (1994).

¹¹⁷ *Id.* § 4622(a)(1).

¹¹⁸ *Id.*

¹¹⁹ See *Dawson v. U.S. Dept. of Housing & Urban Dev.*, 428 F. Supp 328, 329, 332 (N.D. Ga. 1976), *aff'd*, 592 F.2d 1292 (5th Cir. 1979).

¹²⁰ 42 U.S.C. § 4605(a) (2008).

¹²¹ Compare *Kelo v. City of New London*, 545 U.S. 469 (2005) (condemnation of property deemed for public use when transference of property from one private entity to another was in furtherance of economic development plan), with *Southwestern Illinois Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1 (Ill. 2002) (benefiting private entity's role in expansion of tax revenues and enhancement of public happiness does not justify improper eminent domain power because action would still be for "purely private purposes").

“Tax-Increment Financing” (TIF) allows cities to bypass the need for federal subsidies¹²² and is a popular method of financing for redevelopment programs. The remarkable aspect of TIF is that it creates extra funds that can be put towards rent subsidies to encourage affordable housing.¹²³ Put simply, in the TIF model, development is financed by the anticipated increase in tax revenues that the proposed project will create. First, a city will issue municipal bonds to finance property acquisition for redevelopment projects.¹²⁴ Eventual development of the neighborhood expands the tax base and brings in more tax revenue.¹²⁵ Part of this increased tax revenue goes to pay back the bondholders, and the rest is called the “increment.”¹²⁶ The “increment” is now available for various public improvement or housing assistance programs.¹²⁷

Fundraising through a model similar to TIF might plausibly help mitigate the problem of displacement caused by certain adaptive reuse projects. Certainly, one of the most applauded virtues of adaptive reuse is that it acts as an engine to revitalize economies. As seen with smart growth, an area’s relative rise in prosperity would attract business, dining, and shopping. Therefore, the construction of adaptive reuse projects must create an expectation of increased tax revenues for the neighborhoods in which projects are located. With cities standing to benefit from adaptive reuse projects, it seems sensible to propose that they use a portion of the tax increment, or the amount of revenue received over and above the average pre-project level, to fund relocation assistance programs or create housing subsidies for the displaced.

In the redevelopment context, courts will often require a redevelopment agency, pursuant to the California Community Redevelopment Law, to make a legislative finding of blight before it is able to undergo any TIF funded redevelopment projects in a region.¹²⁸ The Community Redevelopment Law serves as protection to “ensure that tax dollars allocated for redevelopment are properly used. For example, the redevelopment power may be exercised only when necessary to alleviate problems associated with blight.”¹²⁹ According to the California Health and Safety Code, a blighted area is “an area that is predominately urbanized” and characterized by such a combination of negative physical and economic factors as to cause a “reduction of . . . proper utilization of the area” so drastic that the burden it places on the community cannot be reversed without redevelopment.¹³⁰ To one familiar with the streets of Downtown Los Angeles, it may seem like finding blight might prove relatively unproblematic.

¹²² SELMI & KUSHNER, *supra* note 62, at 641.

¹²³ *See id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 641, 644.

¹²⁷ *Id.* at 641.

¹²⁸ *Beach-Courchesne v. City of Diamond Bar*, 95 Cal. Rptr. 2d 265, 270 (Ct. App. 2000); *Friends of Mammoth v. Town of Mammoth Lakes Redev. Agency*, 98 Cal. Rptr. 2d 334, 365 (Ct. App. 2000).

¹²⁹ *Lancaster Redevelopment Agency v. Dibley*, 25 Cal. Rptr. 2d 593, 594 (Ct. App. 1993).

¹³⁰ CAL. HEALTH & SAFETY CODE § 33030 (2008).

Fortunately, blight is likely to be a non-issue in the TIF-like scheme proposed here. The mechanics in the adaptive reuse context are slightly different from those in the redevelopment scenario. Unlike with most redevelopment projects, adaptive reuse projects are pursued by private developers, not government agencies. Therefore, blight is not required for the commencement of an adaptive reuse project. Furthermore, because private developers, rather than governments, are financing the development projects, the issuance of municipal bonds would not be necessary to jumpstart this proposed TIF-like relocation assistance programs.

B. EXACTIONS

Assuming that the majority of low-income tenants in a particular residential hotel or other affordable housing complex carry month-to-month leases, surely those tenants have no entitlement to guaranteed housing. Month-to-month leases typically can be terminated at will by the landlord as long as he or she gives reasonable notice to the tenant.¹³¹ Therefore, in equity, the local government should step in and take responsibility to provide further assurance that its less affluent residents have a place to rest their heads at night. Exactions are one vehicle which public entities could employ to prevent, or at least alleviate, the problem.

Exactions concern a government's imposition of either a dedication of property or a fee placed on developers or landowners as a condition of real estate development approval.¹³² Suppose Los Angeles could condition the approval of a residential-to-residential adaptive reuse project on the developer's payment of a fee, the proceeds of which would be earmarked¹³³ to go towards affordable housing or relocation assistance programs. Obviously, this type of plan could have the negative effect of discouraging development in an area that the City has aggressively been trying to revive. The upside is that relocation costs and other costs of displacement would not be entirely shouldered by displaced residents.

Modern jurisprudence in this area of the law centers around two United States Supreme Court decisions—*Nollan v. California Coastal Commission*¹³⁴ and *Dolan v. City of Tigard*.¹³⁵ In *Nollan*, Justice Scalia articulated an “essential nexus” test to determine the constitutionality of certain permit conditions.¹³⁶ To be valid, permit conditions must serve “the same governmental purpose as the development ban.”¹³⁷ Alternatively stated, the reason the government may otherwise deny a developer's request for approval must be the same as the reason why the government is issuing the condition. The requirements can be simplified into a three-part test: “(1) that there be a legitimate state interest (2) that is substantially advanced by the condition and (3) that the interest be such that the project

¹³¹ BLACK'S LAW DICTIONARY 709 (3d pocket ed. 2006).

¹³² ANDREW L. FABER, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE § 64.01 (2008).

¹³³ See CAL. GOVT. CODE § 66006 (1997).

¹³⁴ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

¹³⁵ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

¹³⁶ *Nollan*, 483 U.S. at 837.

¹³⁷ *Id.*

could have been denied because of it.”¹³⁸ To illustrate, in *Nollan*, the California Coastal Commission conditioned approval of the construction of a beach house on an easement passing across the homeowner’s property.¹³⁹ The stated government purpose of such easement was to mitigate any obstacles created by the new home so as to give beachgoers visual access to the beach.¹⁴⁰ Nevertheless, the condition was held unconstitutional because no nexus existed between the “requirement that people already on the public beaches be able to walk across the Nollans’ property” and the reduction of “any obstacles to viewing the beach created by the new house.”¹⁴¹

On the other hand, in *Dolan*, the City of Tigard conditioned the approval of a hardware store’s expansion on the dedication of a portion of the landowner’s property for improvement of a storm drainage system and construction of a bike path.¹⁴² The condition met *Nollan*’s “essential nexus” test,¹⁴³ but was still invalidated because it failed to meet yet a second test fashioned by the Supreme Court—the “rough proportionality” test.

The conditions imposed in *Dolan* passed *Nollan*’s “essential nexus” test because there was a relationship between 1) preventing flooding and reducing traffic and 2) limiting the expansion of the hardware store.¹⁴⁴ In other words, legitimate government interests existed, and restricting expansion advanced those interests. First, since the landowner planned to pave her existing gravel parking lot, run-off into the neighboring creek would be increased.¹⁴⁵ Second, the store’s expansion would result in increased traffic congestion in the area.¹⁴⁶ Clearly, the City’s rationale for requiring the dedication of land addressed those concerns.

Nevertheless, despite compliance with *Nollan*, the City of Tigard’s conditions were invalidated on other grounds. The City failed to “make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”¹⁴⁷ First, the City could not justify why a dedication of land was necessary. An easement would have worked just as well, and *Dolan* would be able to maintain ownership of the property. Second, while the City made a finding that a bike path “could” offset traffic increases, the finding was too conclusory.¹⁴⁸ To clarify, the Court would have allowed the exaction only if it roughly offset the harm that would otherwise be caused by the project. This newer requirement is known as the “rough proportionality” test.¹⁴⁹

¹³⁸ FABER, *supra* note 132, at § 64.03[2].

¹³⁹ *Nollan*, 483 U.S. at 828.

¹⁴⁰ *Id.* at 838.

¹⁴¹ *Id.*

¹⁴² *Dolan*, 512 U.S. at 380.

¹⁴³ *Id.* at 387–88.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 391.

¹⁴⁸ *Dolan*, 512 U.S. at 393–95.

¹⁴⁹ *Id.*

Today, exactions must pass both *Nollan*'s "essential nexus" and *Dolan*'s "rough proportionality" tests to be validated. Those two cases concerned themselves with possessory exactions such as land dedications. The issue at hand, though, is whether the heightened scrutiny of the *Nollan/Dolan* test applies to non-possessory exactions, like impact fees, that might be imposed on adaptive reuse developers to mitigate the harm caused by displacement of low-income tenants. The California Supreme Court addressed this question in *Ehrlich v. City of Culver City*.¹⁵⁰ Two different fee exaction scenarios were examined in that case.¹⁵¹ Exaction fees imposed via individual adjudicative decisions were compared with those instituted by generally applicable legislation. First, the Court held that the *Nollan/Dolan* standard applies to fees imposed on an ad hoc basis through adjudicative proceedings.¹⁵² The Court reasoned that for the purpose of preventing what could amount to government extortion, "it matters little whether the local land use permit authority demands the actual conveyance of property or the payment of a monetary exaction."¹⁵³ Next, the Court held that the heightened scrutiny standards of *Nollan* and *Dolan* do not apply to fees that are legislatively enacted, as opposed to discretionarily set.¹⁵⁴ Takings cases are reviewed under the "rational basis" test of the Fourteenth Amendment's equal protection clause unless the government "singles out individual property owners by conditioning development permits on the payment of ad hoc fees not borne by a larger class of developers or property owners"¹⁵⁵ Justice Arabian argued that if the fee is of a generally applicable form, then the courts should defer to the legislative and political processes.¹⁵⁶

To mitigate the harms of potential displacement associated with residential-to-residential adaptive reuse projects, Los Angeles can choose to impose either ad hoc or legislatively enacted impact fees. Choosing the latter "across-the-board" exaction is preferable for two reasons. First, courts will be more deferential to legislation than they would be towards discretionary adjudicative decisions. Second, the legislation can apply to an entire class of projects without breaching the Constitution's Equal Protection clause. The question that remains: "Can Los Angeles limit an impact fee to apply only to hotel and apartment conversions and still call the legislation 'generally applicable'?" This question is answered in *San Remo Hotel L.P. v. City and County of San Francisco*.¹⁵⁷

In *San Remo*, San Francisco's Hotel Conversion Ordinance (HCO) was under review. The HCO sought to minimize "the adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition" by requiring a one-for-one conversion of units.¹⁵⁸

¹⁵⁰ *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).

¹⁵¹ *Id.* at 880–81.

¹⁵² *Id.* at 881.

¹⁵³ *Id.* at 876 (emphasis in original).

¹⁵⁴ *Id.* at 886.

¹⁵⁵ *Id.* 887–88 (Mosk, J., concurring).

¹⁵⁶ *Ehrlich*, 12 Cal. 4th at 881.

¹⁵⁷ *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643 (2002).

¹⁵⁸ *Id.* at 650–51.

Basically, a permit applicant could either construct or rehabilitate other types of housing for these tenants, or he or she could pay a proportionate in-lieu fee.¹⁵⁹ Since the fee was enacted through legislation, San Francisco argued that it was entitled to a more deferential standard of scrutiny.¹⁶⁰ Moreover, a key issue being debated was whether the ordinance was generally applicable. After all, the HCO applied only to residential hotels.¹⁶¹ The Court stated that as long as a condition applies to all property in a particular *class* (e.g. residential hotels), it is “generally and nondiscriminatorily applicable.”¹⁶² Therefore, the legislatively enacted condition need not apply to every other property in the city. Furthermore, for purposes relevant to the topic of this Note, *San Remo* provides the important precedent that validates the use of a housing replacement fee to mitigate the loss of low-income housing resulting from residential-to-residential conversions.¹⁶³ The Court ruled that “a mitigation fee measured by the resulting loss of housing units was . . . reasonably related to the impacts of plaintiffs’ proposed change in use.”¹⁶⁴

To review, *Nollan* and *Dolan* set forth the “essential nexus” and “rough proportionality” standards that apply to possessory exactions such as physical dedications.¹⁶⁵ Further, according to *Ehrlich*, if the exaction is ad hoc or adjudicatory, then the heightened scrutiny of *Nollan* and *Dolan* will apply, regardless of whether the exaction is non-possessory (i.e. monetary in nature) or possessory.¹⁶⁶ Though, if a fee is imposed across the board or through generally applicable legislation, then it is not subject to the *Nollan/Dolan* takings analysis, and it will be held to a more deferential standard.¹⁶⁷ Lastly, *San Remo* states that a condition is generally applicable as long as it applies to all property in a certain class.¹⁶⁸

Some commentators have recommended that the *Nollan* and *Dolan* holdings ought to apply to the imposition of all impact fees,¹⁶⁹ regardless of whether they were imposed through an adjudicatory proceeding or legislation. They argue that “the primary concern behind the *Dolan* test is that local governments will try to seek exactions unrelated to the impact of a land owner’s development.”¹⁷⁰ This concern “applies equally to impact fees as well as to physical exactions.”¹⁷¹ Other authors reply that heightened scrutiny should be limited to physical exactions because non-possessory exactions such as impact fees do “not involve the loss of real

¹⁵⁹ *Id.* at 651.

¹⁶⁰ *Id.* at 668.

¹⁶¹ *Id.* at 650–51.

¹⁶² *Id.* at 669 n. 12.

¹⁶³ *San Remo*, 27 Cal. 4th at 673, 678.

¹⁶⁴ *Id.* at 678.

¹⁶⁵ *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391.

¹⁶⁶ *Ehrlich*, 12 Cal. 4th at 881.

¹⁶⁷ *Id.* at 881, 886.

¹⁶⁸ *San Remo*, 27 Cal. 4th at 669 n. 12.

¹⁶⁹ Edward J. Sullivan, *Dolan and Municipal Risk Assessment*, 12 J. ENVTL. L. & LITIG. 1 (1997); Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U. L. REV. 513 (1995).

¹⁷⁰ Sullivan, *supra* note 169, at 14; Cordes, *supra* note 169, at 543.

¹⁷¹ Sullivan, *supra* note 169, at 14.

property, nor [do they] entail losing one's right to exclude from real property."¹⁷²

For the sake of facilitating imposition of an impact fee on developers in Los Angeles seeking to take on residential-to-residential conversion projects, it is clearly advantageous for the City to be exempt from having to meet the *Nollan* and *Dolan* tests. Legislative exactions, rather than ad hoc exactions, are the proper means to achieve this goal. Therefore, revising the Adaptive Reuse Ordinance to implement an impact fee provision is preferable to setting the condition upon individual permit applications. Yet, it is probable that the placement of such an obligation on developers would pass heightened scrutiny anyway. Certainly, the proposed exaction is related to such a development's effect on tenant displacement. Further, the benefit of setting a fee, rather than demanding a dedication, is that lawmakers would be able to calculate the fee using a set formula that could ensure that the loss of housing units to low-income tenants is roughly offset. A set formula, based on factors such as replacement costs determined through independent appraisals, would also serve the function of protecting against government discretion and discrimination.¹⁷³ A revision to the Los Angeles Adaptive Reuse Ordinance to introduce a section similar to San Francisco's HCO in *San Remo* would be a sensible way to alleviate the negative impacts on affordable housing created by the Ordinance's current allowance of residential-to-residential conversions Downtown. Also, note that an emulation of San Francisco's HCO appears to be precisely what Los Angeles City Controller Laura Chick has campaigned for in her recent audit, mentioned above.¹⁷⁴

VI. REVISION OF THE LOS ANGELES ADAPTIVE REUSE ORDINANCE¹⁷⁵

To account for the myriad considerations and proposals covered in this Note, the Los Angeles Municipal Code should be revised to lessen the negative impacts potentially produced by section 12.22-A(26), the section concerning Downtown adaptive reuse projects.¹⁷⁶ Section 12.22-A(26)(c) contains the provision that allows for residential-to-residential conversions Downtown.¹⁷⁷ On the other hand, section 12.24X(1)(a) is the provision defining adaptive reuse generally, in non-Downtown areas, explicitly excluding residential-to-residential conversions from its definition.¹⁷⁸ Merely extending section 12.24-X(1)(a) to cover Downtown projects is not a satisfactory answer to the problem posed in this Note. Alternatively,

¹⁷² Sam D. Starritt & John H. McClanahan, *Land-Use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West after Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), 30 LAND & WATER L. REV. 415, 461 (1995).

¹⁷³ See *San Remo*, 27 Cal. 4th at 668–69.

¹⁷⁴ See *supra* Part IV.

¹⁷⁵ The proposed revisions of sections and subsections of the Los Angeles Municipal Code introduced in this Note borrow heavily from language used in the Los Angeles Adaptive Reuse Ordinance and the San Francisco Hotel Conversion Ordinance. Key words in the San Francisco Hotel Conversion Ordinance have been changed to promote application to the City of Los Angeles.

¹⁷⁶ L.A., CAL., MUN. CODE § 12.22-A (2007).

¹⁷⁷ See *id.* § 12.22-A(26)(c).

¹⁷⁸ *Id.* § 12.24-X(1)(a).

substantially modifying section 12.22-A(26)(c) to completely eliminate the possibility of its application to residential-to-residential conversions also would not be prudent. Admittedly, the benefits of allowing the adaptive reuse incentives to apply to residential-to-residential conversions arguably outweigh the consequences, in terms of economic revitalization to Downtown areas in dire need. Eliminating them would prove too great a dissuasion to the developers whom the City is eagerly trying to attract. The best solution is to find a middle ground where incentives for residential-to-residential conversions will be preserved, but the undesirable effects associated with them will be mitigated.

Section 12.22-A(26)(d), which lists buildings eligible for special adaptive reuse treatment,¹⁷⁹ could be modified in a way to indicate the existence of special conditions that would pertain to residential-to-residential conversions:

SECTION 12.22-A(26) DOWNTOWN ADAPTIVE REUSE PROJECTS

(a) – (c) ...

(d) Eligible Buildings. The provisions of this subdivision shall apply to Adaptive Reuse Projects in all or any portion of the following buildings in the CR, C1, C1.5, C2, C4, C5, CM and R5 Zones in the Downtown Project Area, subject, however, to the conditions set forth in Chapter [X] of this Code, imposed on Adaptive Reuse Projects creating any change of an existing Residential Use to new dwelling units, guest rooms, or joint living and work quarters:

(1) – (3) [list of eligible buildings].¹⁸⁰

Chapter [X]’s location within the Code and actual numbering would be determined by the City. Chapter [X] would compose the bulk of the proposed impact fee ordinance for the City of Los Angeles and would be modeled after San Francisco’s HCO. However, unlike the HCO, which applies only to hotels,¹⁸¹ Chapter [X] could be made applicable to all buildings with existing residential uses. Since this variation would make the Ordinance actually broader than San Francisco’s HCO (by applying Chapter [X] to both hotels and apartments), there should not be a problem concerning challenges based on the Ordinance’s discriminatory nature. So long as the provision applies to all property in this particular class, it should pass as “generally applicable.”¹⁸²

Chapter [X]’s first priority is to protect the interests of low income tenants and those with a high probability of displacement residing in buildings considered for adaptive reuse. Therefore, Section [X.1] should read as follows:

SECTION [X.1] RIGHTS OF PERMANENT RESIDENTS

(a) To apply for a permit to convert, an owner or operator of the building shall ensure the following:

¹⁷⁹ *Id.* § 12.22-A(26)(d).

¹⁸⁰ *See id.* §§ 12.22-A(26)(d), 12.24-X(1)(a); *see supra* note 174 and accompanying text.

¹⁸¹ *San Remo*, 27 Cal. 4th at 650–51.

¹⁸² *Id.* at 669 n. 12.

- (1) **A permanent resident, who as a result of the conversion of his/her unit must relocate off site, shall be reimbursed the actual moving expenses not to exceed \$300 or may consent to be moved by the owner or operator.**
- (2) **A displaced permanent resident shall have the right of first refusal for the rental or leasing of replacement units, if any.**
- (3) **A permanent resident displaced by partially completed conversion under the provisions of Los Angeles Municipal Code Section 12.22-A(26) shall be entitled to a displacement allowance of \$1,000 per displaced person.**¹⁸³

San Francisco's HCO defines "Permanent Resident" as "[a] person who occupies a guest room for at least 32 consecutive days."¹⁸⁴ Of course, Chapter [X]'s definition of "Permanent Resident" would change "guest room" to "residential unit" or "unit." This definition allows Chapter [X] to protect the interests of all tenants with month-to-month leases who have occupied a rental unit for more than one term. The reimbursement cap of three-hundred dollars contemplated by section [X.1] is necessary to ensure the reasonableness of moving expenditures by relocatees. The cap strikes a balance between assisting displaced tenants and protecting against their possibly unscrupulous over-spending. The right of first refusal, contemplated in subsection (a)(2), would give an existing tenant the chance to retain his or her unit if he or she can afford to do so. A right of first refusal grants the tenant with a right to match the terms of a third party's offer for the unit if the owner of the building intends to accept that offer.¹⁸⁵ Unfortunately, if the conversion of the building causes rental prices to skyrocket, poorer tenants may not stand to benefit from this provision.

Next, Chapter [X] must ensure that the impacts of any residential-to-residential conversions affect the market for low-income housing as little as possible. Thus, a one-for-one replacement provision is necessary:

SECTION [X.2] ONE-FOR-ONE REPLACEMENT

- (a) **Prior to the issuance of a permit to convert, the owner or operator shall provide one-for-one replacement of the units to be converted by one of the following methods:**
 - (1) **Construct or cause to be constructed a comparable unit to be made available at comparable rent to replace each of the units to be converted; or**
 - (2) **Cause to be brought back into the housing market a comparable unit from any building which was not subject to the provisions of this Chapter; or**
 - (3) **Pay to the City of Los Angeles an amount equal to 80 percent of the cost of construction of an equal number of comparable units plus site acquisition cost. All such payments shall go into [an appropriate fund to be**

¹⁸³ See S.F., CAL., ADMIN. CODE § 41.17(b) (2005); see *supra* note 175 and accompanying text.

¹⁸⁴ S.F., CAL., ADMIN. CODE § 41.4(n).

¹⁸⁵ See BLACK'S LAW DICTIONARY 625 (3d pocket ed. 2006).

determined by the City of Los Angeles]. [The Los Angeles Housing Department or another City Department appointed by the City] shall determine this amount based upon two independent appraisals.¹⁸⁶

One-for-one replacement is possibly the closest substitute available for perfect compensation. Section [X.2] would satisfy *Dolan's* "rough proportionality" test (if it had to)¹⁸⁷ because one-for-one replacement roughly offsets the harm that would otherwise be caused by the project.¹⁸⁸ Here, nothing more is being demanded of the building owner on top of what is simply sufficient to offset the potential harm. Lastly, the importance of the two independent appraisals, contemplated in subsection (a)(3) stems from the fact that a mechanism is needed to shield against potentially discriminatory and discretionary decisions by the City. The analogous provision in San Francisco's HCO was instrumental to the validation of that ordinance in *San Remo*.¹⁸⁹

In certain cases, developers should be allowed to claim exemption from compliance with Chapter [X]. There are at least two different reasons why developers should be eligible for such an exemption. Section [X.3] describes two different bases for exemption:

SECTION [X.3] APPLICABILITY OF THIS CHAPTER

- (a) To qualify for a claim of exemption based on low-income housing, the owner or operator of any building claiming that this Chapter does not apply shall show that the units to be rehabilitated meet the following requirements:**
- (1) With the exception of ground floor commercial space, the entire building must be completely occupied as low-income housing; and**
 - (2) Alternate rooms are made available within the building to the displaced permanent residents; or**
 - (3) In those circumstances where it is necessary to relocate a permanent resident off site, the permanent resident shall receive the actual moving expenses and the difference between the rent at the time of relocation and the rent of the temporary housing during the period of rehabilitation.**
- (b) To qualify for a claim of exemption based on partially completed conversion, the owner or operator of any building claiming that this Chapter does not apply shall show that the following requirements are met:**
- (1) Each permanent resident displaced by the conversion is offered relocation assistance, pursuant to Section [X.1].**
 - (2) For each vacant residential unit converted, but not occupied by a permanent resident, a sum of \$250 per unit not to exceed a total of \$10,000 shall be deposited in**

¹⁸⁶ See S.F., CAL., ADMIN. CODE § 41.13(a) (2005); see *supra* note 175 and accompanying text.

¹⁸⁷ See *supra* notes 165–172 and accompanying text.

¹⁸⁸ See *Dolan*, 512 U.S. at 391.

¹⁸⁹ *San Remo*, 27 Cal. 4th at 668–69.

the [appropriate fund to be determined by the City of Los Angeles] established pursuant to [appropriate Section of the appropriate Code to be determined by the City of Los Angeles] to be used exclusively for the repair, purchase and rehabilitation of affordable housing units by agencies of the City of Los Angeles and to be administered by the [Los Angeles Housing Department or other City Department appointed by the City].¹⁹⁰

Subsection (a) describes “exemption based on low-income housing.” The reasoning behind this exemption is that if an adaptive reuse project is also a low-income housing project, then the provisions of Chapter [X] are irrelevant and unnecessary. This makes perfect sense because, absent this provision, owners would be forced to suffer the costs associated with one-for-one replacement even if they had not contributed to the low-income housing problem. To be eligible for the exemption, owners must either meet both of the first two requirements or comply with the third requirement under subsection (a). To permanent residents of buildings who must temporarily be moved to other sites during construction, the owner or operator of the building must pay moving expenses plus any increase in rent required by the relocatee’s temporary housing. Subsection (b) contemplates “exemption based on partially completed conversion.” It provides a way for developers to enjoy a preemption-like claim against compliance with this Chapter, but stops just short of granting full immunity. To claim this type of exemption, the owner would have to provide relocation assistance to displaced tenants and pay to the City a fee upon the conversion of every unit. Of course, the fee contemplated here would be considerably less than the in-lieu fee described in section [X.2]. These fees will be earmarked to go specifically towards services related to the promotion of affordable housing, as *Nollan*’s “essential nexus” test requires.¹⁹¹ To the developers’ delight, the one-for-one replacement requirement would be waived.

VII. CONCLUSION

Several theories can explain adaptive reuse’s rise to prominence. The trend initiated primarily because of cities’ determination to revitalize their urban cores.¹⁹² When this is coupled with the desires of developers to avoid high land costs¹⁹³ while enjoying the greater development leverage associated with proposing projects that cities are eager to attract, it is clear that adaptive reuse was bound to reach the point that it is at today.

Unfortunately, when cities become overly zealous in their quest to attract these types of projects, the basic interests of society’s underprivileged may become marginalized or overlooked altogether. As they stand, existing programs aimed at increasing the stock of affordable

¹⁹⁰ See S.F., CAL., ADMIN. CODE § 41.7(b)–(c) (2005); see *supra* note 175 and accompanying text.

¹⁹¹ *Nollan*, 483 U.S. at 837; but see *supra* note 165–172 and accompanying text.

¹⁹² *Ware*, *supra* note 17.

¹⁹³ *Id.*

housing options and curtailing displacement in Los Angeles are inadequate to properly assist residents affected by the negative impacts of residential-to-residential adaptive reuse conversions. Much of the problem can be linked to Los Angeles' unwillingness to require developers to set aside a number of low-income housing units for each project they construct.¹⁹⁴ Instead, the City offers only relatively weak encouragement for affordable housing in the form of incentives that require strict compliance with eligibility requirements. Further, California merely offers hard-to-get LIHTCs.¹⁹⁵

The best solution to the displacement problem examined in this Note is an amendment to the Los Angeles Municipal Code imposing mandatory impact fees or one-for-one replacement for residential units that have been modified by adaptive reuse projects. While this might potentially act as a deterring factor to development, most developers probably would be willing to comply in order to continue to receive the existing adaptive reuse incentives. By following in San Francisco's wake,¹⁹⁶ Los Angeles can rest assured that such a regulation would likely be validated by the California courts.

With the proper data, an econometric regression analysis concerning the effect of adaptive reuse on displacement rates would be very valuable to the progression of future studies in this area. This kind of study is necessary to provide researchers and lawmakers with a more precise and quantitative prediction of adaptive reuse's possible long-term and short-term consequences. Furthermore, the results of the study could be included in a city's submission of Findings to accompany any related and remedial land use regulations. Variables and proxies that might be considered in such an analysis are numerous, and their selection can be left up to the imagination of researchers and scholars hungry for a better understanding of the impacts associated with rising levels of adaptive reuse projects.

Much is yet to be learned about the effects of adaptive reuse. After all, the Los Angeles Adaptive Reuse Ordinance has been in place for only nearly a decade.¹⁹⁷ Undoubtedly, gentrification and smart growth—the end products of adaptive reuse—will eventually change the face of Los Angeles. It is crucial to remember, though, that the events occurring in Los Angeles are definitely nonexclusive. Cities across the United States will have the opportunity to observe and learn from the steps taken by Los Angeles with regard to the regulation and encouragement of adaptive reuse projects.

¹⁹⁴ Ring & Donoghue, *supra* note 102.

¹⁹⁵ See BRIGHT, *supra* note 108.

¹⁹⁶ See *San Remo*, 27 Cal. 4th at 643.

¹⁹⁷ Greene, *supra* note 31.

ADDENDUM

To the delight of community activists around the City,¹⁹⁸ the Los Angeles Residential Hotel Unit Conversion and Demolition Ordinance, modeled after San Francisco's HCO, became effective on September 29, 2008.¹⁹⁹ This new ordinance requires building owners to either replace each converted residential hotel unit with a comparable unit somewhere within a two-mile radius of the converted unit or pay to the City an impact fee.²⁰⁰ The ordinance was enacted in the time between the completion of this Note's drafting and its final publication. The revision to the Los Angeles Municipal Code advocated in this Note was intended to be broader in scope than the aforementioned ordinance. The proposed ordinance would apply to the conversion of *any* residential unit in the Downtown area, rather than to only what the Los Angeles Housing Department deems a "residential hotel."²⁰¹ Nevertheless, this author is proud to say that this Note was used by the drafters of the new ordinance for minor consultation purposes.²⁰²

¹⁹⁸ See *Historic Protections for LA's Housing of Last Resort Will Help Prevent Gentrification City-Wide*, THE COMMUNITY CONNECTION, Aug. 2008.

¹⁹⁹ LA CITY CLERK, RESIDENTIAL HOTEL UNIT CONVERSION (Jan. 2009), available at <http://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=ccfi.viewrecord&cfnumber=08-0644>.

²⁰⁰ L.A., CAL., MUN. CODE § 47.79 (2008).

²⁰¹ *Id.* § 47.75(A); see *id.* § 47.73(S).

²⁰² Interview with Judith Reel, Los Angeles Deputy City Attorney, in L.A., Cal. (June 2008).

