

CHILD CARE LAND USE ORDINANCES—PROVIDING WORKING PARENTS WITH NEEDED DAY CARE FACILITIES

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There is a child care crisis¹ in this country.² The problem of providing care for the children of working parents has been aptly described as “one of the pressing domestic issues of this decade.”³ In order for our working population to be most productive, its children must remain safe and healthy through the operation of adequate child care facilities. Recognition and repair of the child care problem must derive not only from parents, social workers, and psychologists,⁴ but also from the legal community, particularly those who make policy and effect it into law.⁵

The demographics of child care are dramatic. Eighty percent of women now in the work force are of childbearing age,⁶ and it is likely that nine out of every ten will have children during their careers.⁷ By 1990, it is estimated that there will be twenty-three million children under the age of six, reflecting the results of a current baby boom.⁸ It is estimated that at least half of these children will require some form of child care.⁹

How will parents go about finding care for their children that is

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¹ One commentator has suggested that the term “child care” be replaced by “child day care.” See Murray, *Child Care and the Law*, 25 SANTA CLARA L. REV. 261, 261 n.2 (1985). This Comment agrees that this change in terminology is appropriate, but acknowledges that its usage is not yet widely accepted. Therefore, in support of this usage, this Comment uses “child care” to denote “less than 24-hour care of children for the purpose of providing positive supervision while their parents work.” *Id.*

² See Schwartz, *Good Day Care—A National Need*, N.Y. Times, Jan. 3, 1986, at A23, col. 2; Walker, *Guess Who’s Minding the Kids? Day Care at the Office*, BUILDING ECON., Aug. 1986, at 19; Murray, *supra* note 1, at 262.

³ Stevenson, *Introduction to Child Care Symposium Issue*, 25 SANTA CLARA L. REV. 239, 239 (1985).

⁴ That is, those individuals traditionally entrusted with the care and protection of children.

⁵ See Murray, *supra* note 1, at 263.

⁶ H.R. SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, FAMILIES AND CHILD CARE: IMPROVING THE OPTIONS, H.R. REP. NO. 1180, 98th Cong., 2d Sess. v (1984).

⁷ *Id.*

⁸ See Murray, *supra* note 1, at 265; *New Provisions for Child Care*, N.Y. Times, Oct. 4, 1985, at A18, col. 2 [hereinafter *New Provisions*].

⁹ See Murray, *supra* note 1, at 265-66.

satisfactory to all parties involved, namely parents, children, and employers? If the present situation persists, the search will be largely in vain. Today, the demand for child care in and near the workplace far exceeds the supply.¹⁰ At some existing office park centers, for example, the waiting list is "unbelievable."¹¹ Private employers, for the most part, are reluctant to get involved directly in workplace child care programs for myriad reasons.¹² Many private centers that are not affiliated with employers have been forced to close or curtail existing operations because of increasing labor and insurance costs.¹³ The federal government lacks a strong commitment to this area,¹⁴ and what commitment it has shown is being sharply reduced.¹⁵ Leaders in business and government simply are not providing enough assistance to alleviate the problem, chiefly because the traditional view that women should be responsible for child care persists to an enormous extent in American society.¹⁶

Existing alternatives are not amenable to or feasible for many parents. Choice of child care arrangements "tends to be dictated by financial considerations, convenience, personal values, and beliefs about child rearing"¹⁷ Many alternatives simply are too expensive and/or unreliable.¹⁸ Clearly, the business of juggling career and childrearing is "frustrating and . . . frightening"¹⁹ for working parents. Geography also is a major obstacle. Many parents are loath to leave their very

¹⁰ As a point of reference, for example, 10,000 more children needed licensed day care than there were spaces available in San Francisco in 1984. See Schmidt, *Help for Working Parents*, IMAGE, Nov. 17, 1985, at 9.

¹¹ *Toddling Trends: Child Care Near the Office*, Wall St. J., Oct. 6, 1986, at 33, col. 2 [hereinafter *Toddling Trends*].

¹² Employer concerns include "costs, complex insurance arrangements, obligations incurred by referrals, parental complaints, quality control, and equity issues," to name a few. Friedman, *Child Care for Employees' Kids*, HARV. BUS. REV., Mar./Apr. 1986, at 28, 29. In addition, many employers see neither an economic nor a philosophical justification for their involvement. And, it must be remembered that there is no existing legal way to force employers to provide child care facilities. See generally *infra* notes 68-91 and accompanying text.

¹³ See Schwartz, *supra* note 2; Walker, *supra* note 2, at 20.

¹⁴ See Meredith, *Day-Care: The Nine-to-Five Dilemma*, PSYCHOLOGY TODAY, Feb. 1986, at 36, 38; see also Divine-Hawkins & Livingston, *Preface to the Federal Role in Child Care*, 25 SANTA CLARA L. REV. 247, 258-59 (1985) (calling for increased efforts by the Federal Government, as well as by state and local governments and the private sector, to respond to demographic trends in the labor force).

¹⁵ See Walker, *supra* note 2, at 20.

¹⁶ See, Meredith, *supra* note 14, at 38; Stevenson, *supra* note 3, at 241; 244.

¹⁷ Murray, *supra* note 1, at 265; see also Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1118-19, 1122 (1986) (discussing traditional notions about men's and women's roles in society).

¹⁸ See Meredith, *supra* note 14, at 38.

¹⁹ *Id.*

young children miles away in the suburbs or in the next city without the capacity for rapid access or, at the very least, convenient drop-off. Thus, current methods are inadequate in meeting current needs for child care, much less for meeting the constantly growing demand for such services.

Solutions do exist. San Francisco, for example, has responded openly and effectively to the child care problem, and it was the first major American city²⁰ to do so. Land use regulation was San Francisco's chosen vehicle for response. On September 10, 1985, Mayor Dianne Feinstein signed into law the Downtown Plan, a schematic revision of the city's planning code that included a child care ordinance.²¹ This ordinance²² requires developers who meet certain criteria to set aside space for child care facilities in their office projects or, alternatively, to pay a fee (in lieu of setting aside space) toward a citywide fund for affordable child care.²³ Part of an overall remodeling of regulations and policies for downtown development, this ordinance places some of the burden of providing convenient and affordable child care upon the shoulders of developers who occasion the increased demand.²⁴

The San Francisco law has been described as an "innovative" measure, a piece of "landmark" legislation.²⁵ This Comment demonstrates that while such legislation is certainly new in the development exaction context, it is *not* revolutionary in terms of legal history and

²⁰ See *New Provisions*, *supra* note 8; *New Requirements for Office Developers*, BUSINESSLINK, Spring 1986, at 5 [hereinafter *New Requirements*]. The City of Concord, California actually passed the first child care ordinance in July of 1985. While similar to the San Francisco ordinance, it is considerably less stringent in its requirements. See *id.*

²¹ SAN FRANCISCO, CAL., MUNICIPAL CODE § 315 (1986).

²² See *infra* notes 95-126 and accompanying text for discussion of the ordinance.

²³ SAN FRANCISCO, CAL., MUNICIPAL CODE § 315(d) (1986).

²⁴ By "occasion the increased demand," this Comment does not imply that developers are the "but for" cause of the need for additional child care facilities. No single culprit is responsible for the growing demand for child care. The reasons why parents enter the workplace are varied: economic necessity; inducement by employers via wage incentives; and the need for self-fulfillment, to name a few. Instead, the language employed is intended to indicate that a child care land use ordinance can operate as the first step in ensuring that such facilities are built. A child care land use ordinance is a simple way of spreading around the costs of child care facilities, other than imposing a citizen-wide tax, and operates by initially placing the burden on developers. Thereafter, developers can pass on their added costs to their business tenants. Because developers are in the best position to design and construct the needed facilities, requiring them to do so will ensure that these facilities are built from the outset instead of as an afterthought.

For an economic analysis of land use laws, see Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 LAW & CONTEMP. PROBS. 85 (1987), and Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, 50 LAW & CONTEMP. PROBS. 101 (1987).

²⁵ Schmidt, *supra* note 10, at 9.

case precedent; therefore, its passage should not be avoided for fear of outrageousness or rejection. San Francisco has done nothing particularly far-fetched or extralegal. Rather, its ordinance comports well with established land use law and policy and represents a logical step in the evolution of land use legislation.

Part I sets the backdrop for an extended analysis of this ordinance by reviewing briefly the child care efforts made in the private business and legal sectors and describing why these efforts have been insufficient to meet the crisis' demand. Part II then explains why land use regulation is a viable solution. It begins with a description of the San Francisco ordinance itself and next discusses the way in which the ordinance follows precedent by meeting court-articulated tests for development exactions. Finally, Part III seeks to ground child care ordinances firmly in the established rubric of development exactions for schools. Simply stated, it argues that because a child care facility is merely another kind of school, child care ordinances fit easily into an established area of law. Consequently, they should be adopted into the land use codes of all municipalities, where the demand so dictates.

I. CHILD CARE EFFORTS IN THE BUSINESS AND LEGAL SECTORS

For corporations there is an obvious self-interest in supporting and subsidizing day care services. Employees who can rest assured that their children are reliably and well cared for will be freed to work more productively. In addition, city, state, and Federal governments should become more involved. The only industrialized nation that lacks a national policy on child care is the United States.²⁶

While child care has not gained widespread legitimacy and status as a critical public issue, it has elicited some attention from both the private sector and the legal community. Corporate employers increasingly are researching the possibilities for involvement in child care, recognizing that the benefits of such involvement accrue not only to employees and their children, but ultimately to the corporation as well.²⁷ In the legal arena, lawyers are beginning to recognize the need for their

²⁶ Schwartz, *supra* note 2. In Europe most countries have adopted child care policies modeled after those first advocated by the International Labor Office ("ILO") in 1952. See Finley, *supra* note 17, at 1172-73. Through such policy formation, the ILO hoped to "make it possible for working women with families to combine their duties as mothers and workers for the good of both families and society, because maternity is a clearly recognized, important social function." *Id.* at 1173.

²⁷ Walker, *supra* note 2, at 20-22; see also Finley, *supra* note 17, at 1175 (describing benefits to employers).

“significant role in building a rational and equitable child-care delivery system,” particularly through “advocat[ing] statutory reform by drafting legislation and testifying at public hearings.”²⁸ In fact, certain legislative programs are already in place to assist parents in addressing their child care needs and concerns.²⁹

Notwithstanding these efforts and improvements, private and legal measures remain sorely insufficient in meeting the current crisis; both the corporate and legal communities are operating well below their capacities to grant assistance in the child care area. The limitations and inadequacies of current efforts ultimately highlight the necessity for creative and effective solutions.

A. *Child Care Efforts in the Private Corporate Sector*

Employer involvement in child care is not a new phenomenon. Rather, child care in the workplace has existed in the United States for several generations.³⁰ Tellingly, industry first became involved in daytime care of children because of pressing need. The exigencies of World War II gave employers the incentive to provide child care for their employees.³¹ Concomitantly, the federal government responded by furnishing labor-short industrial areas with fifty-one million dollars needed to support three thousand day care centers. These centers were necessary to attract much-needed women to the work place.³²

Corporate and governmental investments in child care, however, declined substantially³³ after the war ended. The change was due in large part to the postwar ideology that “women should, if at all possible, stay at home and restore to their children and to the nation the tight-knit family structure that had been disrupted by war.”³⁴ This view has changed somewhat due to economic developments over the years, the practical need for two-income families, rising consumer expectations, women’s liberation,³⁵ and, generally, women’s large, persis-

²⁸ Murray, *supra* note 1, at 263.

²⁹ See, e.g., *infra* note 71 and accompanying text.

³⁰ See Stein, *The Company Cares for Children*, in CHILD CARE—WHO CARES? 245, 245 (P. Roby ed. 1973).

³¹ See *id.* For example, shipyard owner W.J. Kaiser “cared for 3,811 children during the war, freeing 1,931,827 women work hours.” *Id.*

³² See *id.*; see also Kerr, *One Step Forward—Two Steps Back: Child Care’s Long American History*, in CHILD CARE—WHO CARES? 157, 162-65 (P. Roby ed. 1973). “The U.S. entry into World War II occasioned a dramatic shift in the public attitude toward the working mother and sparked a major federal investment in the care of her children.” *Id.* at 162.

³³ See Kerr, *supra* note 32, at 165-67.

³⁴ Stein, *supra* note 30, at 246.

³⁵ The author does not mean to suggest here, of course, that child care is solely a

tent, and valuable presence in the work force.³⁶ However, the traditional, nostalgic, and what some might call archaic, view still reigns in dominant circles.³⁷

Most significantly for this Comment, while many employers seem to recognize a need for their involvement,³⁸ they, as a group, are not responding in numbers great enough to meet the demand. As of April, 1986, roughly 2,500 United States companies were assisting their employees with child care arrangements.³⁹ This number represents an extremely low percentage of companies in this country.⁴⁰ An estimated 44,000 medium- to large-size businesses have done little or nothing at all to address employees' needs.⁴¹ While practical considerations⁴² and informational problems⁴³ help explain this discouraging situation, traditional views regarding caretaker roles certainly have played an important part.⁴⁴

There is a persistent, deeply entrenched ideology in our society . . . that men and women perform different roles and occupy different spheres. The male role is that of worker and breadwinner, the female role is that of childbearer and rearer. The male sphere is the public world of work, of politics, and of culture The female sphere is the private world of family, home, and nurturing support for the separate public activities of men. . . . The notion that the world of remunerative work and the world of the home—or the realms of production and reproduction—are separate, has fostered the economic and social subordination of women⁴⁵

woman's concern.

³⁶ "It is clear that both for financial and personal reasons the surge of women into the workplace is going to continue." Meredith, *supra* note 14, at 38.

³⁷ See *supra* note 16 and accompanying text; see also Finley, *supra* note 17, at 1118 (describing the entrenched ideology of separate roles for the sexes: a male one of breadwinner and a female one of childbearer and childrearer).

³⁸ It must be stressed that "involvement" does not denote subsidization. Neither the costs of building nor the expenses of operation are borne by employers. See *Toddling Trends*, *supra* note 11 ("In most cases, the cost of building the centers is borne by the office park's developers. Centers are typically operated independently, and employees pay to use them."); see also *infra* notes 50-64 and accompanying text (discussing ways in which employers can help alleviate the child care crisis).

³⁹ See Friedman, *supra* note 12, at 28.

⁴⁰ See Meredith, *supra* note 14, at 38.

⁴¹ See Friedman, *supra* note 12, at 28.

⁴² See *supra* note 12.

⁴³ See Friedman, *supra* note 12, at 29 (Employers are "skeptical; productivity and other gains are difficult to prove.")

⁴⁴ See *supra* note 16 and accompanying text.

⁴⁵ Finley, *supra* note 17, at 1118-19.

While the persistence of this ideology is baffling, more troubling is the way in which it has distorted the ability of our market economy to provide adequate child care facilities.⁴⁶ No doubt many employers believe that the maintenance of this ideology works in their best interest. However, research has revealed the falsity of this belief.

Companies have much to gain and little to lose from providing child care options for their employees. Involvement in child care can "increase recruiting, morale, productivity, and quality [of work], and decrease accident rates, absenteeism, tardiness, and turnover."⁴⁷ Moreover, providing employees with child care facilities in or near the workplace reduces stress, because having their children nearby helps employees balance work and family responsibilities.⁴⁸ This balance has been identified as "the heaviest contributor to depression among employees, regardless of gender."⁴⁹ Consequently, companies can alleviate employee stress and enhance employee productivity simultaneously by ensuring that proper child care facilities are available to their workers.

Contrary to what may be a widespread belief, an employer can help with child care other than by providing on-site or near-site facilities. In fact, employers may help alleviate their employees' need for child care in several ways,⁵⁰ none of which forces the employer into the business of child care. For instance, employers might help ease the child care crisis by adopting a "cafeteria plan" of fringe benefits,⁵¹ and then including dependent care as one of the benefits within the plan. In utilizing this option, an employee is able to select from an assortment, or menu, of available benefits. She may select those benefits that she

⁴⁶ For a discussion of why industry has not taken an active role in the area of child care, see *supra* note 12. See also Meredith, *supra* note 14, at 38 ("leaders in business and government . . . still tend to believe that the traditional family predominates").

⁴⁷ Friedman, *supra* note 12, at 28. Companies instituting child care plans "have found that morale and productivity of employees go up . . ." Finley, *supra* note 17, at 1175.

⁴⁸ See Friedman, *supra* note 12, at 28. These conclusions derive from regional and national studies and surveys. See also Walker, *supra* note 2, at 20-25 (studies indicate that providing child care results in reduced absenteeism and less employee turnover).

⁴⁹ Friedman, *supra* note 12, at 28. As mentioned *supra* text accompanying note 19, this balance is of crucial importance to both parents and children: "The compromises parents make in juggling careers and rearing children often cause them to worry that they are less fit parents. They have heard that they are damaging their children's development, weakening the mother-child bond or even exposing them to abuse or disease." Meredith, *supra* note 14, at 38.

⁵⁰ See *infra* notes 51-64 and accompanying text.

⁵¹ See Comment, *Establishing Dependent-Care Programs Through Cafeteria Plans: Fulfilling the Need for a Well-Balanced Benefit Menu*, 25 SANTA CLARA L. REV. 455, 455 (1985) ("A 'cafeteria plan' is a group of . . . benefits offered by employers from which plan participants, the employees, may choose.").

needs or prefers; and she may ignore those benefits unsuited to her personal situation. "For example, an employee with children may choose dependent care as a benefit rather than dental care or extensive life insurance coverage."⁵² The employee often pays for the benefit through deductions from her gross income.⁵³

An employer who chooses to implement a cafeteria plan must develop a written proposal describing the operation of the plan, revise the corporate payroll to reflect salary deductions, and file tax returns covering the number of participating employees.⁵⁴ Because employers pay only for the benefits that their employees choose, they realize savings whenever employees forego choosing more costly benefits in favor of less costly ones.⁵⁵ Thus, if a worker selects dependent care because she has small children, the employer will save the incremental cost of having to provide a more expensive benefit. Moreover, the employer profits by having a more productive employee than before.

Although "'cafeteria plan[s]' . . . [are] an effective and efficient way of increasing dependent-care benefits to those who need them,"⁵⁶ employers have underutilized these plans. Such factors as the paucity of established cafeteria plans in operation, the general lack of guidance in establishing them, and the uncertain tax status of such plans have combined to produce "a chilling influence on employers who would establish cafeteria plans that would include the option of dependent care."⁵⁷ As a result, the opportunity for employees to obtain dependent care benefits through cafeteria plans is limited.

A second way employers may assist employees with their child care needs is by merely offering current information about available and reliable child care facilities. As one commentator has noted: "The child care system is often fragmented, poorly advertised, and varied in quality. A poor child care choice may translate into additional days off from work when parents must look for new arrangements."⁵⁸

Employers may bridge the information gap by engaging the services of local agencies that list and refer parents to child care providers in a given area. Indeed, IBM has gone so far as to "create[] a national contractor . . . to identify local resources and referral programs for employees in its 200 plant sites."⁵⁹ Because information concerning child

⁵² *Id.* at 461.

⁵³ *See id.*

⁵⁴ *See id.* at 464-65.

⁵⁵ *See id.* at 465.

⁵⁶ *Id.* at 455.

⁵⁷ *Id.* at 457.

⁵⁸ Friedman, *supra* note 12, at 29.

⁵⁹ *Id.* at 31.

care is scarce, such community referrals are boons to those employees attempting to identify available child care services. A referral program also serves the employer, because an employee is able to work more steadily and effectively when her child care problem is alleviated. But despite the effectiveness and feasibility of referral systems, only 500 companies engage in contracting with local agencies to provide this needed service.⁶⁰

A third way employers might help is by offering flexible work schedules to their employees with young children. Personnel policies fashioned to take into account parents' needs in caring for and spending time with their children are extremely important to employees.⁶¹ These policies include pregnancy leave, parental leave,⁶² part-time work, job sharing, and paid leave to care for sick children.⁶³ Some of these policies are slowly being implemented in major American companies; however, such implementation is still "in the early stages of development."⁶⁴

The employer assistance programs described above suffer from one common drawback: they are all completely discretionary. On-site corporate child care centers might indeed be the "wave of the future,"⁶⁵ but only if corporate managers so decide. Until then, employees who desperately need child care for their children are left to fend for themselves. Even when employers do provide corporate child care centers for their employees, chances are that the waiting list is "unbelievable," with the result that "[m]ost mothers will make reservations for the child when they determine they are pregnant."⁶⁶ This state of affairs indicates that discretionary corporate facilities do not necessarily fulfill the robust demand for such centers.⁶⁷

⁶⁰ See *id.* at 29.

⁶¹ See Murray, *supra* note 1, at 281-82.

⁶² Men, as well as women, are becoming increasingly interested in leave opportunities. A particular man's level of interest may vary, however, depending on his vocation. See, e.g., Project, *Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict*, 34 STAN. L. REV. 1263, 1264 (1982).

⁶³ See Murray, *supra* note 1, at 281.

⁶⁴ *Id.* (referring to 1985); see Max, *Parental Leaves: U.S. Lags Far Behind Other Western Nations*, N.Y. Times, Aug. 27, 1986, § 1, at 23, col. 1 (Regarding parental leave, "American workers are still forced to rely on a patchwork of personnel policies and union contracts that leave most workers, including 60 percent of working mothers, unprotected.")

⁶⁵ *Toddlers Trends*, *supra* note 11.

⁶⁶ *Id.*

⁶⁷ The San Francisco system contains provisions that affirmatively require minimum square footage and assessment of child care needs of an office project's prospective tenants. SAN FRANCISCO, CAL., MUNICIPAL CODE § 315(d)(2)(c), (5) (1986).

B. *Child Care and the Law*

At present, there is no legal avenue by which to compel private employers to provide child care facilities for their employees. Any legal intervention would controvert basic policies and notions concerning the free market and freedom of contract. As mentioned above, any employer-provided child care is completely initiative-based, introduced and implemented on a discretionary basis. As easily as it is provided, it can just as easily be taken away.

During 1987, the 100th Congress will consider a parental leave bill.⁶⁸ The proposed law, introduced by Representative Patricia

⁶⁸ The proposed Parental and Medical Leave Act states, in relevant part:

(a) In General.—

(1) An Employee shall be entitled to 18 workweeks of parental leave during any twenty-four month period—

(A) because of the birth of a son or daughter of the employee;

(B) because of the placement, for adoption or foster care, of a son or daughter with the employee; or

(C) in order to care for the employee's son or daughter who has a serious health condition.

(2) Such leave may be taken on a reduced leave schedule, in which case—

(A) the total period during which the eighteen workweeks may be taken may not exceed thirty-six consecutive workweeks,

.....

(3) In the case of a child who has a serious health condition, such leave may be taken intermittently when medically necessary.

(b) Unpaid Leave Permitted—Such leave may consist of unpaid leave

.....

H.R. 4300, 99th Cong., 2d Sess. (1986). The proposed bill allows for the option of shortened workweeks and would establish a commission to recommend means by which to provide salary replacement for employees taking parental leave.

Thus far, the bill has received enthusiastic support during congressional hearings. See *Unpaid Leave for Parents Supported at Joint House Comm. Hearing*, Gov't Empl. Rel. Rep. (BNA) No. 23, at 1505-06 (Oct. 21, 1985); *Parental Leave Advances in House*, Gov't Empl. Rel. Rep. (BNA) No. 24, at 833 (June 16, 1986). This bill follows a decade of challenges in the courts to existing child care laws. In *De la Cruz v. Tormey*, 582 F.2d 45 (9th Cir. 1978), cert. denied, 441 U.S. 965 (1979), a group of plaintiffs attempted to establish a legal right to employer-provided child care on both statutory and constitutional grounds. Arguing theories of sex discrimination under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 (1982), and equal protection under the fourteenth amendment, U.S. CONST. amend. XIV, the low-income, female plaintiffs claimed that a community college's refusal to provide child care facilities caused an adverse impact upon their educational opportunities and thereby violated guaranteed rights. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted, 582 F.2d at 48; the Ninth Circuit reversed and remanded for further hearings, *id.* at 64. However, plaintiffs' theory that the accessibility of child care is related to educational opportunity failed to establish precedent. The case was settled before a rehearing could be held.

Although this theory was successful with the Court of Appeals for the Ninth Circuit, it has proven unsuccessful in other courts. See, e.g., *Goicoechea v. Mountain*

Schroeder (D) of Colorado, would require employers engaged in interstate commerce to grant parents, both male and female, a maximum of eighteen weeks of unpaid leave every two years to care for children, without prejudice to the parents' seniority or benefits status.⁶⁹

This bill would augment several government programs already in place.⁷⁰ One tax program that assists parents in meeting child care needs provides tax credits to eligible families who pay child care expenses for children under the age of fifteen.⁷¹ Employers who include Dependent Care Assistance Plans among employee benefits or who otherwise provide child care services for their employees receive tax benefits that include a range of deductions from business expenses to targeted jobs tax credits. Tax benefits are given to employers who provide child care services for their employees and/or include Dependent Care Assistance Plans among employee benefits.⁷² While helpful, these tax programs are not widely used. Moreover, even if their use grew significantly, it is unlikely that the programs could ever provide a substantial share of needed child care assistance.⁷³

Child care funding for low-income families is available through Title XX of the Social Security Act.⁷⁴ In addition, these families may receive assistance from services such as the Child Care Food Program⁷⁵ and Head Start⁷⁶. The Child Care Food Program ("CCFP") is operated by the United States Department of Agriculture. Initially, the Department provides funds to state agencies. Once eligibility is estab-

States Tel. & Tel. Co., 700 F.2d 559 (9th Cir. 1983) (rejecting Title VII claim that travel requirements of job adversely affected employment opportunities because of interference with child care responsibilities); see also Comment, *Title IX, Disparate Impact and Child Care: Can a Refusal to Cooperate in the Provisions of Child Care Constitute Sex Discrimination Under Title IX?*, 52 U. COLO. L. REV. 271 (1981) (examining the potential for the use of federal statutes to support claims alleging sexual discrimination for failure to provide child care at public institutions).

⁶⁹ See *supra* note 68.

⁷⁰ See Divine-Hawkins & Livingston, *supra* note 14, at 249-56; WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FEDERAL FUNDS FOR DAY CARE PROJECTS 10, 12, 21, 49 (1987).

⁷¹ Economic Recovery Tax Act of 1981, 26 U.S.C. § 21 (1982 & Supp. III 1985).

⁷² See Divine-Hawkins & Livingston, *supra* note 14, at 250.

⁷³ *Id.*

⁷⁴ 42 U.S.C. § 1397(f) (1982 & Supp. III 1985) (providing that expenditures made by the states to assist "qualified provider[s] of child day care services" shall be deemed to satisfy the goals of federal funding); see also 42 U.S.C. § 602(a)(8)(A)(iii) (1982 & Supp. III 1985) (codification of the Social Services Block Grant that directs states to disregard from earned income expenditures for dependent child care when determining eligibility for a state plan "for aid and services to needy families with children").

⁷⁵ 42 U.S.C. § 1766 (1982).

⁷⁶ 42 U.S.C. §§ 9831-9868 (1982).

lished,⁷⁷ state agencies allocate funds to local child care centers and programs, which use them to provide nutritious food to needy children. Children who receive food through the CCFP attend child care facilities as well as licensed or approved family day care homes.⁷⁸

While the CCFP has been identified as "a significant program subsidy which allows providers to keep fees low while serving nutritious meals,"⁷⁹ the program suffers in two respects. First, setting up a CCFP contract is a complex, bureaucratically rigid exercise. The requirements imposed on providers are numerous—even onerous.⁸⁰ Second, allocation disputes often occur, occasionally resulting in costly and lengthy lawsuits.⁸¹

Head Start is "the largest federal program expenditure for preschool care,"⁸² serving over 400,000 children.⁸³ Children eligible for Head Start programs are provided health, educational, and nutritional services.⁸⁴ Although not by its original design, Head Start is commonly known as a child care system. Children enroll in Head Start as they would in private child care centers. Unfortunately, 85% of Head Start centers do not stay open throughout the full work day.⁸⁵ Thus, working parents of Head Start children must make additional arrangements to meet their needs.

The Federal Government recently has reduced federal aid for child care.⁸⁶ The reductions have been large enough to force thirty-two states to slash their public child care assistance programs.⁸⁷ The diminishing federal commitment to child care⁸⁸ underscores the unfortunate reality that the national agenda does not include child care on its list of priorities.⁸⁹ While what remains of existing programs does provide

⁷⁷ See 7 C.F.R. § 226 (1986); 42 U.S.C. § 1766(a) (1982).

⁷⁸ See Child Care Food Program, Umbrella Sponsorship for Family Day Care Homes 1 (Sept. 1986) (Fact Sheet from the Children's Foundation).

⁷⁹ Murray, *supra* note 1, at 298.

⁸⁰ *Id.*

⁸¹ See *id.*; 7 C.F.R. § 226 (1986). The Child Care Food Program is carefully regulated. Providers must follow precise guidelines for every aspect of the program, ranging from the specific type and quantity of foods offered at each meal to what administrative records must be kept. The inability to adhere perfectly to such a scheme provides an easy target for hopeful litigants.

⁸² Murray, *supra* note 1, at 296.

⁸³ *Id.*

⁸⁴ *Id.* Children are eligible when their parents are in the lower categories. See *id.*

⁸⁵ See *id.* at 296 (citing H. BLANK, CHILDREN AND THE FEDERAL CHILD CARE CUTS 3 (1983)).

⁸⁶ See Walker, *supra* note 2, at 20.

⁸⁷ *Id.*

⁸⁸ But see Meredith, *supra* note 14, at 38 (there is a "rising tide" of congressional interest in child care).

⁸⁹ See Schwartz, *supra* note 2.

some necessary and valuable services, the services in no way meet the growing need for child care. By answering growing demand with lessening supply, our government exacerbates the child care crisis.

As one commentator has stated, “[b]oth business and government are making some progress toward aiding working parents, but it’s a ‘good news-bad news’ situation.”⁹⁰ Corporations are offering various forms of assistance, but in numbers too low to make a large enough impact on the problem. Moreover, because managers provide assistance at their discretion, programs inevitably are perceived to be unreliable and unpredictable. Similarly, although legislative programs operate to help parents with child care, they are not as effective as they might be.⁹¹

Creative solutions are needed to alleviate the child care crisis. One such solution is a child care land use ordinance. The next part of this Comment will examine the way in which the municipal government of San Francisco has decided to address the demonstrated need for child care through such an ordinance.

II. THE VALIDITY OF CHILD CARE ORDINANCES

Like many major cities in the United States, San Francisco has been experiencing a shortage of adequate child care facilities. A city-commissioned study of the San Francisco work force found that the urgency of the child care problem mandated governmental action, especially in light of increasing building development in the city.⁹² According to the study, the link between the child care shortage and the incidence of development had two components. First, “[n]ew office development would unquestionably add to [the number of single parent and two-earner families], exacerbating the child care shortage.”⁹³ Second, the office vacancy rate in the city was rising at a rapid pace. “City planners were looking carefully at the market and found nearby communities were attracting many potential San Francisco tenants, in part

⁹⁰ Meredith, *supra* note 14, at 38.

⁹¹ See *supra* notes 79-80 and accompanying text.

⁹² See *New Requirements*, *supra* note 20, at 5.

The results of the study highlighted for planners, politicians, and business leaders that child care is an urgent problem The study, together with numerous articles in the local and national press about child care, and a Child Care Information Kit distributed by the California Child Care Resources and Referral Network, provided an effective education effort throughout the city.

Id.

⁹³ *Id.*

because of the availability of on-site child care."⁹⁴ A swift and effective legislative response, the study concluded, would serve important interests of both working parents and the downtown community as a whole.

A. *The San Francisco Ordinance*

The San Francisco Child Care Ordinance affirmatively addresses child care needs:

[O]ffice developments over 50,000 square feet throughout the city [are required] to set aside space for an on-site child care facility or contribute at a rate of one dollar per square foot into an Affordable Child Care Fund, the purpose of which is to expand and ease access to child care facilities serving low and moderate income families.⁹⁵

The ordinance recently has been amended to include hotels and to allow the construction of near-site facilities.⁹⁶

According to currently proposed regulations, developers will not become directly involved in the business of child care; rather, they provide space⁹⁷ or donate money to accommodate needs generated by their development. In this way, developers must participate only minimally in the actual business of child care, an area in which most have little or no experience. By choosing to donate money for the construction of an off-site child care center, a developer will release herself completely from any further responsibilities.

The proposed regulations require a development project sponsor who chooses to provide an on-site facility to follow certain procedures. Initially, the sponsor must screen and select a non-profit provider of child care pursuant to a "request for proposal" procedure.⁹⁸ The provider and sponsor then work together to assess the child care needs of the project, primarily by surveying prospective tenants of the project.⁹⁹ The provider prepares a "work program" for review by the Office of

⁹⁴ *Id.*

⁹⁵ A. Cohen & C. Stevenson, Testimony of the Child Care Law Center Before the San Francisco Planning Commission in Support of Proposed Amendments to the Child Care Ordinances of the Planning Code 1 (available at Child Care Law Center, San Francisco).

⁹⁶ See San Francisco, Cal., Planning Code, §§ 314, 314.3 (1987).

⁹⁷ It has been proposed that non-profit child care providers should be allowed to operate the centers. *Id.* at § 314.4(b). According to the proposals, employers may also elect to install their own non-profit centers. See Schmidt, *supra* note 10, at 9. In both cases, employees may be required to pay to use the facilities.

⁹⁸ See Proposed Regulations, July 28, 1986, at 14.

⁹⁹ See *id.* at 13-14.

Community Development.¹⁰⁰ If approved, a final lease and operating agreement is negotiated by the parties.¹⁰¹

The lease, effective for a minimum term of three years, is provided "without charge to the provider for rent, utilities, property taxes, building services, repairs or any other services of any nature . . ."¹⁰² In addition to complying with all local and state laws, the facility must have a minimum gross floor area of 3,000 square feet.¹⁰³ Space for the facility is to be provided for the life of the development project.¹⁰⁴

Alternatively, a development project sponsor may elect to satisfy the Child Care requirement in conjunction with other developers or by instituting a near-site facility. The Consolidated On-Site Child Care Facility provision allows sponsors located within one-half mile of each other "to provide a single child care facility on the premises of one of their development projects."¹⁰⁵ The Near-Site Child Care Facility provision allows a sponsor to provide a facility within one mile of the development project.¹⁰⁶ Both of these provisions add efficiency and flexibility to the San Francisco program.

Instead of providing a child care facility, a development project sponsor may choose to pay an in lieu fee. The amount of this fee is calculated in the following way: Net additional gross square feet office or hotel space \times \$1.00 = Total fee.¹⁰⁷ The fee is paid to the Controller in return for a certification of payment.¹⁰⁸ A developer may elect both to pay an in lieu fee and provide an on-site or near-site facility. In such a case, the in lieu fee is offset by the number of square feet used for the facility.¹⁰⁹ Again, an element of flexibility is afforded the sponsor in meeting the requirements.

The ordinance provides for continuing evaluation of child care needs in the city as well as evaluation of the ordinance's efficacy in meeting those needs.¹¹⁰ If, after conducting empirical studies, the Planning Commission finds that the child care ordinance results in requirements disproportionately high to the need for child care, corrective measures can be taken. "The Commission shall adjust any sponsor's requirement and the formulae set forth [in the ordinance] so that the

¹⁰⁰ *Id.*

¹⁰¹ *See id.* at 14-16.

¹⁰² SAN FRANCISCO, CAL., PLANNING CODE § 314.4(b)(A) (1987).

¹⁰³ *See id.* at § 314.4(b)(C).

¹⁰⁴ *See id.* at § 314.4(b).

¹⁰⁵ *Id.* at § 314.4(b)(2).

¹⁰⁶ *See id.* at § 314.4(b)(3).

¹⁰⁷ *Id.* at § 314.4(b)(4).

¹⁰⁸ *See id.*

¹⁰⁹ *See id.* at § 314.4(b)(5).

¹¹⁰ *See id.* at § 314.8.

amount of the exaction is set at the level necessary to provide child care for the employees attracted to office and hotel development projects subject to [the ordinance]."¹¹¹ This adjustment includes a refund of the portion of fees paid, or reduction of the "set aside" space required by the ordinance in excess of this level.¹¹²

B. *The San Francisco Ordinance as a Land Use Law*

The San Francisco Child Care Ordinance discussed above is a land use law. Land use laws in general regulate the development and use of physical space in a municipality.¹¹³ The interplay among property development, the influx of residents, and the need for increased services causes the need for land use laws. But "[t]he increased demand for . . . services raises the difficult question of how a community should finance such services and programs without overburdening either the already strained property base or existing local residents who have already contributed to the financing of existing improvements."¹¹⁴ A community can opt to accommodate these needs by enacting land use laws that target developers. This option is particularly effective if market failure "prevents the market from achieving an efficient allocation of land uses" and the city can "predict the course of the market and . . . draw a zoning map that will be filled in efficiently over time."¹¹⁵ The community must ensure, however, that its laws will stand up to judicially-created tests in the event that a developer later challenges their validity in court.

One can view the San Francisco Child Care Ordinance as either a development exaction or as a piece of linkage legislation. A development exaction is

the required construction of physical improvements, dedication of land, or fees in lieu of construction or dedication that municipalities require from a developer as a condition of approving the building of the project. Thus, in order to build,

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ *See, e.g.,* *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (sustaining restrictions on residential development); *Penn Central Transp. v. City of New York*, 438 U.S. 104 (1978) (sustaining restrictions on commercial development); *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926) (sustaining restrictions on industrial development).

¹¹⁴ D. HAGMAN & J. JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 202 (2d ed. 1986).

¹¹⁵ Tarlock, *Euclid Revisited*, 34 *LAND USE L. & ZONING DIG.* 4, 7 (1982); *see also* Komesar, *Housing, Zoning and the Public Interest*, in *PUBLIC INTEREST LAW* 218, 220-23 (1978) (presenting different economic models of land use law).

the developer must pay for or build facilities to ameliorate the externalities allegedly caused by its project, all of which would otherwise be provided by the local government, if at all.¹¹⁶

The San Francisco ordinance qualifies as a development exaction because it mandates either land dedications or payment of in lieu fees. Just as subdivision developers are required to provide local residents with streets, sidewalks, sewers, water lines, schools, parks, police and fire stations, and open space¹¹⁷ when their developments create the need for these improvements, San Francisco developers must likewise accommodate the municipality by providing space or money for newly-needed child care.¹¹⁸

A linkage regulation is functionally equivalent to a development exaction. "In recent years, the idea of a mandatory tithe for land developers has appeared in the form of local regulations that condition the approval of certain types of land development . . . that further particular public purposes."¹¹⁹ Linkage programs place the burden of remedying public services shortages upon developers who create the need for such services.

A linkage theory has been used to require developers of "[j]ob-generating facilities"¹²⁰ to build low-income housing for workers drawn to the new development.¹²¹ For example, the San Francisco Office/Housing Production Program¹²² is premised upon the rationale that

¹¹⁶ Connors & Meacham, *Paying the Piper: What Can Local Governments Require as a Condition of Development Approval?*, 1986 INST. ON PLAN. ZONING & EMINENT DOMAIN 2-2. See generally Connors & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69, 70-72 (1987) (discussing the evolution of exactions from intradevelopmental dedication of land for streets, sidewalks, water and sewer lines to linkage payments used to implement social policy).

¹¹⁷ See generally D. HAGMAN & J. JUERGENSMEYER, *supra* note 114, at 202-12 (discussing exactions keyed to municipal approval of a subdivision); Note, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U.J. URB. & CONTEMP. L. 269 (1983) [hereinafter *Subdivision Exactions*] (advocating a reasonableness standard for reviewing subdivision exactions); Note, *Subdivision Land Dedication: Objectives and Objections*, 42 STAN. L. REV. 419 (1975) [hereinafter *Subdivision Land Dedication*] (analyzing the economics of subdivision exactions); Note, *Subdivision Exactions: Where is the Limit?*, 42 NOTRE DAME LAW. 400 (1967) [hereinafter *Limit*] (arguing that subdivision exactions prevent developers from receiving unfair gains at the expense of the public).

¹¹⁸ See Connors & Meacham, *supra* note 116, at 2-30.

¹¹⁹ Bosselman & Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA L.J. 381, 381 (1985).

¹²⁰ *Id.* at 390.

¹²¹ See *id.*

¹²² For a comprehensive discussion of OHPP, see Diamond, *The San Francisco Office/Housing Program: Social Policy Underwritten by Private Enterprise*, 7 HARV.

since developers simultaneously receive substantial benefits from developing office projects and impose social costs upon the community, the municipality is entitled to use "windfall recapture devices . . . to recoup part of the governmental costs associated with new development."¹²³

The San Francisco Child Care Ordinance has been described as a linkage regulation,¹²⁴ indeed, it "links" the development of office and hotel projects to the increased need for child care. This linkage also has been referred to as a "downtown development exaction"¹²⁵ because it is a municipally-established precondition of construction. Whether the San Francisco ordinance is termed a linkage payment or a development exaction, however, does not decide its validity. Judicial analysis likely would be the same were the law termed a traditional development exaction or a linkage program.¹²⁶

C. Meeting the Tests

The San Francisco ordinance has not been challenged in court either as a development exaction or as a linkage payment.¹²⁷ But future challenges to similar ordinances are not unlikely. Child care does not yet occupy a recognized, legitimate place in America's social or legislative policy; its novelty in the legal sphere is bound to arouse controversy—even hostility.

While developers and Chambers of Commerce "appear to be con-

ENVTL. L. REV. 449 (1983). See also Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 25-30 (1987) (arguing that linkage fees approach "grand theft" as the benefit to private land owners has become marginal . . . and the public need attributable to new development more tenuous and theoretical").

¹²³ Hagman & Misczynski, *Executive Summary*, in WINDFALLS FOR WIPEOUTS xxxv (D. Hagman & D. Misczynski eds. 1978), quoted in Diamond, *supra* note 122, at 455.

¹²⁴ See *New Requirements*, *supra* note 20, at 5; Connors & Meacham, *supra* note 116, at 2-22.

¹²⁵ Connors and Meacham, *supra* note 116, at 2-20.

¹²⁶ See Bosselman & Stroud, *supra* note 119, at 411 ("[L]inkage programs should be required to meet the same tests that have evolved for measuring the validity of other forms of development exaction."); Connors & Meacham, *supra* note 116, at 2-25 ("Because of the many similarities between linkage programs and more traditional subdivision exactions, a court confronted by a challenge to linkage should apply [the same standards used] to evaluate the legality of ordinances imposing . . . suburban exactions.").

¹²⁷ In fact, some developers support the measure, citing a desire "to give something back to the city." *New Requirements*, *supra* note 20, at 6 (quoting James Bronckema, president of the company developing the Embarcadero Center West). Others, however, merely acquiesce because, for one reason, they do not want to jeopardize their ability to obtain building permits. See *id.*

tent to pay the necessary price"¹²⁸ at the present time, this situation may change if other municipalities follow San Francisco's progressive lead in passing child care ordinances. If frustrated by the added costs of the exaction, developers might seize upon a municipality's lack of statutory authority to impose child care exactions. Even if statutory authority existed, developers could claim that the imposition of the exaction was an unreasonable regulation exceeding the municipality's police powers. This section of the Comment, therefore, hypothesizes a challenge for the purpose of analyzing these allegations and their relation to the law as defined by judicially-articulated tests.

With regard to land use laws generally, because states assume somewhat different postures toward development exactions, they do not apply any universal test.¹²⁹ The three tests that are regularly applied¹³⁰ include: the strict need test,¹³¹ the specifically and uniquely attributable test,¹³² and the rational nexus test.¹³³ Since the case law indicates that different approaches are taken in the context of exaction challenges, even within the framework of these tests,¹³⁴ a description of each follows.

The strict need test is best suited to internal exactions,¹³⁵ such as those for utilities,¹³⁶ in suburban, residential areas. To some extent, then, hypothetical application of the strict need test to the San Francisco ordinance is inapposite, since the law covers mainly downtown San Francisco. The basic rationale of the strict need test, however, is still worth noting: the new subdivision must create a need, occasioned

¹²⁸ Connors & Meacham, *supra* note 116, at 2-31.

¹²⁹ See Connors & Meacham, *supra* note 116, at 2-11 (the order in which courts consider legal questions can change the results); *Subdivision Exactions*, *supra* note 117, at 283 (introducing the three commonly-used tests).

¹³⁰ See *Subdivision Exactions*, *supra* note 117, at 283 (noting a fourth test, the privilege test, that "has since fallen from favor").

¹³¹ See *infra* notes 135-38 and accompanying text.

¹³² See *infra* notes 139-49 and accompanying text.

¹³³ See *infra* notes 150-58 and accompanying text.

¹³⁴ See Staples, *Exactions—Mandatory Dedications and Payments in Lieu of Dedication*, 1980 INST. ON PLAN. ZONING & EMINENT DOMAIN 111, 144 ("As the cases . . . indicate[], any court in any state may hold either way on the question depending mainly upon the wording of the enabling statute and the actual exaction required thereunder."); A. DAWSON, *LAND USE PLANNING AND THE LAW* 50 (1982).

¹³⁵ In subdivisions, internal exactions provide for effects created within the subdivision. External exactions, however, provide for effects created outside the subdivision. For example, requiring a developer to construct streets within a subdivision is an internal exaction. On the other hand, requiring the developer to build a sufficiently wide road to the subdivision is an external exaction. See *Subdivision Exactions*, *supra* note 117, at 272-79 (distinguishing by use of examples between internal and external exactions).

¹³⁶ See Comment, *Subdivision Exactions: The Constitutional Issues, the Judicial Response and the Pennsylvania Situation*, 19 VILL. L. REV. 782, 788 (1974).

by an influx of newcomers, that strains existing facilities in order for the exaction to be valid.¹³⁷ Thus, a development exaction is justified only if it is "based on the reasonably anticipated burdens to be caused by the development."¹³⁸

The specifically and uniquely attributable test adds an extra dimension to the strict need test. Not only must the development create the need, but the need must be specifically and uniquely attributable to the particular development at issue.¹³⁹ For example, if a municipality requires a developer to dedicate land for a park, the need for that park must be directly attributable to the residents introduced by that developer's project and not attributable to a general need that the developer's project merely heightens. Indeed, the Illinois Supreme Court, in the landmark case of *Pioneer Trust & Savings Bank v. Village of Mount Prospect*,¹⁴⁰ has stated that an exaction scheme is invalid if the need is due to the "total development of the community"¹⁴¹ and not the specific development project itself.

A recent New Hampshire case illustrates an application of the specifically and uniquely attributable test and the court's readiness to invalidate an ordinance within its somewhat restrictive contours. In *J.E.D. Associates v. Town of Atkinson*,¹⁴² the court overturned an ordinance compelling developers to dedicate a certain amount of acreage or pay an in lieu fee to the municipality. The court held that the need for acreage was not specifically attributable to the particular development. Rather, the ordinance was more akin to an "arbitrary blanket requirement;"¹⁴³ therefore, it was impermissible.

Although a "strong minority"¹⁴⁴ of jurisdictions apply the *Pioneer* test, if applied to the San Francisco ordinance, validity might be difficult to prove under a specifically and attributable analysis. While a major premise of the law is that "[t]he scarcity of child care in the City is due in great part to large office and hotel development . . . which has attracted and will continue to attract additional employees and resi-

¹³⁷ See *id.*

¹³⁸ *Lampton v. Pinaire*, 610 S.W.2d 915, 919 (Ky. Ct. App. 1980) (sustaining an exaction for road construction).

¹³⁹ See D. HAGMAN & J. JUERGENSMEYER, *supra* note 114, at 209; *Subdivision Exactions*, *supra* note 117, at 285; *Subdivision Land Dedication*, *supra* note 117, at 441-42.

¹⁴⁰ 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961) ("If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible . . .").

¹⁴¹ *Id.* at 381, 176 N.E.2d at 802.

¹⁴² 121 N.H. 581, 432 A.2d 12 (1981).

¹⁴³ *Id.* at 585, 432 A.2d at 15; see *Subdivision Exactions*, *supra* note 117, at 286.

¹⁴⁴ *Subdivision Exactions*, *supra* note 117, at 285.

dents to the City,"¹⁴⁶ the already-existing scarcity is a result of other factors as well. Consequently, the uniquely attributable connection may be "impossible to prove conclusively where the cumulative effect of multiple developments rather than the presence of a single one produces the strain and justifies the exaction scheme."¹⁴⁶ On the other hand, San Francisco,¹⁴⁷ or any similar municipality, conceivably could amass enough empirical evidence to delineate a concrete relationship between particular developments and the consequent influx of new employees with child care needs. The data would have to be extremely specific, however, to meet this demanding test so as to avoid having the relationship between the development and the need labeled "attenuated."¹⁴⁸ The municipality, therefore, must affirmatively prove that the amount and use of dedicated space are *directly* correlated to the influx of new employees; otherwise, a court will view the exaction as an unconstitutional tax levied to address an overall community problem.¹⁴⁹

In contrast to the specifically and uniquely attributable test, the rational nexus test is applied by a majority of jurisdictions.¹⁵⁰ This test, derived from a reexamination of the *Pioneer* test by the Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*,¹⁵¹ is less restrictive than *Pioneer*. It requires a "reasonable connection" between the new development and the needed facilities. If proof of the "reasonable connection"¹⁵² is presented, thus establishing the essential nexus of the test, then the exaction scheme is a valid exercise of the municipality's police power.¹⁵³

Proponents of child care ordinances should not have much trouble leaping the "rational nexus" hurdle. The San Francisco law, for in-

¹⁴⁶ SAN FRANCISCO, CAL., PLANNING CODE § 314.2 (1987).

¹⁴⁶ Connors & Meacham, *supra* note 116, at 2-14.

¹⁴⁷ It should be noted that California actually applies the rational nexus test in exaction challenge cases. See Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949).

¹⁴⁸ *Subdivision Exactions*, *supra* note 117, at 292-93.

¹⁴⁹ See *Subdivision Land Dedication*, *supra* note 117, at 441-42.

¹⁵⁰ See R. ELLICKSON & A. TARLOCK, LAND-USE CONTROLS: CASES AND MATERIALS 755 (1981); Bosselman & Stroud, *supra* note 119, at 397; Connors & Meacham, *supra* note 116, at 2-14; *Subdivision Exactions*, *supra* note 117, at 287; see also *supra* note 147 (stating that California uses the rational nexus test).

¹⁵¹ 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966). *Jordan* actually does not call the test "rational nexus." This phrase was "coined by commentators" to reflect the "reasonable connection" language in the case. See Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415, 431 n.93 (1981); Comment, *supra* note 136, at 802-07.

¹⁵² 28 Wis. 2d at 618, 137 N.W.2d at 448.

¹⁵³ *Id.* at 619, 137 N.W.2d at 448.

stance, states:

Projections from the EIR for the Downtown Plan indicate that between 1984 and 2000 there will be an increase of nearly 100,000 jobs in the C-3 District under the Downtown Plan. Most of that employment growth will occur in office and hotel work, which consist of a predominantly female work force.

According to the survey conducted of C-3 District workers in 1981, 65 percent of the work force was between the ages of 25-44. These are the prime childbearing years for women, and the prime fathering years for men. The survey also indicated that only 12 percent of the C-3 District jobs were part-time, leaving up to 88 percent of the positions occupied by full-time workers. All of these factors point to the inevitable increase in the number of working parents in the C-3 District and the concomitant increase in need for accessible, quality child care.

.....

The Master Plan encourages "continued growth of prime downtown office activities so long as un-desirable consequences of such growth can be avoided" and requires that there be the provision of "adequate amenities for those who live, work and use downtown." In light of these provisions, the City should impose requirements on developers of office and hotel projects designed to mitigate the adverse effects of the expanded employment facilitated by such projects.¹⁵⁴

In short, if a municipality can show that the development is expected to cause a substantial influx of new employees who will need child care facilities in order to live and work successfully, then the rational nexus test is satisfied. The consequent need for child care in such a context is comparable to already litigated needs for schools,¹⁵⁵ parks and recreational services,¹⁵⁶ canals,¹⁵⁷ and sewer systems,¹⁵⁸ to name a

¹⁵⁴ SAN FRANCISCO, CAL., PLANNING CODE § 314.2 (1987).

¹⁵⁵ See *Jordan*, 28 Wis. 2d at 620, 137 N.W.2d at 448-49; *Builders Ass'n of Santa Clara-Santa Cruz Counties v. Superior Ct.*, 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974); *Board of Educ. Dist. No. 68 v. Surety Developers*, 63 Ill. 2d 193, 347 N.E.2d 149 (1975).

¹⁵⁶ See *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), *appeal dismissed*, 404 U.S. 878 (1971); *Billing Properties Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964); *Home Builders Ass'n v. City of Kansas City*, 555 S.W.2d 832 (Mo. 1977) (en banc); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); *Frank Ansuini, Inc. v. City of Cranston*, 107 R.I. 63, 264 A.2d 910 (1970); *Call v.*

few.

Another way to analyze an exaction scheme is to ask two major questions that subsume the central issues discussed in the case law.¹⁵⁹ The first is what is the "*relationship* of the pressures caused by the project to the improvement that the municipality proposes to exact."¹⁶⁰ Inherent in this inquiry are constitutional concerns. If the exaction requirement is proportionate to the need, then no constitutional problem exists; developers are neither forced to donate more than their fair share¹⁶¹ nor compelled to relinquish the right to their property without just compensation.¹⁶² In enacting child care ordinances and setting exaction amounts, municipalities, therefore, should perform careful statistical analyses regarding projections of needs and apportionment of costs so that the established constitutional benchmark is satisfied.

The second question concerns the benefits side of the exaction scheme: whom will the dedication or fees benefit, and what needs may they be used to ameliorate?¹⁶³ As long as the proceeds of the exaction inure primarily to the new employees in the office project, and not to the general work force of the municipality, the exaction scheme is a regulation, not a tax. That distinction is highly important as courts are much more likely to invalidate tax-like exactions than those that resemble presumptively valid regulations.¹⁶⁴

The San Francisco ordinance appears to address the benefits side

City of West Jordan, 606 P.2d 217 (Utah 1979).

¹⁵⁷ See *Wald Corp. v. Metropolitan Dade County*, 338 So. 2d 863 (Fla. Dist. Ct. App. 1976), *cert. denied*, 348 So. 2d 955 (Fla. 1977).

¹⁵⁸ See *Ivy Steel & Wire Co. v. City of Jacksonville*, 401 F. Supp. 701 (M.D. Fla. 1975); *Vail v. City of Bandon*, 53 Or. App. 133, 630 P.2d 1339, *review denied*, 291 Or. 771, 642 P.2d 308 (1981).

¹⁵⁹ See *Connors & Meacham*, *supra* note 116, at § 2.02(2), at 2-11. *Connors and Meacham* set forth a proposed approach to examine municipal exaction schemes. While their approach involves three questions, only two are germane to the discussion here.

¹⁶⁰ *Id.* (citation omitted).

¹⁶¹ See U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

¹⁶² See U.S. CONST. amends. V, XIV. Through the fourteenth amendment, the fifth amendment, which states "nor shall any private property be taken for public use, without just compensation," applies to the states. See, e.g., *Chicago, B & Q R.R. v. Chicago*, 166 U.S. 226, 241 (1897).

¹⁶³ See *Connors & Meacham*, *supra* note 116, at 2-17.

¹⁶⁴ See *Juergensmeyer & Blake*, *supra* note 151, at 422-27; see, e.g., *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. Dist. Ct. App. 1983) (exaction for parks space not a tax because earmarked for specified purchase of capital facilities), *review denied*, 440 So. 2d 352 (Fla. 1983); *Broward County v. Janis Dev. Corp.*, 311 So. 2d 371 (Fla. Dist. Ct. App. 1975) (exaction for roads is a tax when used for county-wide purposes and not specific relevant community); *Coulter v. City of Rawlins*, 662 P.2d 888, 903 (Wyo. 1983) (exactions for water and sewer lines not a tax since used in a narrowly defined manner).

of the equation. It explicitly sets forth that the conditions for approval by the City Planning Commission "shall require that the sponsor construct child care facilities on the site of the office development project or pay an *in lieu* fee to the City Controller which shall thereafter be used exclusively to foster the expansion of and ease access to child care facilities affordable to households of low or moderate income."¹⁶⁵ With respect to the on-site facilities, San Francisco thus will not have too great a problem satisfying the benefits requirement because the space is specifically earmarked for use by the new employees of the office project's new resident companies.

The payment of an *in lieu* fee, however, may be more problematic. It leaves unanswered several questions. First, can San Francisco demonstrate that most of the new downtown employees belong to the low- and moderate-income groups? Perhaps the majority of new employees are in the moderate- to upper-, or upper-income categories. Also, exactly whose children benefit from the Affordable Child Care Fund—those of the new employees or the general community? In order to clarify these issues the municipality should produce data establishing that a majority of the new employees are of low- or moderate-income and that it is primarily their children who will receive the benefits of the Fund. Only then will *in lieu* fees, used "exclusively to foster the expansion of and ease access to child care facilities," satisfy the benefits requirement.

Part II of this Comment has argued that the San Francisco ordinance is most likely, by its own terms, a valid development exaction. However, given the attractiveness and usefulness of categorization in the law, along with the novelty of child care ordinances, Part III will seek to classify child care ordinances in an established area of exactions. This classification will add validity to these ordinances. Consequently, municipalities experiencing the related duet of increasing development and a growing demand for child care can look to such ordinances as a viable solution to their problems.

III. CHILD CARE FACILITIES AS SCHOOLS

Ordinarily, states must statutorily authorize municipal development exactions before imposition takes place.¹⁶⁶ Child care ordinances,

¹⁶⁵ SAN FRANCISCO, CAL., PLANNING CODE § 314.4(a)(1).

¹⁶⁶ See P. ROHAN, ZONING AND LAND USE CONTROLS § 45.01 (1982); *Subdivision Exactions*, *supra* note 117, at 280. Statutory authorization is granted through enabling acts, which typically give a municipality power to approve or disapprove subdivision plans in accordance with certain guidelines. *Id.* Within these guidelines the state can either specifically or generally require the developer to meet municipally-

however, are not presently included under most municipalities' lists of permissible exactions.¹⁶⁷ While seeking specific statutory authorization for such ordinances might be the most direct way to facilitate their adoption, this Comment argues for an indirect approach. Indeed, by first arguing for the categorization of child care ordinances as school exactions, such ordinances then can be passed in a more expeditious and appropriate manner than that offered by the direct approach.

The direct approach is less desirable than an indirect approach for two significant reasons. First, social and political resistance to the acknowledgement of child care as a legitimate object of legislation is substantial.¹⁶⁸ Child care often is looked upon as an unimportant, less crucial, area of societal interest; many continue to regard it as "just babysitting."¹⁶⁹ Second, even if a child care ordinance was adopted as a municipal development exaction, serious challenges could be made later as to whether the exaction was legal.¹⁷⁰

Municipalities, on the other hand, either already are authorized to impose exactions for schools¹⁷¹ or easily could obtain a permissive amendment to this end.¹⁷² Moreover, "school" is a more benign, less

requested exactions. *Id.* & n.63. See generally Connors & High, *supra* note 116, at 73-75 (discussing enabling legislation and the judicial response thereto).

¹⁶⁷ Cf. Comment, *Family Day-Care Homes: Local Barriers Demonstrate Needed Change*, 25 SANTA CLARA L. REV. 481, 494-504 (1985) (arguing that the absence of zoning for child care facilities among single-family dwelling accounts for the absence of these facilities in residential communities).

¹⁶⁸ See generally *supra* notes 68-91 and accompanying text.

¹⁶⁹ See Stevenson, *supra* note 3, at 244.

¹⁷⁰ Three issues arise when an exaction is challenged: 1) whether the municipality possesses state authority; 2) whether it has properly applied its authority; and 3) whether the exaction is a constitutional exercise of the municipality's police power with respect to the particular developer making the challenge. See *Subdivision Exactions*, *supra* note 117, at 279-83; see also Smith, *supra* note 122, at 9-16 (discussing challenges to subdivision exactions in general); *Limit*, *supra* note 117, at 402-03 (stating that the determination of the constitutionality of an exaction rests on whether that exaction amounts to a taking). Explicit state authorization obviates the first and second inquiries—the first because the enabling statute exists, and the second because the legislation explicitly includes the challenged exaction. See *Subdivision Exactions*, *supra* note 117, at 280-82. At this point, the legality of the particular exaction depends on whether the state's adopted legal standard for the reasonableness of the exaction is met. See *id.* at 282-99; see also *supra* notes 130-58 and accompanying text.

¹⁷¹ See, e.g., *Jordan v. Village of Menomonee*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) (reviewing the municipal authorization granted under WIS. STAT. ANN. § 236.45(1) (West 1957)); *Board of Educ. v. Surety Developers, Inc.*, 63 Ill. 2d 193, 347 N.E.2d 149 (1975) (reviewing the municipal authorization granted under ILL. ANN. STAT. ch. 24, para. 11-12-5, 11-12-12 (Smith-Hurd 1973)); see also Bauman & Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51, 57-58 (1987) (citing statistics concerning exaction requirements for schools).

¹⁷² See D. HAGMAN & J. JEURGENSEMEYER, *supra* note 114, at 119. Note that this crucial point militates against the fact that many enabling acts do not offer explicit

threatening, more acceptable term than "child care facility" in the eyes of legislators and policymakers.¹⁷³ In short, the classification of a child care facility as a school mollifies the problem of statutory authorization; and because ample precedent is available for the state's authorization of school exactions, it is most expedient to categorize child care facilities as schools.

A. *The Educational Perspective of Child Care*

Substantial authority exists in the psychological and educational communities for the proposition that preschool child care is an educational experience;¹⁷⁴ to resist terming a child care facility a school is to ignore the documented relationship between child care and subsequent stages of academic training. Child care and traditional schooling have much in common.

First, the types of activities commonly engaged in at child care centers and preschools are integral to a child's intellectual development.¹⁷⁵ In keeping with the age-old maxim "play is learning and learning is play," child care instructors involve young children in activities that are playful, yet also instructive in nature.¹⁷⁶ "In this way opportunities to learn are matched to a period in life when the child is most interested in new explorations and mastery."¹⁷⁷ For instance, playing with blocks or riding a tricycle aids the child in the develop-

authorization for school exactions. See *Subdivision Exactions*, *supra* note 117, at 275. Moreover, within this context courts are amenable to suits challenging the exaction as beyond the municipality's statutory authority. See, e.g., *West Park Ave., Inc. v. Township of Ocean*, 48 N.J. 122, 224 A.2d 1 (1966) (lack of statutory authority barred municipality from "extorting" exactions for school sites); *Kelber v. City of Upland*, 155 Cal. App. 2d 631, 318 P.2d 561 (Cal. Dist. Ct. App. 1957), *overruled on other grounds*, 29 Cal. 3d 656, 664, 630 P.2d 521, 525, 175 Cal. Rptr. 336, 340 (1981) (enabling act does not authorize designation of municipal maps for school exactions).

¹⁷³ *Contra* Grubb, *Day Care Regulation: Legal and Policy Issues*, 25 SANTA CLARA L. REV. 303, 326-27 (1985) (arguing for a distinction between day care facilities and schools). Note that especially ardent legislators—those who oppose a direct exaction for child care—might oppose a school exaction amendment if within it "school" is defined to include child care facilities.

¹⁷⁴ See, e.g., I.J. GORDON, *ON EARLY LEARNING: THE MODIFIABILITY OF HUMAN POTENTIAL* 15-22, 28-29 (1971) (advocating educational day care as a means of offering the stimulus both craved and needed by children six months to school age in order to maximize their intellectual and emotional growth); S. PROVENCE, A. NAYLOR & J. PATTERSON, *THE CHALLENGE OF DAYCARE 1-10* (1977) (arguing for the structuring of day care and of its position within society in a manner best suited to nurture the child's development).

¹⁷⁵ See Rowbry, *Preacademic Skills for the Reluctant Learner*, in *EARLY CHILDHOOD EDUCATION* 201-28 (K. Allen & E. Goetz eds. 1982).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 201.

ment of motor skills.¹⁷⁸ Playing with other children in a supervised setting introduces a child to social development and the world of instructional control.¹⁷⁹ These activities, along with many others, contribute to a child's overall cognitive development, making the entire preschool experience an educationally significant one. As one commentator has noted: "[T]here are a number of programs, including day-care centers, where very young children are exposed to a variety of educational experiences."¹⁸⁰

Second, a strong and valuable relationship between early child care and subsequent schooling has been discovered. Studies show that child care programs truly *are* pre-academic.¹⁸¹ "Experiences during the preschool years have often been identified as critical determinants of later development of academic and social skills. For increasing numbers of children, many of these crucial early experiences are occurring in a day care setting."¹⁸² A child, even at a very young age, is educable. Indeed, the educational experiences that happen "during the first 24 months of life," often at a child care center, "are major determinants of the quality of his motivation, expectancy of success, and cognitive abilities during his school years."¹⁸³ Undoubtedly, child care is something above and beyond "just babysitting."

B. *The Legal Perspective*

The legal case for terming a child care facility a "school" for land use purposes is best made by arguing from analogy. That is, because a child care program has qualified as an educational program in other legal contexts, ample support is available for its inclusion in the land use law area.

Whether to consider a child care facility a school has already been litigated in a regulatory context. In *United States Department of Labor*

¹⁷⁸ Cooper & Holt, *Development of Social Skills and the Management of Common Problems*, in EARLY CHILDHOOD EDUCATION, *supra* note 175, at 112.

¹⁷⁹ *Id.* at 111.

¹⁸⁰ V. DENENBERG, EDUCATION OF THE INFANT AND THE CHILD 2 (1970).

¹⁸¹ See Arend, Gove & Sroufe, *Continuity of Individual Adaption From Infancy to Kindergarten: A Predictive Study of Ego-resiliency and Curiosity in Preschoolers*, 50 CHILD DEV. 950, 958 (1979); Belsky & Steinberg, *The Effects of Day Care: A Critical Review*, 49 CHILD DEV. 929, 944 (1978); L. MILLER & J. DYER, FOUR PRESCHOOL PROGRAMS: THEIR DIMENSIONS AND EFFECTS 131-33 (40 Monographs of the Society for Research in Child Development No. 162, 1975); Barton & Schwarz, *Day Care in the Middle-Class: Effects in Elementary School* (Aug. 1981) (paper presented at the American Psychological Association Annual Convention, Los Angeles).

¹⁸² Hough, Nurss & Goodson, *Children in Day Care: An Observational Study*, 14 CHILD STUD. J. 31, 31 (1984).

¹⁸³ V. DENENBERG, *supra* note 180, at 125.

v. Elledge,¹⁸⁴ the Tenth Circuit examined the issue of whether the term "preschool," as found in the Fair Labor Standards Act ("FLSA"), included a day care center.¹⁸⁵ The center primarily served working parents' children ranging in age from infancy to twelve years. The debate centered on the definitional purpose of a child care facility. Elledge argued that while her center was both custodial and educational, the custodial purpose should predominate for statutory definitional purposes. In finding that the center was "essentially custodial in nature,"¹⁸⁶ the district court disregarded the educational function of the facility and held that it was not a preschool and thereby beyond FLSA coverage.¹⁸⁷

The Tenth Circuit reversed on several grounds. First, it held that the distinction between custodial and educational purposes was not dispositive of the case's outcome, since the statute itself did not make use of that distinction. The court found that the statute included under its coverage "both custodial and educational operations,"¹⁸⁸ ranging from institutions for the care of the sick and aged to schools for the handicapped. Thus, simply because a day care center is custodial as well as educational, it does not become ineligible for inclusion under FLSA.

The court also was not persuaded that Congress's failure to define "preschool" rendered it inappropriate for a court to do so. Relying in large part upon authoritative dictionary definitions¹⁸⁹ and expert testi-

¹⁸⁴ 614 F.2d 247 (10th Cir. 1980). This case was an action for declaratory judgment brought by the proprietor of the center. Her contention that the center was not a preschool was based on an allegation—actually, a stipulation—that she had violated the Fair Labor Standards Act. The court's finding that the center was a preschool thus subjected Elledge to FLSA liability.

¹⁸⁵ 29 U.S.C. § 203(s)(5) (1982). Section 203(s)(5) defines enterprises subject to its coverage as including: "a hospital, an institution primarily engaged in the care of the sick, . . . a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education . . ." In 1972, the word "preschool" was added: "Section 3(s)(4) of such Act (29 U.S.C. § 203(s)(4)) is amended by deleting 'an elementary or secondary school' and inserting in lieu thereof 'a preschool, elementary or secondary school.'" Fair Labor Standards Act of 1938, Pub. L. No. 92-318, § 906(b)(2), (3), 86 Stat. 375 (1972).

¹⁸⁶ 614 F.2d at 249.

¹⁸⁷ In reaching this conclusion, the trial court applied and followed *Marshal v. Rosemont, Inc.*, 584 F.2d 319 (9th Cir. 1978). This case stands in direct opposition to *Elledge*, holding that certain Arizona nursery and kindergarten schools, serving children from the age of infancy to five years, were not preschools for FLSA purposes. *Id.* at 321. The court refused to conjecture as to the definition of "preschool" since Congress itself did not define the term in the statute. It stated merely that where employers' institutions were "essentially custodial in nature" and where they were "in no way regulated by [the] State of Arizona as being a part of the state's school system," employers were not "preschools." *Id.*

¹⁸⁸ 614 F.2d at 250.

¹⁸⁹ According to Webster's New International Dictionary, "preschool" is "a kindergarten or nursery school where children of preschool age, sometimes in age groups,

mony, the court stated that it was reasonable to call a day care center a preschool: “[P]rofessional consensus recognizes that institutions for the care of preschool aged children are generally educative in nature because they provide appropriate learning opportunities for preschool age children in group settings with adult supervision.”¹⁹⁰

Finally, in its effort not to be defeated by the absence of congressional definition, the court looked to statements of the Wage and Hour Administrator issued shortly after the Act was amended to include “preschool”:

“The term “preschool” includes any establishment or institution which accepts for enrollment children of preschool age for purposes of providing custodial, educational or developmental services designed to prepare the children for school in the years before they enter the elementary school grades. This includes day care centers, nursery schools, kindergartens, Head Start programs and any similar facility primarily engaged in the care and protection of preschool children.”¹⁹¹

The court further quoted Wage-Hour Administrative Rulings concerning the educative quality of preschools: “[K]indergartens, nursery schools, day care centers, and other preschools provide some elements of basic education. . . . [A] critical foundation for intelligence and personality is laid during the first six years of life.”¹⁹²

Based on the cumulative operation of this evidence, the Tenth Circuit concluded that “[a]pplication of FLSA may not be avoided by the assertion of primary emphasis on custody and the rejection of the undenied learning opportunities afforded to the children.”¹⁹³ In closing its opinion, the court pronounced itself “convinced” that Elledge’s enterprise was a preschool “within the meaning and intent of the 1972 amendments”¹⁹⁴

The second analogy is found in tax law and policy. *San Francisco Infant School, Inc. v. Commissioner*¹⁹⁵ involved a declaratory action concerning the classification of a day care facility for tax exemption purposes. The facility challenged the Commissioner’s determination

are entered for observation and social and educational training.” 2 WEBSTER’S NEW INTERNATIONAL DICTIONARY 1954 (2d ed. 1934). “School” is “an institution for teaching children” or “any place or means of learning or discipline.” *Id.* at 2236.

¹⁹⁰ 614 F.2d at 250.

¹⁹¹ *Id.*

¹⁹² *Id.* (quoting Opinion Letter No. WH-294 [2 Wages-Hours] Lab. L. Rep. (CCH) ¶ 30,953 (Oct. 24, 1974)).

¹⁹³ 614 F.2d at 251.

¹⁹⁴ *Id.*

¹⁹⁵ 69 T.C. 957 (1978).

that it did not qualify for tax exempt status under Section 501(c)(3) of the Internal Revenue Code.¹⁹⁶ In order for tax exempt status to attach, an organization had to be operated for exclusively educational purposes.¹⁹⁷ The Commissioner's argument was that "the provision of custodial day care was a substantial noneducational purpose"¹⁹⁸ of the facility. The court, however, rejected this argument, asserting that "the custodial services were performed in a manner calculated to complement petitioner's educational purpose,"¹⁹⁹ and therefore "an integral and inseparable part of that education."²⁰⁰ The court was openly impressed that the San Francisco Infant School concentrated on creating an educational environment and curriculum tailored to young children's needs. For instance, the program for children between the ages of six and eighteen months featured language development, sensory/cognitive development, motor development, individual self-awareness, and societal development.²⁰¹

Significantly, that the court acknowledged that day care centers are, by definition, custodial in nature, does not and should not render them altogether different from other types of educational facilities:

Although past cases and rulings granting exemptions as an educational organization generally involve older students, we see no reason why the tender age of petitioner's students should preclude qualification. The record amply demonstrates the importance of education for infants and petitioner's efforts to optimize the educational experience for them. The young age of petitioner's students may require more custodial care than that which most schools provide, but, as petitioner points out, custodial services of varying degree are provided by schools at all levels of education.²⁰²

As this language demonstrates, it is sensible to classify a day care facility as merely another kind of school for both practical and legal

¹⁹⁶ I.R.C. § 501(c)(3) (1976) (current version at I.R.C. § 501(c)(3) (1982)).

¹⁹⁷ 69 T.C. at 964. "The term 'educational', as used in section 501(c)(3), relates to — (a) The instruction or training of the individual for the purpose of improving or developing his capabilities" *Id.* at 965 (quoting Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (1960)).

¹⁹⁸ 69 T.C. at 964. Undoubtedly, the Commissioner borrowed his terminology from the language of *Better Business Bureau v. United States*, 326 U.S. 279, 283 (1945) ("[T]he presence of a single noneducational purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly educational purposes.").

¹⁹⁹ 69 T.C. at 965.

²⁰⁰ *Id.*

²⁰¹ See *id.* at 960-62 for an elaboration of the curriculum described.

²⁰² *Id.* at 965.

purposes. One of these legal purposes should be land use law. The classification of child care facilities as schools for land use purposes will inherently compel the inclusion of child care exactions in the list of permissible exactions under state enabling act authority. As has been demonstrated, this inclusion is a logical consequence of the educational nature of child care.

CONCLUSION

The land use regulation response to the child care crisis is both logical and feasible. Child care ordinances, such as the one passed in San Francisco, if well drafted in a detailed and documented fashion, should satisfy both the court-articulated "specifically and uniquely attributable" and "rational nexus" tests. In the context of satisfying these tests, child care development exactions are best viewed as school exactions, since school exactions are presumptively valid, assuming proper municipal authority. And from both an educational and legal perspective, child care facilities qualify as "schools."

In enacting its Child Care Ordinance, San Francisco has employed an excellent method by which to address one of the greatest social challenges of our time: meeting the burgeoning need for accessible and affordable child care services. This Comment encourages other municipalities to employ the established vehicle of land use law to meet the challenges in their areas, thereby using San Francisco's innovation upon the past as model legislation for the future.

