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OPENING THE DOOR FOR BOSTON'S POOR: WILL "LINKAGE" SURVIVE JUDICIAL REVIEW?1

Richard J. Gallogly*

I. INTRODUCTION

Over the last decade, the concept of linking downtown development and neighborhood housing, once just a dream of city planners, has developed into a reality. To date, several cities have adopted such linkage programs.2 The Boston Zoning Commission adopted

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1 On March 31, 1986, the Massachusetts Superior Court held that the Boston Zoning Enabling Act did not authorize Boston's linkage exaction program (Article 26). The court ruled that a zoning variance granted to Massachusetts General Hospital, which was contingent upon payment of linkage fees, was invalid. Bonan v. General Hospital Corporation, No. 76438 (Mass. Super. Ct. March 31, 1986). The City of Boston pressed for a quick appeal and on August 21, 1986 the Supreme Judicial Court reversed the superior court. Bonan v. City of Boston, 398 Mass. 315, 496 N.E.2d 640 (1986). The reversal was based on procedural grounds, therefore, the court did not discuss the merits of the legality of linkage.
2 Housing linkage programs have been adopted in at least six cities: Boston, New York, Princeton, San Francisco, Santa Monica, and Seattle. Housing linkage is currently being considered in Chicago, Denver and Hartford. While this Comment focuses on the development and legality of the Boston linkage program, the analysis is adaptable to similar programs throughout the country.

For the purposes of this Comment, the term linkage refers to any inclusionary zoning program that requires developers to contribute into a fund designed to counteract negative effects of development. Linkage also refers to programs that allow or require a developer to construct affordable housing in lieu of paying a fee. For more information concerning inclusionary zoning programs see generally, INCLUSIONARY ZONING MOVES DOWNTOWN (D. Merriam, D. Brower & P. Tegeler eds. 1985); Diamond, The San Francisco Office/Housing Program: Social Policy Underwritten By Private Enterprise, 7 HARV. ENVTL. L. REV. 449 (1983); Bosselman and Stroud, Mandatory Tithes: The Legality of Land Development Linkage, 9 NOVA L.J. 381 (1985); Pavelko, Subdivision Exactions: A Review Of Land Use Standards, 25 J. URB. & CON. L. 269 (1983); Gougelman, Impact Fees: National Perspectives To Florida Practice; A Review Of Mandatory Land Dedications And Impact Fees That Affect Land Developments, 4 NOVA L.J. 137 (1980).
one such program on December, 1983. This zoning regulation, Article 26, requires developers to make payments into a neighborhood trust fund administered by the City of Boston. Under the terms of the trust, the city is to utilize the trust proceeds for the construction and rehabilitation of low and moderate income housing. The Boston Zoning Commission subsequently expanded Article 26 on February 26, 1986 to allow for increased payments by developers. The city is

3 BOSTON ZONING CODE, Art. 26. The Statement of Purpose of Article 26 is as follows:

The purpose of this article is to promote the public health, safety, convenience and welfare; to prevent overcrowding and deterioration of existing housing; to preserve and increase the City's housing amenities; to facilitate the adequate provision of the public requirement for low and moderate income housing; and to establish a balance between new, large-scale real estate development and the low and moderate income housing needs of the City of Boston by provisions designed to:

1. Afford review and to regulate large scale real estate development projects which create new jobs and attract new workers to the City of Boston.

2. Increase the availability of low and moderate income housing by requiring developers, as a condition of the grant of deviations from the Zoning Code or the grant of an amendment to the Zoning Map, to make a development impact payment to the Neighborhood Housing Trust or to contribute to the creation of low and moderate income housing.

Id. § 26-1.

It is virtually impossible for a developer to build in downtown Boston without deviating from the Zoning Code or Zoning Map.


5 The additions to Article 26 are broken into two parts, Articles 26A and 26B. Article 26A covers linkage payments for housing needs, while Article 26B covers linkage to job training programs. Article 26 remains in effect for neighborhood projects only.

The statement of purpose of Article 26A is as follows:

The purpose of this article is to promote the public health, safety, convenience and welfare; to prevent overcrowding and deterioration of existing housing; to preserve and increase the City's housing stock; to establish a balance between new, large-scale real estate development and the housing needs of the City and to mitigate the impacts of large-scale development on the availability of low and moderate income housing, by provisions designed to:

1. Afford review and regulation of large-scale real estate development projects which directly or indirectly displace low or moderate income residents from housing units or contribute to an increase in the costs of housing.

2. Increase the availability of low and moderate income housing by requiring developers, as a condition of the grant of deviations from the Zoning Code or the grant of an amendment to the zoning map or text, to create low and moderate income housing or to make a housing contribution grant to the Neighborhood Housing Trust.


The statement of purpose of Article 26B is as follows:

The purpose of this article is to promote the public health, safety, convenience and welfare and to mitigate the adverse impacts of new large-scale real estate development projects on existing development by providing for job training for low and moderate income people. In particular, the owners of new commercial uses, which are more capital intensive and less land intensive than industrial uses, can pay more for land than owners of manufacturing uses. Therefore these uses directly result in
to apply the increased payments for job training programs for city residents.

While the concept of linkage between downtown development and housing has recently become quite popular, Boston is the first city in the country to incorporate a fee for job training into its zoning regulations. The Boston linkage program is a bold step in the exercise of municipal police power, and may represent a national trend. The legal, economic, and political success of the Boston linkage program may serve both as a signal to expand linkage in those cities that have a program and as an incentive to develop a linkage program in those cities that have not yet done so.

The driving force behind the passage of Article 26 was the ever-decreasing availability of affordable housing in Boston. With the election of Ronald Reagan in 1980, the federal government began a retreat from the area of housing. One major source of housing rehabilitation funds, the Community Development Block Grant (CDBG) program, provided the city with $23,285,000 in 1982. The level of CDBG funding for fiscal year 1986 decreased by over 25 percent from the previous year. During this same period, interest higher land costs and indirectly cause further land price increases by increasing housing demand. Workers will therefore need to be trained so that they will have the job skills necessary to compete for these new jobs. This Article is designed to:

1. Afford review and to regulate large-scale real estate development projects which result in the creation of new jobs, requiring the creation of new job training programs or the expansion of existing ones.

2. Increase the opportunities for job training for low and moderate income people by requiring developers, as a condition of the grant of deviations from the Zoning Code or the grant of an amendment to the zoning map or text, to make a development impact payment to the Neighborhood Jobs Trust.

Id. Art. 26B, § 26B-1.

* See supra note 2.

* Id.

The median rent in Boston during 1985, about $530 a month, is the highest in the country. This figure is particularly difficult for households receiving Aid to Families with Dependent Children (AFDC), where the monthly grant for a family of three, including food stamps, is $565. Between 1982 and 1984, more than four out of every five housing units renting for less than $300 disappeared from the marketplace. Boston Globe, Poverty Amidst Affluence: Bostonians The Boom Left Behind, Searching For Security In A Sky-High Market, Dec. 15, 1985, (Magazine) at 16.

The Boston Housing Authority (BHA) has released a draft report which states that the average monthly rent for a two-bedroom apartment in Boston rose 68 percent between 1982 and 1985—from $515 to $863 per month. The Boston Tab, March 11, 1986, at 1, col. 1. While the methodology used by the BHA is subject to criticism, there is no dispute as to the report's conclusion that there has been a rapid increase in the cost of rental housing in Boston.

rates and other market forces were pushing the cost of adequate housing beyond the means of many Boston residents.¹⁰

At the same time the federal government was cutting aid to cities, the voters of Massachusetts passed Proposition 2 1/2,¹¹ which forced cities in Massachusetts to limit the amount of revenue that can be raised through property taxes.¹² Under Proposition 2 1/2, the City of Boston has faced the challenge of maintaining the current level of services with a declining property tax levy.¹³ While Boston has devoted a larger share of its operating budget to housing, the problems of an expensive, tight housing market cannot adequately be addressed within the confines of Proposition 2 1/2. Linkage is one of the ways Boston can provide adequate housing and job training for low income residents while coping with the tax limitations of Proposition 2 1/2.¹⁴

This Comment explores the economic, legal, and political aspects of Boston's linkage program. Section II discusses the Boston Downtown Development Linkage Program and the events that led up to its passage; Section III reviews the possible legal challenges to the program, and suggests an analysis that might be used by courts; Section IV provides recommendations to the city that may help ensure the legality of linkage and thereby further the goals of housing and job training.

¹⁰ The retreat of the federal government from the business of creating subsidized housing, coupled with the attraction of quick profits through condominium conversion, led developers away from constructing rental housing. CONDOMINIUM DEVELOPMENT IN BOSTON, at 24, Boston Redevelopment Authority Research Department (August 1984) [hereinafter CONDOMINIUM DEVELOPMENT].

The median sale price for a single family home in the Boston area during the fourth quarter of 1986 was $167,800. Boston Globe, Mar. 21, 1987, at 20, col. 5. This compares to a median price of $84,900 for the fourth quarter of 1983. Boston Globe, Feb. 21, 1986, at 25, col. 3. In 1978, a City of Boston publication listed affordable neighborhood housing as one of the major attractions of the city. At that time, the city estimated the cost of a typical single family home to be between $25,000 and $40,000. See Living in Boston, published by the City of Boston, July 1978.

¹¹ St. 1980, c.580, § 1; (codified as amended at MASS. GEN. LAWS ANN. ch. 59, § 21C (West Supp. 1986)).


¹³ Id.

¹⁴ The City of Boston operates a variety of housing rehabilitation programs. Most of the programs involve the use of public funds as leverage for an even greater amount of private dollars. Despite this extensive reliance on leveraging, it still costs the city approximately $10,000 in public funds to rehabilitate one vacant apartment unit. Interview with staff member, City of Boston Public Facilities Department, March 10, 1986.
II. BOSTON'S DOWNTOWN DEVELOPMENT LINKAGE PROGRAM

A. Historical Background

A comparison of the Boston skyline as it existed in 1970 and as it exists today, or a walk through the new Copley Place development tends to reinforce the perception that all is well in Boston. But a look behind the glitter reveals serious housing problems. The high interest rates of the late 1970's and early 1980's, coupled with federal budget cutbacks, resulted in a decline in the number of new affordable housing units constructed in the Boston area. The decline in housing construction began to occur at about the same time that the demand for housing was increasing. Based upon its analysis of the 1980 census data and projections for future office employment, the Boston Redevelopment Authority estimates the creation of approximately 49,000 downtown office jobs between 1985-1995. Many of these new workers can be expected to look for housing in Boston. The new residents are in direct competition with lower income residents for the limited number of housing units available. Because of

15 According to Boston Redevelopment Authority director Stephen Coyle, Copley Place is "one of the few places outside of Berlin where you can be killed at any moment by a German automobile." The Boston Tab, April 15, 1986, at 10, col. 2.
16 The Boston Housing Authority (BHA) produced 1,800 housing units between 1970 and 1975. Between 1980 and 1985 the BHA was able to produce only 400 units. The number of assisted housing units in Boston grew from 6,800 to 16,200 between 1970 and 1975. In the last five years, only 2,400 additional units came under subsidy. Since 1970, there has been a 7,700 net decrease in the number of apartment units in one to four family houses. BOSTON'S HOUSING STOCK CHANGES, 1980 TO 1985, at 3-4, Boston Redevelopment Authority Research Department (1985) [hereinafter BOSTON'S HOUSING STOCK].
17 An example of the increased demand for housing is evidenced by the fact that in 1970 there were about 12,000 licensed rooming house units in Boston; by 1983, that number had fallen to 3,100. CONDOMINIUM DEVELOPMENT, supra note 9, at 24. The population of Boston has also been increasing and is expected to expand by 40,000 between 1985 and 1995. This growth will further add to the demand for housing. THE LINKAGE BETWEEN OFFICE DEVELOPMENT AND HOUSING COSTS IN THE CITY OF BOSTON, at 4, n.1, Boston Redevelopment Authority Report (January, 1986)(citations omitted) [hereinafter THE LINKAGE BETWEEN OFFICE DEVELOPMENT AND HOUSING].
18 The Boston Redevelopment Authority (BRA) is a semi-autonomous body consisting of five board members. The BRA functions as the City of Boston Planning Board. Four members are appointed by the Mayor, with City Council approval, and one is appointed by the Governor of Massachusetts. The BRA was formally organized in September 1957, and received its certificate of organization from the Secretary of State on October 4, 1957. The BRA has the authority to review and approve all development projects in Boston. See generally Aronson, The Boston Redevelopment Authority: A Quasi Public Authority, 43 B.U.L. REV. 466 (1963).
19 THE LINKAGE BETWEEN OFFICE DEVELOPMENT AND HOUSING, supra note 17, at 7, n.5.
20 Id.
their higher income, the new residents are likely to win this com-
petition.\footnote{One indication that the higher income residents are winning the competition for available housing is the increasing number of apartments that are being converted to expensive condominums. Condominium conversion in Boston has removed approximately 17,900 previously private apartments from the market between 1970 and 1985. About 70 percent of those rental units were moderately priced. \textsc{Boston's Housing Stock}, supra note 15, at 3.}

A review of the 1980 census data reveals some alarming statistics about the Boston housing market. In 1980, Boston's population had the fifth lowest median income of the country's thirty largest cities.\footnote{In 1985, 4,400 rental units in Boston were converted to condominiums. WGBH-TV, Evening News, Feb. 24, 1986. In response to the alarming rate of condominium conversions, the city passed an ordinance in December, 1985, which was designed to curb speculation. The ordinance allows the city to block the conversion of a rental building to condominiums unless more than half of the units are purchased by tenants. Despite this ordinance, it is estimated that 1,450 rental units were converted to condominiums in the first two months after the ordinance passed. \textsc{Boston Globe}, Feb. 25, 1986, at 17, col. 6.}
The percentage of Boston residents in poverty was twice that of the surrounding metropolitan area.\footnote{On July 9, 1986, the Massachusetts Supreme Judicial Court struck down Boston's condominium conversion ordinance on the grounds that it was beyond the authority of the city's power under the rent control enabling statute. \textsc{Greater Boston Real Estate Board v. City of Boston}, 397 Mass. 870, 494 N.E.2d 1301 (1986). The city has passed a home rule petition designed to amend the rent control enabling statute in order to give the city the power to regulate condominium conversions. This petition is presently before the state legislature. In the meantime, conversions are continuing at a rapid pace. In 1986, 4,626 rental units were converted to condominiums. \textsc{Boston Globe}, April 7, 1987, at 28, col. 6.}

Seventy percent of the households in Boston rely on rental housing.\footnote{\textit{Linkage Report}, supra note 11, at 6.} In 1980, almost 40% of Boston's renters were paying in excess of 30% of their income in rental costs.\footnote{\textit{Id.}}

Over 5,000 housing units in Boston are vacant and boarded up.\footnote{\textit{Id.}} these 5,000 represent 2% of the total housing stock, a higher percentage than most cities, including New York, Cleveland, Buffalo, and Newark.\footnote{\textit{Id.}} The limited supply of available housing, coupled with the entry of new residents to the market, has led to gentrification of neighborhoods and displacement of low and moderate income residents.\footnote{\textit{Linkage Report}, supra note 12, at 6.}

The social, economic, and political pressures that have combined to squeeze the Boston housing market, have occurred at the same time that the downtown office development industry was experienc-
ing a resurgence. Between 1979, and 1986, private development investment in Boston totaled four billion dollars. This private investment signifies an average annual construction rate of 2.2 million square feet of new office space. Looking ahead to the years 1987-92, development proposals yet to be approved indicate that downtown development construction will continue at an average annual rate of 1.9 to 2.4 million square feet.

Recognizing the need for additional funding for the construction and rehabilitation of affordable housing, in March, 1983, Boston City Councillor Bruce C. Bolling introduced a Home Rule Petition to establish an Office/Housing Production Program. Modeled after a

29 "In the last ten years, 12.2 million square feet of office space have been created and 85,000 net new jobs have been added. Also worthy of note are the construction of 5,000 hotel rooms and 1.2 million square feet of retail space. Boston's development market is robust." THE IMPACT OF BOSTON'S DEVELOPMENT ON HOUSING AND JOB TRAINING NEEDS: THE PROPOSED NEW LINKAGE PROGRAM SEEN IN PERSPECTIVE, at 3 (Report presented at the Public Hearing on Articles 26A and 26B, Boston Redevelopment Authority, January 23, 1986) [hereinafter THE IMPACT OF BOSTON'S DEVELOPMENT].

The justification most often cited for establishing a linkage program is that downtown office development directly increases the pressures on the surrounding housing and job markets.

30 LINKAGE REPORT, supra note 12, at 5.

31 Id.

32 Id. This development shows no sign of letting up. According to John Carroll, Vice President of development firm Meredith & Grew, Inc., "[t]he present [office rental] market exhibits a brisk leasing velocity and there are no signs of it slowing. Boston is postured to have a healthy tenant demand through the decade." MASS. HIGH TECH, Office Space in Boston Changing Trends, Jan. 7, 1985. Evidence of this continuing boom can be seen by looking at statistics involving the proposed Fan Piers development. The Boston Redevelopment Authority recently approved this development. The proposal calls for "2.1 million square feet of offices, a quarter million square feet of retail stores, more than 900,000 square feet of hotel space, about 1.4 million square feet of housing and 5,150 parking spaces." Boston Globe, Apr. 24, 1987, at 19, col. 4. As a result of this development, the city will receive over 18 million dollars in linkage funds. Id.

33 In 1966 the voters of Massachusetts adopted Article 89 § 6 of the Amendments to the Massachusetts Constitution ("Home Rule Amendment"). Prior to the adoption of the "Home Rule Amendment," Massachusetts municipalities were completely subordinate to the State Legislature and could enact legislation only after receiving an affirmative grant of power from the General Court. "The Home Rule Amendment grants cities and towns independent municipal powers which they did not previously inherently possess." Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339, 358, 294 N.E.2d 393, 408 (1973). The Hanover Court held that "the zoning power is one of a city's or town's independent municipal powers included in [the Home Rule Amendment's] broad grant of powers . . . ." Id. at 359, 294 N.E.2d at 409. The "Home Rule Amendment" authorizes municipalities to adopt "ordinances and bylaws," whereas the Boston Zoning Enabling Act authorizes the Zoning Commission to adopt "regulations." As a result, the "Home Rule Amendment" may not authorize a zoning-based exaction in Boston. The full extent of Boston's power under the "Home Rule Amendment" is beyond the scope of this Comment. For an in-depth review of the "Home Rule Amendment" See Jerison, Home Rule in Massachusetts, 67 MASS. L. REV. 51 (1982).
1981 San Francisco plan, the program would have required developers either to construct one unit of housing for every 1,200 square feet of commercial space, or to contribute a set fee to a public Housing Development Corporation. Mayor Kevin White vetoed the plan as unfair to developers. However, in June, 1983, in the face of mounting community pressure, the "lame duck" Mayor White proposed the creation of a thirty-member Advisory Group on the Linkage Between Downtown Development and Neighborhood Housing to recommend what form of linkage Boston should adopt.

B. Articles 26, 26A and 26B

The Advisory Group was composed of developers, financiers, representatives from neighborhood-based non-profit organizations, housing advocates, academicians, and representatives from city government. In October, 1983, the Advisory Group gave its recommendations to the mayor. The Advisory Group's recommendations formed the basis of the December 29, 1983 zoning amendment, Article 26, which officially established linkage in Boston. On February 26, 1986, Articles 26A and 26B supplemented Article 26.

Articles 26, 26A and 26B require an exaction payment from developers for any Development Impact Project in Boston. A Development Impact Project is defined as any development or substantial rehabilitation having a gross floor area, exclusive of parking, in

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34 The San Francisco Office/Housing Production Program (OHPP) imposes a compensatory housing requirement on developers who build more than 50,000 square feet of offices. Office developers accomplish this by building or rehabilitating the housing themselves, by financing other housing projects, or by contributing money into a special city housing fund. The OHPP is based on a formula developed by the city planning department to calculate the housing demand generated by new office development. See Share and Diamond, San Francisco's Office-Housing Production Program, 35 LAND USE LAW AND ZONING DIGEST No. 10, at 4 (Oct. 1983).

35 LINKAGE REPORT, supra note 12, at 1.


37 LINKAGE REPORT, supra note 12, at 2.

38 Id.

39 See supra note 5 and accompanying text.


excess of 100,000 square feet.\textsuperscript{42} This definition includes the expansion of buildings resulting in an increase in excess of 100,000 square feet.\textsuperscript{43}

Under the original linkage program that was passed in 1983, a developer has to pay $5.00 for each square foot of gross floor area in excess of 100,000 square feet.\textsuperscript{44} This payment is to be made over a period of twelve years, with the first payment due up to two years after issuance of the building permit.\textsuperscript{45} This program remains in effect today for neighborhood projects only.\textsuperscript{46} The 1986 amendments to the Boston Zoning Code introduced Articles 26A and 26B. The housing exaction—Article 26A—remains $5.00 for each square foot of gross floor area over 100,000 square feet.\textsuperscript{47} Article 26A differs from Article 26 in that the Article 26A exaction is payable in seven annual installments, and the first installment is due upon issuance of the building permit.\textsuperscript{48} The payments are to be made into a Neighborhood Housing Fund, which will be used for the creation of low and moderate income housing.\textsuperscript{49} Developers also have the option of creating low and moderate income housing themselves.\textsuperscript{50} The job training exaction—Article 26B—is $1.00 per square foot of floor area over 100,000 square feet.\textsuperscript{51} Payments are to be made over two years, with the first payment due upon issuance of the building permit.\textsuperscript{52} The changes in the linkage fee, as represented by Articles 26A and 26B, approximately double the developer's payments under the program.\textsuperscript{53}

The Boston Redevelopment Authority estimates that the linkage program will generate approximately $50,000,000 by 1995.\textsuperscript{54} The first payments are due April, 1987.\textsuperscript{55} While there is still some question

\textsuperscript{42} BOSTON ZONING CODE, Art. 26A, § 26A-2(1) and Art. 26B, § 26B-2(1).
\textsuperscript{43} Id.
\textsuperscript{44} Id. Art. 26, § 26-3(2)(a).
\textsuperscript{45} Id. Art. 26, § 26-2(3)(a).
\textsuperscript{46} See supra note 40.
\textsuperscript{47} BOSTON ZONING CODE, Art. 26A, §§ 26A-2(3)(b) and 26A-3(2)(a).
\textsuperscript{48} Id. Art. 26A, § 26A-2(3)(b).
\textsuperscript{49} Id.
\textsuperscript{50} Id. To date, no Boston developers have chosen this option.
\textsuperscript{51} Id. Art. 26B, § 26B-3(1)(a).
\textsuperscript{52} Id. Art. 26B, § 26B-2(3)(a).
\textsuperscript{53} The linkage requirement of $5.00 per square foot for housing and $1.00 per square foot for job training represent a present value of $4.78 per square foot. Under the original Article 26, the requirement of $5.00 per square foot payable over 12 years represented a present value of $2.58 per square foot.
\textsuperscript{54} LINKAGE REPORT, supra note 12, at 14.
\textsuperscript{55} As of January 1986, 35 million dollars has been earmarked through agreements with
as to exactly how the monies will be spent,\textsuperscript{56} initial drafts of the ordinance creating the Neighborhood Housing Fund indicate that a majority of the funds will be used for rehabilitation of existing rental housing units and that 30\% of the Fund will be used to assist low and moderate income persons wishing to purchase homes.\textsuperscript{57}

The very concept of linking downtown office development and neighborhood housing met with mixed reactions from those affected by the program.\textsuperscript{58} By the fall of 1985, however, many Boston residents felt that the linkage formula needed to be changed to ensure that, in the words of the new Mayor Raymond Flynn, "major economic development in the downtown area . . . is shared with the neighborhoods."\textsuperscript{59} The recently passed increases in the linkage fees and the inclusion of job training as a beneficiary of linkage funds has resulted in major disagreements between developers and neighborhood-based community groups.\textsuperscript{60} These increases in linkage fees have also revived questions concerning the legality of linkage.

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\textsuperscript{56} On December 17, 1985, the Boston City Council passed an ordinance establishing a Neighborhood Housing Fund. Boston Mayor Raymond Flynn vetoed this ordinance. The Mayor and the City Council were in disagreement over how the Fund was to be managed and what percentage of the Fund was to be set aside for low income housing assistance. The Boston Linkage Action Coalition has recommended that the housing funds be limited to projects that set aside at least 50\% of the units for low to moderate income residents. Without this restriction, the Coalition fears that the Fund could become a slush fund for developers. Boston Globe, Jan. 20, 1987, at 17, col. 1.

Article 26A specifies that up to 20\% of any housing exaction contribution "shall be reserved for the neighborhood or neighborhoods where or adjacent to where the Project is located . . . ." BOSTON ZONING CODE, Art. 26A, § 26A-2(3)(c).

\textsuperscript{57} REPORT: THE NEIGHBORHOOD HOUSING FUND, Boston City Council, December 17, 1983 [hereinafter REPORT].

\textsuperscript{58} In their statement of partial concurrence and partial dissent Emily Achtenberg and Albert Walls, two pro-tenant LINKAGE REPORT committee members, expressed their support for a linkage ordinance that would require that linkage fees be paid in full prior to the grant of a certificate of occupancy, rather than over twelve years. LINKAGE REPORT, supra note 12, at 35. Developers, on the other hand, accepted the linkage program rather quietly. While expressing general opposition to linkage, developer representatives refused to commit themselves to a legal challenge to the program. Boston Globe, December 21, 1983, at 84, col. 6.

\textsuperscript{59} Boston Globe, November 12, 1985, at 1, col. 6. During the fall of 1985, community groups lobbied Mayor Flynn in an effort to increase substantially the linkage payment formula. Evelyn Hannigan, co-chairperson of the Boston Linkage Action Coalition, asked the Mayor to increase the linkage payment to $10 per square foot, force developers to pay the exaction prior to construction, eliminate the exemption for projects under 100,000 square feet, and force developers of luxury housing projects to pay linkage fees also. Boston Globe, Nov. 11, 1985, at 18, col. 5.

\textsuperscript{60} Kenneth Morrison, spokesman for the Greater Boston Real Estate Board, stated that the $1 increase in the linkage fee "confirms the fear that the linkage plan two years ago was merely the opening move to tap what is viewed as an endless source of new revenues." Boston
III. LEGAL CHALLENGES TO BOSTON'S LINKAGE PROGRAM

Because linkage is a relatively new issue, very few judicial decisions speak to the legality of a program similar to the one in Boston. An analogy with subdivision cases provides the best indication of how courts will construe a linkage program. Subdivision exactions, that is, local regulations that require developers to pay for and/or build public improvements associated with their developments, are subject to review by courts to determine if the exaction is beyond the scope of the zoning power or violates the due process, equal protection, or takings clauses of the federal or state constitutions.

In addition, the exaction may violate Proposition 2 1/2. Proposition 2 1/2 has substantially limited the revenue raising ability of local communities through the property tax. If linkage fees are construed by the courts as real estate taxes, they may conflict with Proposition 2 1/2.

A. The Scope of Zoning

The scope of the zoning power is defined by the United States Constitution, the State Constitution and the Zoning Enabling Acts. Accordingly, a claim that Boston's linkage ordinance is beyond the scope of the zoning power would raise two questions: The legal analysis used to support a claim that an ordinance is beyond the scope of the zoning power is similar whether one is raising a constitutional or statutory argument. However, this Comment will discuss each separately, because an ordinance could be sustained on one ground yet fail on another, i.e., the enabling statute might specifically authorize the zoning ordinance, yet the ordinance is beyond the scope of the police power. Therefore, the ordinance violates the substantive due process clause of the constitution.

Globe, Nov. 13, 1985, at 24, col. 3. Morrison went on to say that “[a]nother major source of skepticism is the premise that funding can be extracted from the private sector to finance virtually an open-ended array of social programs, such as housing, job training, parks and day care centers, while simultaneously limiting the capacity of the industry to grow.” Id.

On the other hand, Donald Chiofaro, developer of International Place, which will generate nearly $8 million in linkage payments, agrees with the concept of linkage. “I build office buildings in downtown and the better downtown and the city work, the better my investment works.” Id.

At the same time the business community was giving the linkage program revisions mixed reviews, housing activists were complaining that the small increase in the linkage exaction from $5 to $6 was evidence that Mayor Flynn “had dropped the ball.” Boston Globe, Nov. 13, 1985, at 24, col. 3.

61 See supra note 1.
65 The legal analysis used to support a claim that an ordinance is beyond the scope of the zoning power is similar whether one is raising a constitutional or statutory argument. However, this Comment will discuss each separately, because an ordinance could be sustained on one ground yet fail on another, i.e., the enabling statute might specifically authorize the zoning ordinance, yet the ordinance is beyond the scope of the police power. Therefore, the ordinance violates the substantive due process clause of the constitution.
ordinance authorized by state enabling statutes; and (2) is the ordinance a legitimate exercise of the police power?

1. Authorized By Enabling Statute

As a creature of the state, the City of Boston has no inherent powers of its own. The only powers it may exercise are those expressly granted to it by the state. The Boston Zoning Commi-

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The law in this regard has been fairly reversed by the Home Rule Amendment and the Home Rule Procedures Act, which permit municipalities to exercise any power or function conferrable on them by the Legislature, so long as exercise of the power is ‘not inconsistent’ with the Constitution or a general law enacted pursuant to the Legislature’s retained powers.

The Massachusetts Supreme Judicial Court has not clarified the extent of municipal power under the Home Rule Provision. “Unless an ordinance or by-law is clearly authorized by statute or clearly contradicts an express statutory mandate, it is difficult to predict how the Court will react to a given independently enacted local law.” See Jerison, supra note 32, at 56.

67 See, e.g., City of Cambridge v. Commissioner of Public Welfare, 357 Mass. 183, 257 N.E.2d 782 (1970). In 1975 the General Court repealed the Zoning Enabling Act (St. 1954, c.368, § 2) and replaced it with the Zoning Act (St. 1975, c.808, § 3). While neither act applies to the City of Boston, according to Emerson College v. City of Boston, 393 Mass. 303, 471 N.E.2d 336 (1984), the words of the new Zoning Act suggest a legislative intent to encourage municipal use of the Home Rule Amendment.

The purposes of this act are to facilitate, encourage, and foster the adoption and modernization of zoning ordinances and by-laws by municipal governments in accordance with the provisions of Article 89 of the Amendments to the Constitution (Home Rule Amendment) and to achieve greater implementation of the powers granted to municipalities thereunder.

St. 1975, c.808, § 2A.

The Zoning Act is an attempt by the legislature to introduce flexible planning concepts for municipal use . . . .” Healy, Massachusetts Zoning Practice Under The Amended Zoning Enabling Act, 64 MASS. L. REV. 157 (1979).

It is this author’s belief that the 1975 amendments to the Zoning Act were an attempt by the legislature to give proponents of affordable housing some much needed assistance in their battle with suburban zoning and planning boards. Because the old Zoning Enabling Act did not explicitly list housing for all income groups as a valid purpose of zoning, many suburban communities, intent on maintaining homogeneity, argued that considerations of housing affordability were not valid subjects for consideration by a zoning commission.

The State Legislature amended the Zoning Enabling Act in 1975 in order to send a message to suburban communities that affordable housing was a valid purpose of zoning. The passage of the “Anti-Snob Zoning Act” in 1969 is evidence that the legislature believed that the then existing Zoning Enabling Act implicitly authorized housing for all income groups. It is only because suburban communities ignored this implicit authorization that the legislature chose to amend the Zoning Act. See infra notes 74–79 and accompanying text.

The fact that the legislature chose not to amend the Boston Zoning Enabling Act at the
sion adopted Articles 26, 26A and 26B on the basis of the zoning authority conferred on Boston by the Zoning Enabling Acts. This zoning enabling legislation permits Boston to zone “[f]or the purpose of promoting the health, safety, convenience, morals or welfare of its inhabitants . . . .”

Generally, there is a presumption in favor of local zoning regulations. A court will not refuse to enforce a local zoning regulation unless “there is a showing beyond reasonable doubt of conflict with the Constitution or the enabling statute.” The general “test is whether there is ‘any substantial relation between the [zoning] amendment and the furtherance of any of the general objects of the enabling act . . . .’” In order to be upheld by the courts, Boston’s linkage payment exactions must be authorized by the Zoning Enabling Act. In other words, the creation of low and moderate income housing and job training programs must fall within the definition of “health, safety, convenience, morals or welfare of [the city’s] inhabitants.”

a. Housing and Job Training As Valid Purposes of Zoning

The creation of a Neighborhood Housing Fund is an attempt by the City of Boston to address one of the major problems facing the State of Massachusetts today: the lack of affordable housing. This problem was recognized by the state legislature and was specifically addressed in the 1975 Massachusetts Zoning Act. According to the same time the Zoning Act was amended is consistent with the proposition that the legislature felt that Boston was aware that affordable housing was implicitly a valid purpose of zoning. The City of Boston, unlike the suburbs, did not need a nudge from the legislature in order to give consideration to the plight of low and moderate families.

68 St. 1956, c.665.
69 Id. § 2.
73 The test for judging the validity of a zoning law is whether it furthers any purpose included within the enabling statute. See, e.g., Moss v. Town of Winchester, 365 Mass. 297, 299, 311 N.E.2d 555, 556 (1974).
74 See REPORT, supra note 57, at 6–9.
75 St. 1975, c.808 (codified as amended at MASS. GEN. LAWS ANN. ch. 40A (West 1979 & Supp. 1986)).
Zoning Act, one of the purposes of zoning is “to encourage housing for persons of all income levels . . .” The Supreme Judicial Court recognized just such a legislative intent when they upheld the state’s “Anti-Snob Zoning Act” in Board of Appeals of Hanover v. Housing Appeals Committee. In Hanover, the Court stated that the construction of low and moderate income housing serves the general welfare.

Even if one accepts the proposition that affordable housing serves the general welfare, the job training portion of Boston’s linkage program remains an issue. This provision presents a much more difficult question. While it is arguably true that job training contributes to the “health, safety, convenience, morals or welfare” of the city’s inhabitants, the objectives of the Zoning Act are more characteristically thought of as applying to such physical characteristics of a city as building type, size, height, and location. While housing comes within the gambit of a physical characteristic of a city, job training does not. Nevertheless, it can be argued that job training has consistently been viewed as a legitimate public purpose. Both the state and federal governments have, at various times, extensively funded job training programs.

While it is clear that housing and job training serve a public purpose, the question remains whether both goals are zoning purposes, authorized by the zoning enabling legislation. If the statement of purpose contained in the Boston Zoning Enabling Act does not include both housing and job training, the enactment of linkage is beyond the scope of the legislative delegation and invalid.

The City of Boston is governed by the Boston Zoning Enabling Act, rather than the more permissive 1975 Massachusetts Zoning

76 St. 1975, c.808, § 2A.
77 St. 1969, c.774, (codified at MASS. GEN. LAWS ANN. c.40B, §§ 20–23 (West 1979)).
79 Id. at 363, 294 N.E.2d at 411.
81 The federally funded Comprehensive Employment and Training Act is an example of the government commitment to job training. While job training has been considered a legitimate public purpose, the city has never before used its zoning power to set up such a program.
Act. The Boston Zoning Enabling Act has a much more narrow statement of purpose than the Zoning Act. The statement of purpose of the Boston Zoning Enabling Act does not list housing or job training as valid purposes of zoning. A literal interpretation of the Boston Zoning Enabling Act, therefore, would result in a determination that the Boston linkage program is without statutory authorization. The Boston Zoning Enabling Act does, however, list the health and welfare of citizens as a valid purpose of zoning. Affordable housing and job training are just two of the components that make up health and welfare. In recognition of the complex nature of the problems facing urban centers today, and in light of the great deference with which local zoning determinations receive, courts may view housing and job training as implied purposes of zoning. In doing so, courts will be mindful of the fact that there still remain other statutory and constitutional limits on the power of a municipality to zone.

b. Authorization for an Exaction

Even if a Massachusetts court finds that a linkage regulation promoting job training and construction of low and moderate income housing is within the general welfare objective of zoning, the question remains whether the enabling statute authorizes the means employed by the city to further this objective. In other words, is the city authorized to exact money from a developer of downtown office space as a means of advancing valid zoning objectives?

Historically, when presented with a challenge to an exaction, state courts have accepted plaintiffs' arguments that the enabling legis-

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84 See St. 1956, c.665, § 2.
85 The Boston Zoning Enabling Act allows zoning ordinances for the purpose of promoting the health, safety, convenience, morals or welfare of its inhabitants . . . .
86 . . . [T]o lessen congestion in the streets; to conserve health; . . . [and] to encourage the most appropriate use of land throughout the city . . . .
87 Id.
88 Id.
89 See supra notes 70–72 and accompanying text.
90 See supra note 67. Over the last twenty years, numerous innovative zoning techniques have been utilized by cities in the attempt to combat the problems associated with growth. See generally R. Babcock and C. Siemon, THE ZONING GAME REVISITED (1985). Despite the lack of explicit statutory authorization, practitioners and courts alike have accepted these innovative techniques.
lation does not authorize the exaction. While there is no Massachusetts case directly on point, commentators have frequently argued that existing case law supports a finding that linkage exactions are not within the zoning power. One such case is *Sylvania Electric Products, Inc. v. City of Newton*, in which the Supreme Judicial Court of Massachusetts upheld a zoning amendment that changed a single-family residence district to a limited manufacturing district. Prior to the zoning amendment approval, the landowner gave the City of Newton an option to purchase a portion of the property. With this restriction attached to the land, the city then agreed to the zoning change. While recognizing that the option and the zoning amendment were mutually induced, the *Sylvania* court upheld the amendment on the ground that the grant of the option was a voluntary action taken prior to the actual zoning decision and thus the rezoning was not conditioned upon the grant of the option.

In reaching this decision, the *Sylvania* court, in dicta, included language which is frequently cited as supporting the proposition that zoning exactions are invalid:

What was done involved no action contrary to the best interest of the city and hence offensive to general public policy. It involved no extraneous consideration (as, for example, a request to give land for a park elsewhere in the city) which could impeach the enacting vote as a decision solely in respect of rezoning the locus.

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92 Id. at 430–32, 183 N.E.2d at 120–21.

93 Id. at 430–31, 183 N.E.2d at 120.

94 Id. at 431–32, 183 N.E.2d at 120–21.

95 Id. at 433, 183 N.E.2d at 121–22. "[T]he conclusion is inescapable that the option proposal was a significant inducement of the zoning amendment and the amendment induced the giving of the option." Id.

96 Id. at 433–34, 183 N.E.2d at 122.

97 See *supra* note 90 and accompanying text.

98 344 Mass. at 434, 183 N.E.2d at 122.
On its face, the above quoted language appears to indicate that zoning exaction programs similar to Boston's are invalid under Massachusetts law. There is, however, an alternative way to interpret the Sylvania decision. In the first instance, it is important to note that the Sylvania court upheld the City of Newton's zoning decision. The plaintiff's challenge was based on the grounds that the zoning amendment represented either contract or spot zoning. A quick review of contract and spot zoning law indicates that Boston's linkage program may well survive the Sylvania decision.

Contract zoning is illegal because it involves a bargaining away of a local government's police power. While there may have been some bargaining between the landowner and the City of Newton, there was no contract between the landowner and the city obligating Newton to change the zoning of the locus. There could not, therefore, be any violation of the prohibition against contract zoning.

Spot zoning generally means that the zoning power has been used to single out a small area for different treatment that is inconsistent with a comprehensive plan. The test for spot zoning is whether the "zoning change is designed solely for the economic benefit of the owner of the property receiving special treatment and is not in accordance with a well considered plan for the public welfare." The zoning change challenged in Sylvania was upheld because its result was consistent with the comprehensive plan.

The Boston linkage program meets the Sylvania court's requirements for a valid zoning amendment. The linkage requirements have been incorporated into the zoning regulations. They are also part of the city's comprehensive plan. Unlike the contract or spot zoning situation that the Sylvania court expressed concern with, the City of Boston is not allowed to pick and choose which developers must pay the exaction, the linkage payments are uniformly imposed on all developers. There is no bargaining away of the zoning power. Developers, as well as the public at large, are on notice as to the requirements of the program. Prior to even talking to the city about permits and other approvals, developers know what the proposed

100 See 5 P. Rohan, Zoning and Land Use Controls § 38.01(1), at 38-3.
101 Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339, 362, 294 N.E.2d 393, 410–11 (1973). "The test is whether there has been shown any substantial relation between the change in applicable zoning regulation and the furtherance of any general objects of the enabling act." Id. at n.15 (citations omitted).
102 The grant of the variance in Sylvania did not contravene the public welfare. In addition, the option granted to the city helped further the public welfare, because it afforded the city the opportunity to obtain additional park land.
103 See notes 3–5 and accompanying text.
project's linkage payments will be. In sum, the Boston linkage program does not involve any action “contrary to the best interest of the city and hence offensive to general public policy.”

Another case frequently cited as weighing against linkage is Middlesex & Boston St. Ry. Co. v. Board of Aldermen of Newton.104 In Middlesex & Boston, the Massachusetts Supreme Judicial Court struck down an exaction imposed on a developer as a condition for a special permit. The court stated that the Board of Aldermen did not have the authority to impose the challenged exaction, because there was “no language anywhere in the statute or in the Newton zoning ordinance . . . ” giving the Board such authority.105 The court specifically reserved the question whether the exaction would be valid if the power to impose it were delegated to the Board by municipal ordinance.106 The Boston linkage program was properly adopted by the Boston Zoning Commission. Middlesex & Boston does not, therefore, stand as an impediment to a finding that enabling legislation authorizes linkage exactions.

Nationally, recent challenges to zoning exactions indicate a softening of the judicial attitude toward these types of programs.107 The changing judicial attitude is nowhere more clearly evident than in California.108 California courts find legislative authority for exactions as long as the exaction is in some way related to the needs created by the development.109 In Kalaydjian v. City of Los Angeles,110 the California Court of Appeals upheld an exaction program that required the payment of a fee for tenant relocation prior to condominium conversion approval. While not specifically addressing the question of statutory authorization, the court cited Ayres v. City Council of Los Angeles111 for the proposition that imposition of relocation fees was within the power of the city.112

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105 Id. at 856, 359 N.E.2d at 1283.
106 Id. at 858–59, 359 N.E.2d at 1284.
108 Courts in states other than California have also been receptive to these types of inclusionary zoning programs. See, e.g., Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965)(Wisconsin Supreme Court upheld an ordinance requiring dedication of land for school purposes, or payment of a fee in lieu of dedication).
111 94 Cal. 2d 31, 207 P.2d 1 (1949).
112 149 Cal. App. 3d at 698, 197 Cal. Rptr. at 151. See also Associated Home Builders of
The Boston Zoning Enabling Act does not contain any language that expressly authorizes the zoning commission to exact money from downtown office developers. Despite this lack of a clear statutory authorization for an exaction, Massachusetts courts may uphold the Boston linkage program because the Enabling Act implicitly authorizes such a program. The City of Boston has adopted linkage as a means of furthering the valid zoning purposes of housing and job training. Legislative authorization for the means chosen by local governments to further the general welfare are included by implication in the Zoning Enabling Act. It would be inconsistent for the enabling legislation to list several legitimate public purposes of zoning and at the same time deny the means chosen by cities to carry them out. Courts should give local zoning decisions great deference, unless the local zoning decision is not a legitimate exercise of the police power.

2. Legitimate Exercise of the Police Power—Substantive Due Process

In the landmark zoning case of Village of Euclid v. Ambler Realty Co., the United States Supreme Court stated that zoning regulations "must find their justification in some aspect of the police power, asserted for the public welfare." The "zoning power may be used

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113 See supra note 67 and accompanying text. It remains an open question as to how a Massachusetts court would treat a linkage program. See supra note 1. In Middlesex & Boston St. Ry. Co., 371 Mass. 849, 359 N.E.2d 1279 (1977), the Massachusetts Supreme Judicial Court refused to answer the question of whether an exaction would be upheld if authorized by either the Zoning Enabling Act or municipal ordinance. Id. at 858–59, 359 N.E.2d at 1284. That question was before the Court in Iodice v. City of Newton, 397 Mass. 329, 491 N.E.2d 618 (1986). In Iodice, the plaintiff charged that the new Zoning Act did not authorize a Newton inclusionary zoning ordinance. The ordinance in question required a mandatory set-aside of 10% of all newly constructed housing units as a condition of the grant of a variance. The Massachusetts Supreme Judicial Court refused to rule on the merits, citing procedural errors on the part of the plaintiff.

114 The legal analysis used to determine whether a zoning regulation has exceeded the limits of the police power is the same as a constitutional substantive due process analysis. The substantive due process analysis also overlaps with equal protection and taking arguments. See D. MANDELKER, supra note 63, at 37.

115 272 U.S. 365 (1926).

116 272 U.S. at 387. See, e.g., Rayco Investment Corp. v. Board of Selectmen of Raynham, 368 Mass. 385, 331 N.E.2d 910 (1975). "The zoning power is, of course, merely one category
"where the interests of the public require such action and where the means employed are reasonably necessary for the accomplishment of the purpose." 117

In *Opinion of the Justices to the House of Representatives*, 118 the Massachusetts Supreme Judicial Court laid out the test for judging the constitutionality of local regulations under the police power, or due process, analysis. According to the Massachusetts Supreme Judicial Court, when considering the question of whether legislation violates the due process clause, the court's task is to determine whether the objective of the legislation is rationally related to the statutory objective of public health, safety, morals, or general welfare. 119 If there is a rational relationship, the means selected to achieve the objective must be supportable in reason. 120 Courts have framed the due process analysis with a two part question: is the regulation a reasonable means to serve a legitimate public purpose? 121

a. **Legitimate Public Purpose** 122

The United States Supreme Court recently reaffirmed that legislative determinations of the public interest should be accorded great deference. In *Hawaii Housing Authority v. Midkiff*, 123 the Court stated that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social of the more general police power, concerned specifically with the regulation of land use." Id. at 392 n.4, 381 N.E.2d at 914 n.4 (citations omitted).


119 Id. at 861, 333 N.E.2d at 418 (citations omitted).

120 Id.

121 See, e.g., Board of Appeals of Hanover v. Housing Appeals Commission, 363 Mass. 339, 385, 294 N.E.2d 393, 424 (1973) (citations omitted). In *Euclid v. Ambler Realty*, the United States Supreme Court held a zoning ordinance constitutional because it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U.S. at 395 (citations omitted). The reasonable means test has also been defined as requiring a rational basis, rational nexus or rational relationship.

122 The discussion of the public purpose under the police power doctrine is similar to the discussion of the valid purposes of zoning. A determination by a court that providing housing and job training are valid purposes of zoning will be determinative as to whether they are legitimate public purposes. See supra notes 72–84 and accompanying text.

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legislation . . .". The Court will not substitute its judgment for a legislature's judgment as to what constitutes the public purpose unless the purpose is "palpably without reasonable foundation." A finding that housing and job training are valid purposes of zoning will be dispositive of whether they are also legitimate public purposes. The due process standard for determining whether a legislative action serves a legitimate public purpose is not as stringent as the test for judging whether enabling legislation authorizes a local action. For the reasons stated above, a court is likely to find that Boston's linkage program serves a legitimate public purpose.

b. Reasonable Means

Even if housing and job training may be pursued as legitimate public purposes, in order to be constitutional, the linkage exaction must bear a rational relationship to that legitimate state interest. The burden is on the party challenging the zoning regulation to show that no rational relationship exists. To challenge Boston's linkage program successfully, a developer will have to show that there is no rational basis between the need created by the development and the exaction.

Generally, courts analyze the relationship between an exaction program and the proposed development in one of three ways: 1) the strict rule or direct benefit test, 2) the specifically and uniquely attributable test, and 3) the rational nexus test. While it is sometimes difficult to recognize much of a difference between these tests, it is important to understand that there is no single test for judging the constitutionality of exaction programs. Courts are free to create their own test and give it any label they see fit. Massachusetts courts have not yet had an opportunity to announce which type of rational basis test they would apply to a subdivision or zoning exaction.

124 Id. at 239 (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)).
126 See supra notes 74–88 and accompanying text.
127 Id.
128 See supra notes 114–121 and accompanying text.
131 See Pavelko, supra note 2, at 283.
review of the tests used by various state courts, however, may provide some insight into how a Massachusetts court will analyze linkage.\footnote{In Bonan v. City of Boston, 398 Mass. 315, 496 N.E.2d 640 (1986), this question was before the court but was not answered because of procedural errors below. See supra note 1.}{132}

\textit{Lampton v. Pinaire} represents the strict rule or direct benefit test.\footnote{610 S.W.2d 915 (Ky. Ct. App. 1980).}{133} In \textit{Lampton}, the Kentucky Court of Appeals stated that a required dedication of a right of way would be permissible if the anticipated future traffic burden arising from the development exceeded current road capacity.\footnote{Id. at 919. See also Baltimore Planning Commission v. Victor Development Co., 261 Md. 387, 393–94, 275 A.2d 478, 482 (1971).}{134} The court acknowledged that any substantial development inevitably puts additional burdens upon a municipality's services.\footnote{610 S.W.2d at 919.}{135} The court stated that an exaction is valid only if it "is based on the reasonably anticipated burdens to be caused by the development 
\ldots ."ootnote{Id. at 919.}{136}

The Illinois Supreme Court decision in \textit{Pioneer Trust and Savings Bank v. Village of Mount Prospect}\footnote{22 Ill. 2d 375, 176 N.E.2d 799 (1961).}{137} is often cited as standing for the specifically and uniquely attributable test.\footnote{See, e.g., McKain v. Toledo City Plan Commission, 26 Ohio App. 2d 171, 176, 270 N.E.2d 370, 374 (1971); Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 69, 264 A.2d 910, 913 (1970).}{138} Under the \textit{Pioneer Trust} test, a court will uphold an exaction only if the municipality establishes that a specific developer's activities have generated a specific need.\footnote{22 Ill. 2d at 381–82, 176 N.E.2d at 802. [T]his record does not establish that the need for recreational and educational facilities in the event that said subdivision plat is permitted to be filed, is one that is specifically and uniquely attributable to the addition of the subdivision and which should be cast upon the subdivider as his sole financial burden.}{139} In \textit{Pioneer Trust}, a local ordinance requiring a subdivider to dedicate a portion of land for public use was struck down because the need for the land was not specifically and uniquely attributable to the subdivision.\footnote{Id. at 381, 176 N.E.2d at 802.}{140} The specifically and uniquely attributable test puts a higher burden on the local governing body than does the direct benefit test. Under the specifically and uniquely attributable test, a municipality must show that a development has caused a specific, identifiable need.

The final test for judging the relationship between an exaction and a development—the rational nexus test—is represented by \textit{Jordan}
v. Village of Menomonee Falls. In Jordan, the village required subdividers to pay a fee in lieu of a dedication of land. The Jordan Court modified the Pioneer Trust test and decided to uphold the exaction because the evidence reasonably established that the municipality would be required to provide more land for schools, parks and playgrounds as a result of the subdivision. The rational nexus test as developed by the Jordan court is similar to the specifically and uniquely attributable test, except that the rational nexus test increases the presumption of validity of the local action. Subsequent California cases have expanded the Jordan test even further in upholding legislative determinations of rational nexuses with little judicial scrutiny.

While it is unlikely that a Massachusetts court will adopt a permissive California-type rational nexus test, it is possible that a court will develop a hybrid test, combining elements of the Jordan test with those adopted in other states. One such state decision that a Massachusetts court may utilize is the New Hampshire case of Land/Vest Properties, Inc. v. Town of Plainfield. In Land/Vest, the town planning agency conditioned approval of a subdivision on the developer's agreement to improve two roads that primarily served other lot owners and residents not within the subdivision. The town justified this condition using a "but for" test, arguing that, but for the subdivision, the road improvements would not be required. The court rejected this argument. The court stated that the town's test was faulty because it only balanced the burdens that the precondition placed on the parties. A proper balancing test, according

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141 28 Wisc. 2d 608, 137 N.W.2d 442 (1965).
142 Id. at 611, 137 N.W.2d at 444.
143 Id. at 617-19, 137 N.W.2d at 447-48.
144 See Pavelko, supra note 2 at 287.
145 See Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal.3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971). See generally supra notes 107-12 and accompanying text.
146 In Marshfield Family Skateland v. Town of Marshfield, the Massachusetts Supreme Judicial Court stated that zoning regulations can be justified by "any state of facts reasonably ... conceived ...." 389 Mass. 436, 446, 450 N.E.2d 605, 611 (1983)(quoting Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 542, 320 N.E.2d 911, 913 (1974)). While it is unlikely that the court meant to be taken literally, this language indicates a desire to give deference to zoning regulations. The best way to give deference to zoning regulations is to apply the permissive rational basis test to due process challenges.
148 Id. at 821, 379 A.2d at 203.
149 Id.
150 Id. at 822-23, 397 A.2d at 204.
to the court, should include the benefits and burdens incurred by all parties. The court concluded that a developer could "be compelled to bear 'only . . . that portion of the cost which bears a rational nexus to the needs created by, and [special] benefits conferred upon, the subdivision."

The Land/Nest test, which can be characterized as a proportionality test, is arguably the correct test for reviewing exactions. The court, however, misapplied the test. The Land/Nest court failed to consider all of the benefits that accrued to the subdivision. The court considered only the benefits received by the subdivision as a result of the exaction, that is, only those benefits resulting from the road improvements. The court failed to consider the benefits conferred on the subdivision as a result of the town's approval of the subdivision application. A true proportionality test places all the benefits and all the burdens incurred by each party onto a scale. Exactions are then upheld only if there is an approximate balance between these benefits and burdens.

Using the Land/Nest proportionality test, as modified above, the City of Boston will be required to show that downtown office development contributes to the upward spiral of housing costs. The city will also have to show that development has increased the need for job training services. These housing and job training needs would be weighed against the benefits and burdens that accrue to the development as a result of both the zoning approval and the exaction. Under this type of test, it will be particularly important for the city to show the benefits that a developer receives from the zoning approval. The amount of the exaction should be reasonably related to these benefits and burdens.

As a first step toward making this showing, the City of Boston will need to develop the statistical information that reveals the im-

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151 Id.
152 Id. at 823, 397 A.2d at 204 (quoting Longridge Builders, Inc. v. Planning Board of Princeton Tp., 52 N.J. 348, 350, 245 A.2d 336, 337 (1968)).
153 See generally Comment, One Hundred Years of Supreme Court Regulatory Taking Doctrine: Average Reciprocity of Advantage from Mugler to Keystone Bituminous Coal Assn. (to be published in the Summer 1987 issue of B.C. Envtl. Aff. L. Rev.).
154 117 N.H. at 823–25, 379 A.2d at 204–06.
155 Id.
156 See, e.g., Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935). In Nashville, Justice Brandeis described this balancing as follows:

When particular individuals are signaled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured.

Id. at 429.
pact of new development on the housing market. The city has made great strides in this direction. In a report prepared for the Boston Redevelopment Authority, the estimated increase in costs for housing rentals and new housing generated by each square foot of downtown office space was $11.28 and $11.75, respectively. A comparable study, documenting the increased need for job training, has not yet been undertaken. Initial estimates by the city indicate that each new square foot of downtown office space increases entry level job training costs by $1.74. Despite these initial estimates, a showing that development is responsible for increasing job training needs is likely to present the city with a formidable task. Absent such a showing, a court will likely strike down the job training portion of the linkage exaction.

One possible way to show a sufficient rational nexus to justify the job training exaction would be to argue that an activity requiring zoning approval should not be allowed to go forward unless it includes all residents of Boston among its beneficiaries. In other words, because downtown development creates both high and low paying jobs, zoning approval should be granted only when there are sufficient conditions attached that ensure the participation of Boston’s residents in all areas of the development. Thus, Boston residents would be able to participate in both low and high paying jobs. Such participation can only be guaranteed through the creation of job training programs.

If it is true that housing costs have increased as a result of downtown development, then it naturally follows that a good paying job

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157 See supra notes 16–28 and accompanying text.
158 The Linkage Between Office Development And Housing, supra note 17, at 14.
159 The Impact Of Boston’s Development, supra note 29, at 1. It is not clear as to how this figure was calculated.
160 Since 1976, almost 80,000 new jobs have been created in Boston. However, of the downtown jobs paying more than $15,000 a year, only about 20 percent are held by Boston residents. According to Lee Fremont-Smith, president of a Boston area employment agency, his agency has 500 to 600 job openings a week. Yet, he is unable to find qualified workers to fill them. Boston Globe, Poverty Amidst Affluence, Bostonians The Boom Left Behind, Just a job, not an opportunity, December 15, 1985, (magazine) at 18, 19, and 54–55.

The only jobs that many Boston residents qualify for are the low paying service jobs, such as janitors, dishwashers, and messengers. An employee working 40 hours a week at minimum wage earns $6,968 per year. The poverty line for a family of four is $10,609 per year. In September, 1985, Boston had an unemployment rate of 4.8%, compared to a national unemployment rate of 7.1%. Despite the good unemployment figures, 20% of Boston residents live below the poverty level, compared to a national rate of 15%. The Boston Redevelopment Authority estimates that by 1990, 23% of Boston’s residents will be living below the poverty level. Id.
is one of the needs created by the development. Without a well paying job, housing opportunities are non-existent. Requiring developers to contribute to a program that spreads the benefits of development and addresses the needs created by the development is consistent with a proportionality-type rational nexus test. 161

B. Takings

A developer attacking Boston's linkage program will undoubtedly argue that Articles 26, 26A, and 26B operate as a taking of property without just compensation in violation of the fifth and fourteenth amendments. 162 It is unlikely that such a challenge will succeed. The traditional test for a taking, as set out by the United States Supreme Court in 1915, is whether the regulation diminishes the landowner's use of the property to such an extent that it is virtually useless. 163 Under the modern test for a taking, a zoning regulation will not effect a taking if the ordinance advances legitimate state interests and does not deprive the owner of an economically viable use of his land. 164

In adopting the takings analysis developed by the Supreme Court, Massachusetts courts have said that there is no taking when an ordinance denies a property owner the most profitable use or substantially diminishes the value of land. 165 One such Massachusetts case affirming the above takings test was Lovequist v. Town of Dennis Conservation Commission. 166 In affirming the denial of a developer's application for permission to build a road across a wetland, the Massachusetts Supreme Judicial Court stated that a local governmental action is a taking only when the local action leaves the

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161 The development boom in Boston has created many jobs that do not match the occupational skills of Boston workers. The IMPACT OF BOSTON'S DEVELOPMENT, supra note 29, at 4. One solution to this problem would be to approve only those projects that create jobs matched to the skills of Boston residents. Undertaking this option would, of course, preclude development of most of the downtown office projects. The city has instead chosen to provide a benefit to developers by giving approval to development projects, regardless of the type of jobs created. Because the developer has been given this benefit, it may be viewed as reasonable to impose a minimal $1.00 per square foot fee to compensate for the mismatch between existing job skills and jobs created.

162 Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239 (1897)(fifth amendment was made applicable to the states through the fourteenth amendment).


property owner with nothing other than the burden of paying taxes. 167

Further support for the position that a takings challenge to linkage would fail can be found in Flynn v. City of Cambridge. 168 The ordinance under attack in Flynn was a rent control ordinance, which required the owner of a rental unit to get a permit before evicting a tenant or converting the unit for his own use. In effect, in certain circumstances the owner could be prevented from occupying his own condominium unit. The owner was not compensated for this deprivation. In finding that the challenged ordinance was not a taking, the Massachusetts Supreme Judicial Court relied on a line of United States Supreme Court takings cases including Penn Central Transportation Co. v. New York City.169 The Flynn court held that as long as "the governmental action did not interfere with the owner's primary expectation concerning the use of the property, and the owner was still able to obtain a reasonable return on [his] investment," the ordinance is valid.170

The Boston linkage program imposes a small cost on the developer, relative to total development costs. The linkage exaction does not deny a developer use of his land or prevent him from realizing profits. It would be unlikely, therefore, for a court to hold that linkage is an invalid taking.

C. Equal Protection

The crux of an equal protection claim is that similarly situated people must be treated in a like manner.171 That the exaction payment is required from only new construction and that it requires higher payments for downtown development give rise to the equal protection issue. A developer could ask why the linkage fee is not imposed on all existing downtown developments or why developments outside of the downtown area, which may very well have the same incidental costs as downtown development, are treated differently under the linkage program.172 Because the linkage fee does not

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167 Id. at 20, 393 N.E.2d at 866 (citations omitted).
170 383 Mass. at 160, 418 N.E.2d at 339 (citations omitted).
171 The analysis in an equal protection claim parallels that of a due process claim in that in order to be upheld, a government action must be reasonably related to a legitimate public purpose. See supra notes 82–101 and accompanying text.
172 Article 26, which requires exaction payments to be made over twelve years, applies to projects outside of downtown Boston. Article 26A, which applies to downtown projects,
infringe upon a fundamental right nor upon a suspect class, the standard of review will be the deferential rational basis test.\textsuperscript{173}

A linkage fee limited to newly constructed downtown developments will not violate the equal protection clause. When an administrative agency institutes a new policy, in the course of what is otherwise a valid exercise of its authority, the fact that the new policy does not operate retroactively will not invalidate that policy.\textsuperscript{174} In \textit{Middlesex & Boston St. Ry. Co.}, a new regulation concerning the disposal of solid waste withstood a developer's equal protection challenge even though prior, similar developments were exempt from the new regulation.\textsuperscript{175} The Massachusetts Supreme Judicial Court held that, although a developer was among the first to be affected by the new policy, the new regulation did not violate the equal protection clause as long as the regulation was validly related to a legitimate purpose and not irrational or arbitrary.\textsuperscript{176}

Courts will also uphold a regulation even if it is not imposed upon all conceivably eligible parties.\textsuperscript{177} Although development outside of downtown Boston may have "incidental costs" similar to downtown developments, it is not an equal protection violation to limit the linkage requirement to only one area.\textsuperscript{178} That being the case, the linkage program is still open to attack as an unlawful attempt to avoid the strictures of Proposition 2 1/2.

\textbf{D. Proposition 2 1/2}

The passage in 1981 of Proposition 2 1/2 signaled a new era in the management of municipal finances in Massachusetts.\textsuperscript{179} Proposition

\begin{itemize}
\item requires that payments be made over a seven year period. \textit{See supra} notes 40–53 and accompanying text.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{See} Opinion of the Justices, 368 Mass. at 848, 333 N.E.2d at 400. Having recognized that there are negative externalities associated with downtown development, the city has chosen to "select one phase of one field and apply a remedy there, neglecting the others." Williamson v. Lee Optical, 348 U.S. at 489. Such a decision will survive an equal protection challenge as long as the government action is reasonably related to a legitimate state interest.
\item \textit{See} Boston Globe, Jan. 7, 1984, at 14, col. 1.
\end{itemize}
2 1/2 limits real estate taxes to 2.5% of the fair market value of the tax base. The question, not yet answered by any court, is whether the linkage fee is really a property tax and therefore covered by the limitations of Proposition 2 1/2. If the linkage exaction is viewed as a tax, it would also be invalid because cities and towns have no independent power of taxation.\(^{180}\)

The fact that a statute raises revenue does not indicate the statute is \textit{per se} an exercise of the taxing power.\(^{181}\) If the primary purpose of a statute is to regulate rather than to raise revenue, the exaction will be considered a fee rather than a tax.\(^{182}\) In \textit{National Cable Television v. United States},\(^{183}\) the United States Supreme Court made the following distinction between taxes and fees:

Taxation is a legislative function, and Congress . . . may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, \textit{e.g.}, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society . . . . A "fee" connotes a "benefit" . . . .\(^{184}\)

In \textit{Southview Co-operative Housing Corp. v. Rent Control Board of Cambridge}\(^{185}\) and \textit{Emerson College v. Boston},\(^{186}\) the Massachusetts Supreme Judicial Court expanded the \textit{National Cable Television} holding into a three-part test.\(^{187}\) In order to be accepted as a fee, the exaction must satisfy each part of this test. First, the beneficiaries of the local agency action\(^{188}\) must be "sufficiently par-


\(^{182}\) See generally P. NICHOLS, TAXATION IN MASSACHUSETTS (3rd ed. 1938).


\(^{184}\) Id. at 340–41.


\(^{187}\) Other jurisdictions have a narrow view of a municipality's power to exact fees. See generally Town of Longboat Key v. Lands End, Ltd., 433 So.2d 574 (Fla. Dist. Ct. App. 1983)(dedication of park land or in-lieu fee is invalid where fees are placed in separate accounts for capital improvements and parks, because exacted fees were not earmarked for benefit of the subdivision); Hillis Homes, Inc. v. Snohomish County, 97 Wash. 2d 804, 650 P.2d 193 (1982)(fees struck down as invalid taxes because main purpose was revenue raising and not subdivision regulation).

\(^{188}\) In the case of linkage, the local agency action is the zoning approval, and the beneficiaries are those who are allowed to construct large office buildings.
ticularized as to justify distribution of the costs among a limited group . . . rather than the general public." 189 Second, the exaction must be voluntary, that is, the party charged with the exaction must be able to avoid payment by declining the tendered agency action. 190 Finally, the exaction must be designed not to raise revenues but to compensate for an "agency's reasonably anticipated costs of providing the services for which the fees are charged." 191

When applied to the test announced by the *Southview* and *Emerson* Courts, Boston's linkage program, on the surface, appears to have more characteristics of a tax than a fee. The linkage exaction passes the first part of the test; it is applied only to those seeking approval for downtown projects not presently allowed by the zoning regulations. According to many observers, developers of large scale downtown projects have reaped the benefits of developing the downtown area, while contributing to the housing and employment problems of Boston residents. 192 The city's linkage program is designed to raise funds from developers of large scale projects and to use these funds to combat the negative effects of that development. Downtown developers, who are the beneficiaries of zoning approval, are only being asked to pay for some of the costs of their developments.

To pass the second part of the *Southview/Emerson* test, the city will have to show that the exaction is voluntary, that is, if developers want to avoid the exaction, they can easily do so. In *Emerson College*, the city's augmented fire service fee was invalidated by the Court, because the owners of existing buildings could not choose to decline the services. 193 Nevertheless, the voluntariness standard is not very well adapted to the context of the zoning approval process. The voluntariness test is useful only when the property subject to the "fee" is occupied by an existing structure. Otherwise, all gov-

190 391 Mass. at 426, 462 N.E.2d at 1106. In *Emerson College*, the City of Boston attempted to charge certain buildings in Boston for augmented fire service availability. The fee, which was authorized by enabling legislation, was based on the rationale that certain buildings "by reason of their size, type of construction, use and other relevant factors . . . require[] the city to employ additional firefighters . . . and purchase equipment . . . ." *Id.* at 416, 462 N.E.2d at 1100 (citations omitted). The Court held that the exaction was invalid because it failed to meet either the proportional application requirements of a valid tax or the voluntary aspects of a valid fee. *Id.* at 424–28, 462 N.E.2d at 1105–07.
191 396 Mass. at 402, 486 N.E.2d at 705. "Within reasonable limits, the legislative department of government may place the cost of mitigating a public evil on those in connection with whose business the evil arises." NICHOLS, *supra* note 181, at 7.
192 See notes 157–160 and accompanying text.
193 391 Mass. at 426, 462 N.E.2d at 1106.
ernmental permit fees would be liable to attack as involuntary
taxes.\footnote{194}{For example, a building permit fee for a single family home must be paid before beginning construction on the home. The builder has no choice.}

In the \textit{Emerson} decision, the Court intimated that if the fire service fee were not mandatory, it would have been upheld.\footnote{195}{391 Mass. at 426 n.17, 462 N.E.2d at 1106 n.17.} The Boston linkage fee program is, in one sense, a mandatory exaction. If a developer refuses to take part in the program, he is not allowed to build. The program provides no real choices. Alternatively, however, the voluntariness test could be given its literal meaning. Developers do have a choice. If they do not want to pay linkage fees, they can certainly build in another city that does not have a linkage program. If a developer wants to enjoy the benefits of building in Boston, he takes part in the linkage program with his eyes wide open. There is no suggestion that the linkage program operates retroactively. The Boston linkage exaction is also distinguishable from the fire service tax in \textit{Emerson College}. The fee is imposed only on those developers that knowingly and voluntarily agree to its provisions.

The third characteristic of a fee—that it is designed to regulate rather than to raise revenue—presents a more difficult problem for Boston's linkage program. The Statement of Purpose of Articles 26, 26A and 26B declares that their provisions are designed to “[a]fford review and to regulate large scale real estate development projects.”\footnote{196}{\textit{BOSTON ZONING CODE}, Art. 26, § 26-1(1). See \textit{supra} note 2. Art. 26A, § 26A-1(1) and Art. 26B, § 26B-1(1). See \textit{supra} note 4.} The fact that the exaction is characterized as a regulatory fee is not dispositive. Such a determination must be made by looking to the operation of the exaction.\footnote{197}{391 Mass. at 424, 462 N.E.2d at 1105 (quoting Thomson Electric Welding Co., v. Commonwealth, 275 Mass. 426, 429, 176 N.E. 203, 204-05 (1931)).}

In operation, the Boston linkage exaction helps defray the costs that arise as a result of the construction of downtown office projects. As long as the linkage exaction is related to the governmental expenditures occasioned by the downtown project, the exaction can be classified as a valid regulatory fee.\footnote{198}{391 Mass. at 425 n.16, 462 N.E.2d at 1105 n.16. To satisfy fully the “related to governmental expenditures” requirement, the linkage fee must bear a reasonable relationship to the housing and job training costs that are generated by office development. These costs must be fully documented. The city cannot just rely on some arbitrary figure like $5, $6, or $10 per square foot. See \textit{generally} Diamond, \textit{supra} note 1, at 479-80. Some jurisdictions have invalidated fees even though the funds collected were related to the needs created by the subdivision. See Hillis Homes, Inc. v. Snohomish County, 97 Wash.} The documentation that is
required to show this relationship is the same as that required to survive a due process challenge. The city must show that there is a rational nexus between downtown development and the increased need for housing and job training.

There is also support for the proposition that Boston's linkage exaction is a fee because the funds collected are managed by a newly created Neighborhood Housing Fund, rather than the existing city housing department. In *Emerson College*, the fact that the augmented fire service availability fee was not targeted directly to the alleged need, but deposited into the general fire services, was indicative that the exaction was a tax and not a fee. The funds collected through the linkage exaction are specifically set aside to address the needs that have arisen as a result of downtown development. In sum, absent compelling documentation that development increases the need for housing and job training, courts will likely classify Boston's linkage exaction as a tax.

IV. SUGGESTED MODIFICATIONS

While the preceding analysis supports the position that the Boston linkage program, as presently written, may survive a legal challenge, there are several actions that the City of Boston, or cities with similar linkage programs, may want to consider in an effort to avoid costly litigation. The first, and perhaps the most difficult course of action entails securing passage of legislation amending the Zoning Enabling Act. This proposed legislation should take two forms. First, the valid objectives of zoning, listed in the Boston Zoning Enabling Act, should be amended to include the construction and rehabilitation of housing and the creation of job training programs. The new enabling legislation should also authorize the use of reasonable exaction fees as a method of furthering these new legitimate objectives of zoning. The second piece of proposed legislation would be designed to eliminate the problems associated with the determination of whether the exaction is a fee or a tax. In addition to specifically authorizing the use of exactions in zoning, this legislation should specify that because the zoning exactions are authorized zoning fees, they are exempt from the limitations of Proposition 2 1/2.

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2d 804, 650 P.2d 193 (1982)(fee struck down because it was designed to raise money rather than regulate).

199 See supra notes 114–61 and accompanying text.

200 Id.

201 391 Mass. at 427, 462 N.E.2d at 1106.
The city has taken the initial step to getting this type of legislation passed. On December 17, 1986, the Boston City Council passed a Home Rule Petition specifically authorizing linkage.\textsuperscript{202} The petition, if adopted by the state legislature, would amend the Boston Zoning Enabling Act\textsuperscript{203} by adding new sections governing affordable housing exactions,\textsuperscript{204} employment exactions,\textsuperscript{205} ratification of prior zoning decisions,\textsuperscript{206} and creation of a neighborhood trust.\textsuperscript{207} The petition would also permit the zoning commission to promulgate new zoning regulations and amendments for the purpose of mitigating the effects of commercial development.\textsuperscript{208} These new regulations would be permitted as long as such regulations are not in force simultaneously with those elsewhere authorized under the petition.\textsuperscript{209}

If the legislature passes the above Home Rule Petition, the city would still face the potential of a strong substantive due process challenge to linkage. The city retains the burden of showing a rational nexus between downtown office development and the need for housing and job training. The city should continue its efforts to document the effects of large scale development on the city. While it is obvious to all of those involved in the Boston development process that there are negative effects of development, the city has the burden of putting the data together in order to show both the courts and the general public that linkage is sound public policy.

V. CONCLUSION

The Boston linkage program is an exciting new zoning concept that potentially opens the door for a sharing of the benefits of development with all city residents. A properly run program can help to break down the barrier between the downtown area and the

\textsuperscript{202} \textit{An Act Authorizing Certain Actions By City Of Boston To Mitigate The Effects Of New Large-Scale Commercial Real Estate Development (Linkage).} Mayor Flynn signed this Home Rule Petition on January 23, 1987. The petition has been submitted to the legislature. The House Committee on Housing and Urban Development unanimously approved the petition on April 22, 1987. Boston Globe, Apr. 23, 1987, at 31, col. 1.

\textsuperscript{203} St. 1956, c.665 (as amended through June 30, 1983).

\textsuperscript{204} \textit{An Act Authorizing Certain Actions By City Of Boston To Mitigate The Effects Of New Large-Scale Commercial Real Estate Development (Linkage)}, § 16, \textit{Affordable Housing Exaction}.

\textsuperscript{205} Id. § 17, \textit{Employment Exaction}.

\textsuperscript{206} Id., § 19, \textit{Ratification of Prior Actions}.

\textsuperscript{207} Id. § 20, \textit{Authorization of Trust and Manner of Payment}.

\textsuperscript{208} Id. § 18, \textit{Alternative Regulations}.

\textsuperscript{209} Id.
neighborhoods. These barriers have existed in Boston for too long. A court reviewing the legality of linkage should be mindful of the symbolic importance of a linkage program. Linkage helps foster the feeling among neighborhood residents that development is good for downtown office workers and developers as well as neighborhoods. This Comment attempts to give courts the framework from which they can uphold linkage, even if Boston's Zoning Enabling Act is not amended by the State Legislature.

Linkage, however, is not a panacea. It is just one part of what must be an overall plan for downtown and neighborhood development. Neighborhoods will not feel the positive impact of a linkage program if the city and downtown businesses sit back and do nothing else. This is particularly true given the reduction of federal funds available for housing and job training programs.

Finally, the city must not view linkage as a gold mine that can supply the city with funds to run all of its programs. Linkage funds must only be used to address the needs that are related to downtown development. The city must also maintain the linkage formula at a reasonable level. If the exaction becomes too burdensome, not only does the legality of linkage become suspect, but the developers may go elsewhere. It is in the interest of the City of Boston and the neighborhood activists to work with the developers, so that all residents share the benefits as well as the burdens of living and working in Boston.