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Curbing Real Estate Speculation in California

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CURBING REAL ESTATE SPECULATION IN CALIFORNIA

Make $30,000 in two weeks! It may sound like an invitation to a scam, but it has become a reality for some speculators dabbling in the California real estate market.[1] Just as the discovery of gold at Sutter's Mill over 125 years ago drew thousands of prospectors with dreams of great wealth, the unprecedented profits from small outlays of cash have lured an untold number of speculators into the residential housing market. Last spring, it was estimated that between twenty and forty percent of the new homes purchased in the state (as many as eighty percent in a few developments) were bought by speculators.[2]

Community groups[3] have become concerned about this phenomenon, which they feel is significantly contributing to the escalation of residential property prices in an already inflated market.[4] Several city legislatures have considered various methods aimed at curbing speculation in their residential real estate market.[5] Two different legislative approaches have been considered

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1. *The Wild Speculation in California Homes,* BUS. WEEK, May 2, 1977, stated:

> Last week, Irving Co., a big Southern California land developer, sold a new condominium in the Harbor View development in Newport Beach for $85,050. Two weeks later the buyer resold it—for $117,500. All that despite the fact that the unit is still under construction. The cycle was started by a speculator, who listed the unit for sale with a local realtor the same week he bought it, reselling it even before the closing on his purchase.

Id. at 31.

2. *Id. See also* Immel, *A Bursting Bubble?,* Wall St. J., June 2, 1977 § F, at 1, col. 1.

3. *E.g.,* The San Francisco Housing Coalition which drafted an anti-speculation ordinance considered by the San Francisco Board of Supervisors. The Board voted not to adopt the ordinance on May 30, 1978. The Santa Cruz Housing Action Coalition attempted to obtain a sufficient number of signatures to put an anti-speculation initiative on the November 1978 ballot which would amend Santa Cruz Ordinance Chapter 3.32.

4. Graham, *S.F. Anti-Speculation Drive, Home Sweet Profit,* CONSUMER ACTIONEWS, March 1978, at 1, col. 1.

5. The City of Davis passed an interim ordinance which restricted the purchase of individual residential ownership units within the City of Davis to owner-occupants. Davis, Cal., Ordinance 893, § 4 (July 20, 1977)[hereinafter cited as Davis Ordinance]. This ordinance requires the purchaser of any single family residence, which includes detached houses and attached houses such as condominiums, to sign an affidavit swearing that he or she intends to occupy that house as his or her principal residence for at least one year. Failure to comply with the ordinance results in a prosecution for a misdemeanor. The ordinance will continue in effect until July 1978 and, according to the City Attorney in a telephone interview on March 2, 1978, will not be renewed for practical reasons. Although the ordinance has not been challenged in the courts, the city does not have the staff to

as methods for curbing speculation: (1) restricting purchase of residential houses to only those who intend to occupy the houses as their principal places of residences;[6] and (2) imposing a transfer tax on residential housing that is graduated on the basis of length of ownership.[7]

Legislation restricting purchases to owner-occupants usually takes the form of requiring buyers of single family residences[8] to

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enforce it. The City of San Buenaventura considered enacting a similar ordinance to that of Davis. The proposed ordinance, which was not adopted, also required a sworn statement submitted by each purchaser of a bona fide intent to reside in the single family house. Memorandum from Donald S. Greenberg, City Attorney, to Members of the City Council, Subject: Possible Regulation of Housing Speculation (July 21, 1977)[hereinafter cited as San Buenaventura Proposed Ordinance]. This proposed ordinance, however, restricted only the sales of newly constructed single family homes. *Id.*

The Board of Supervisors of the City and County of San Francisco considered an anti-speculation ordinance based on the Documentary Transfer Tax Act. *See* CAL. REV. & TAX. CODE §§ 11901-11934 (West 1970). The tax would have been imposed on a graduated scale based on the length of ownership of any residential property, for both owner-occupied and rental units. The maximum amount levied would have been 80% of the difference between the full actual consideration for which the property was previously purchased and the full actual consideration for which the property is being sold, whenever the sale occurs within one year of purchase. San Francisco Proposed Speculative Tax Ordinance, Amendment by substitution of the whole of Ordinance 315-67 (Draft No. 5, February 2, 1978)[hereinafter cited as San Francisco Proposed Ordinance]. The amount of tax would decrease as the duration of ownership increased with no tax imposed upon the transfer of residential property held more than five years. *Id.* § 2. This ordinance which provides for deductions of the cost of any substantial improvements made to the property, would not discourage purchasers who buy deteriorating property, repair it and thereby substantially improve its habitability prior to reselling it. *Id.* § 4.

A concerned citizens group in Santa Cruz, California, (SCHAC), attempted to place an anti-speculation initiative on the November 1978 ballot. Santa Cruz, Cal., Proposed Chapter 3.32, Real Property Transfer Tax (undated draft)[hereinafter cited as Santa Cruz Proposed Ordinance]. This proposed initiative was also based on the Documentary Transfer Tax Act. CAL. REV. & TAX. CODE §§ 11901-11934. The tax is also imposed on a graduated scale based on the duration of ownership, however, the rate is based on the full resale value of the property rather than on the profit earned through the resale. Santa Cruz Proposed Ordinance § 4.0.

In January 1978, the District of Columbia adopted The Real Property Transfer Tax Act of 1978, which is an excise tax aimed at curbing speculation in the District's residential housing market. Washington, D.C., Act 2-189 (Jan. 1978). The rate of the excise is computed by matching both the percentage in appreciated value and the seller's holding period (determined in the same manner as for federal income tax purposes) with corresponding figures in the tax table. The actual excise is then determined by multiplying the applicable tax rate by the gain realized on the transfer. *Id.* § 203. *See generally* VT. STAT. ANN. tit. 32, § 10001-10010 (1977) (a tax on gains from the sale or exchange of land which is a tax based on length of ownership); Andrews v. Lathrop, 132 Vt. 255, 315 A.2d 860 (1974); Smith, *The Ontario Land Speculation Tax,* LAND ECONOMICS, February 1976, at 1.

6. This description is based primarily on the Davis Ordinance.

7. This description is based primarily on the San Francisco Proposed Ordinance.

8. Davis Ordinance states:

sign affidavits of intended occupancy for a requisite period of time, usually one year.[9] The ordinance enacted in Davis, California, places the duty of compliance on both the buyer and seller.[10] Violation of the ordinance is considered a misdemeanor.[11]

Legislation imposing a transfer tax is based in California on the Documentary Transfer Tax Act.[12] This Act authorizes counties, general law cities, and chartered cities to impose a tax on documents transferring real property.[13] The maximum tax that a county may levy is at the rate of 55 cents for each $500 of the value of the property, and cities are authorized to impose such a tax at one-half the rate authorized for the county tax.[14] When a city enacts an ordinance which imposes a documentary transfer tax conforming to the amount allowed in the Act, the city's tax

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For the purpose of this ordinance, the following words have the meanings as ascribed by this section: (a) "Individual residential ownership unit" shall refer to any single-family residential living unit which is situated upon its own lot (including condominiums and split lot units) or any such vacant lot designed for a single-family residential unit . . . .

9. *Id.* Section 4 provides:

It shall be unlawful for any person to purchase an individual residential ownership unit unless a qualified purchaser intends to occupy such unit as his or her principle personal residence for a minimum of twelve (12) consecutive months and that such occupancy is intended to commence within six (6) months following completion of purchase.

10. *Id.* Section 6 provides that

[i]t shall be unlawful to sell or to act as the agent or broker for a seller of an individual residential ownership unit without obtaining a sworn declaration of each purchaser of said unit that said purchaser(s) intend(s) to assume occupancy of the unit within six (6) months following completion of the purchase and that upon commencement of said occupancy, the purchaser(s) intend(s) to occupy such unit as his or her principle personal residence for a minimum of twelve (12) consecutive months.

11. *Id.* Section 9 provides for penalties as follows:

(a) It shall be a misdemeanor for any person to knowingly provide false information on the declaration required by Sections 6 and 7 of this ordinance.

(b) It shall be an infraction for a seller, agent or broker to fail to file the sworn declaration as required by Section 7 of this ordinance, except the such failure which is shown to have been intentional on the part of any such person shall be a misdemeanor.

(c) It shall be a misdemeanor to violate the provisions of Section 8 of this ordinance regarding the dating of sale documents.

12. CAL. REV. & TAX. CODE §§ 11901-11934 (West 1970).

13. *Id.* § 11911 (West 1970).

14. *Id.* § 11911(a), (b) (West 1970).

is credited against the tax imposed by the county.[15] The county must then administer the tax.[16] The Act provides, however, that no credit shall be allowed against any county tax unless the city's tax conforms to the Act.[17] Therefore, when a city enacts a tax which does not conform to the Documentary Transfer Tax Act the result is that the city must bear the burden of administering the tax.[18] Further, the city tax is an amount in addition to the amount of tax allowed under the Act and collected by the county.

The proposed nonconforming transfer tax would be imposed on a graduated scale, with the highest percentage taken from real estate transfers which occur during the first year of ownership. The percentage of tax would decrease as the length of ownership increased until the property had been held a requisite period of time. For example, the proposed and defeated San Francisco ordinance[19] would have imposed an 80% tax on the profit of a resale of residential property which occurred within one year of its purchase, a 60% tax on the profit of a resale of residential property which occurred after one year but less than two years of purchase, a 30% tax on the profit of a resale of residential property which occurred after two years but less than four years of purchase, and a 15% tax on the profit of a resale of residential property which occurred after four years but less than five years from purchase. If the property was held more than five years, no transfer tax would have been imposed.[20]

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15. *Id.* § 11911 (c), (b) (West 1970).

16. *Id.* § 11931 (West 1970).

17. *Id.* § 11911 (c), (b) (West 1970).

18. However, this analysis would not apply to communities which are both a city and a county such as San Francisco.

19. San Francisco Proposed Ordinance, *supra* note 5 (defeated by a 8-2 vote by the Board of Supervisors on 5/30/78).

20. *Id.* Section 2 provided:

> San Francisco shall be granted, assigned, transferred or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his or their direction, when the full actual consideration or the the value of the interest or property conveyed (inclusive of the value of any lien or encumbrances remaining thereon at the time of sale) exceeds one-hundred dollars ($100), a tax, as hereinafter described:
> (a) On residential property, as defined in the MUNICIPAL BUILDING CODE, Article IV, Subsections 402.4.23, and 402.12.15, and on any other property in which one or more floors are used for or intended for use as a residence as defined herein, the tax shall be .5% of the full actual consideration for which the property is now being sold. In addition, whenever the previous purchase price is smaller than the present selling price the tax shall be:

Although the two legislative methods differ in their techniques, both have the same underlying purpose of deterring short-term speculation in the community's residential housing market. This purpose presumes that short-term speculation artificially inflates the price of homes and rental units.[21] The definition of a

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(1) An amount equal to 80% of the difference between the full actual consideration for which the property was previously purchased and the full actual consideration for which the property is now being sold, whenever the present sale occurs within one year of the previous purchase;
(2) an amount equal to 60% of the difference between the full actual consideration for which the property was previously purchased and the full actual consideration for which the property is now being sold, whenever the present sale occurs more than one year but within two years of the previous purchase;
(3) an amount equal to 30% of the difference between the full actual consideration for which the property was previously purchased and the full actual consideration for which the property is now being sold, whenever the present sale occurs more than two years but within four years of the previous purchase;
(4) an amount equal to 15% of the difference between the full actual consideration for which the property was previously purchased and the full actual consideration for which the property is now being sold, whenever the present sale occurs more than four years but within five years of the previous purchase.
(5) On commercial and industrial property, the tax shall be .5% of the full actual consideration for which the property is now being sold.

The Santa Cruz Proposed Ordinance, *supra* note 5, § 4.0 provides, in part:

(b) A tax is hereby imposed on each sale by deed instrument or writing, of any lands, tenements, or other real property sold, located in the City of Santa Cruz, when the value exceeds One Hundred Dollars ($100), said tax to be at the rate of $.55 for each $1000.00 of value.
(c) An additional tax is hereby imposed on each sale by deed instrument, or writing, by which any dwelling unit located in the City of Santa Cruz is sold within four years from the date the property was acquired by the seller at a rate of:

25% of the value if the property is acquired by the seller and sold within one year after acquisition.

23% of the value if the property is acquired by the seller and sold within more than one year and no more than two years.

21% of the value if the property is acquired by the seller and sold within more than two years and no more than three years.

18% of the value if the property is acquired by the seller and sold within more than three years and no more than four years.

21. Each of the purpose statements of the proposed anti-speculation ordinances contends that speculation is a cause of the rapid inflation in the price of homes.

[I]n the last two years there has been an increase in price of homes in California which is unprecedented in recent years. In

short-term speculator is not specifically defined, but all the ordinances appear to be aimed at the purchaser of residential property who has no intention of either occupying purchased property or of making major improvements to it. A speculator considers the purchase to be a short-term investment which will produce a high profit from a small expenditure due to skyrocketing inflation.[22] Whereas the statistical data as to the degree of responsibil-

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> some areas, the rate of inflation in prices has been two percent (2%) per month. Such inflation in prices has been accompanied by an unprecedented rush of speculators seeking to purchase individual residential units as investments. There is evidence that one hundred and fifty (150) owner-occupant residences were converted to investment property in the City of Davis in 1976. In some areas of the State the character of whole residential neighborhoods has been converted from owner-occupancy to rental.

Davis Ordinance, *supra* note 5. The preamble to the San Francisco Proposed Ordinance, *supra* note 5, states an intention of:

> [P]roviding for a disincentive to short-term speculation on residential property and for the raising of additional revenue by imposing a documentary stamp tax on the sale of real property. Whereas, there exists in San Francisco a situation in which short-term speculation in the housing market is artificially inflating the cost of homeownership and rental units beyond the financial reach of lower and middle-income households, the goal of the Documentary Stamp Tax is to tax, on a progressively scaled and graduated basis, the transfer of residential property bought and sold within five years unless a hardship exists. Funds generated from the tax shall accrue to the Municipal General Fund.

Id.

Section 1.0 Title and Purpose of the Santa Cruz Proposed Ordinance, *supra* note 5, states:

> The people of the City of Santa Cruz, hereinafter called the People, find that a growing shortage of housing units resulting in a critically low vacancy rate, rapidly rising rents and sales prices exploiting the shortage, continuing deterioration of the existing housing stock, and a rapidly declining rate of home ownership, constitute a serious danger to the public health and welfare of the residents of the City of Santa Cruz; and the People find that short-term real estate speculation has played a substantial role in the extraordinary appreciation of dwelling unit values resulting in hardship for a large proportion of low and moderate income residents of the City of Santa Cruz; and the People have considered the rate of tax for real property transfers and have found that it is proper and appropriate to modify the rate thereof; therefore it is the intent of the People to tax transfers of real property for the purpose of raising revenue and discouraging short-term speculation in real property, and so do enact this ordinance.

Id.

22. A Crocker Bank economic report which was reported in an article entitled *Speculating on the Speculation Spectacle,* Sacramento Bee, May 8, 1977, § D, identified two types of investors:

ity of short-term speculators in causing the high inflation rate in housing is debatable, the general public, as reflected by their city officials and concerned citizens groups, appears convinced that speculators are chiefly responsible and, therefore, need to be deterred.[23]

This Note will discuss whether a municipality has the authority, under its police or taxing power, to enact legislation aimed at regulating speculation in its residential housing market. The analysis will consider the following challenges to its validity: (1) whether such local legislation is preempted by state law; (2) whether it violates due process: and, (3) whether it violates equal protection by employing an impermissible classification.

I. PREEMPTION

The California Constitution expressly confers on municipalities the power to "make and enforce within its limits all local, police, sanitary and other ordinances and regulations *not in conflict with general law.*"[24] In determining whether a local ordinance is in conflict with general law it must be determined if the field or subject matter has been preempted by state law.[25] Preemption

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> The first puts a small deposit on an unbuilt home, immediately puts the home back on the market and resells it before the close of escrow.
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> The second category holds the home for at least six months, rents it out, takes the depreciation and usually has more money going out than coming in while waiting to profit on the price appreciation.

Id. at 1, col. 1.

An unpublished memorandum from the City Attorney of Buenaventura to the members of the City Council reported:

> The concept underlying this concern (speculation) is that purchasers of single-family and other homes who buy them without intending to live in them, but rather to hold them for profit, are contributing substantially to the price rises that are occurring and thus to the cost that has to be borne by the ultimate housing consumer who is seeking a place to live. The regulations that would be contemplated would be for the purpose of precluding or discouraging speculation in housing so as to eliminate the extra tier of ownership which gives profits to speculators and raises the cost that must be borne by the ultimate housing consumer.

San Buenaventura Proposed Ordinance *supra* note 5.

23. *See* notes 21 & 22 *supra.*

24. CAL. CONST. art. XI (emphasis added).

25. *In re* Koehne, 59 Cal.2d 646, 648, 381 P.2d 633, 634, 30 Cal. Rptr. 809, 810 (1963), *citing In re* Moss, 58 Cal.2d 117, 118, 373 P.2d 425, 426, 23 Cal. Rptr. 361, 362 (1962). *See also In re* Hubbard, 62 Cal.2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964); Abbott v. Los Angeles, 53 Cal.2d 674, 349 P.2d 974, 3 Cal. Rptr. 158 (1960).

occurs "[w]henever the Legislature has seen fit to adopt a general scheme for the regulation of a particular subject, [with the result being that] the entire control over whatever phases of the subject [that] are covered by state legislation ceases as far as local legislation is concerned."[26] In *In re Hubbard,*[27] the California Supreme Court set forth three tests to determine whether a subject is preempted by state law. Under *Hubbard,*[28] local legislation is preempted if:

> (1) [T]he subject matter has become so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.[29]

The proposed ordinances, popularly referred to as anti-speculation ordinances, can generally be classified as regulations of the transfer of residential property. While there are no state statutes that specifically address housing speculation, there are a multitude of statutes which regulate the transfer of real property.[30] At first glance, the extensive number of statutes on the subject of real estate regulation strongly suggests that there is a "paramount state concern [which] will not tolerate further or additional local action . . . ."[31] However, "[i]n determining whether the legislature intended to occupy a particular field to the exclusion of all local regulation [the courts] look to the 'whole purpose and scope of the legislative scheme' . . . ."[32]

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26. 59 Cal. 2d 646, 381 P.2d 633, 30 Cal. Rptr. 809.

27. 62 Cal. 2d at 128, 396 P.2d at 815, 41 Cal. Rptr. at 399.

28. *Id.* at 119, 396 P.2d at 809, 31 Cal. Rptr. at 393.

29. *Id.* at 128, 396 P.2d at 815, 41 Cal. Rptr. at 399. *See generally* Davis v. Justice Court for the Pittsburg Judicial Dist. of Alameda County, 10 Cal. App. 3d 1002, 89 Cal. Rptr. 409 (1970).

30. CAL. CIV. CODE §§ 1000-1085 (West 1970) deal with the various modes of transferring real property. CAL. BUS. & PROF. CODE §§ 10000-10602 (West 1964) deal with the regulation of real estate salespersons and brokers.

31. 62 Cal. 2d at 128, 396 P.2d at 815, 41 Cal. Rptr. at 399.

32. 59 Cal. 2d at 648, 381 P.2d at 634, 30 Cal. Rptr. at 810.

In *Birkenfeld v. City of Berkeley*,[33] which considered the validity of a rent control regulation, the California Supreme Court concluded that even though there was substantial legislation governing many aspects of the landlord-tenant relationship, some of which pertained specifically to the determination or payment of rent, neither the quality nor the content of the statutes implied any legislative intent to exclude municipal regulation of the amount of rent charged based on local conditions.[34] Therefore, a similar contention would be that municipal governments are free to legislate in the area of the regulation of real estate transfers since the purpose to be served, checking inflation in the housing market, is distinguishable from any purpose sought to be achieved by the current state-wide statutory scheme. Further, the courts have been reluctant to hold that an area has been preempted by the state, even when there is considerable legislation in that area, unless the statutes expressly prohibit local legislation.[35] In view of the above, it appears that it would be difficult to maintain that the state legislature had preempted the area of regulating short-term speculative purchases of residential housing.

However, anti-speculation ordinances based on the Documentary Transfer Tax Act[36] may be specifically preempted by the recently adopted Jarvis-Gann amendment to the California constitution.[37] Under this amendment, the state, counties, cities and special districts are prohibited from enacting any new transaction taxes on sales of real property[38] after July 1, 1978, the date when the amendment went into effect.[39] The documentary transfer tax,

33. 17 Cal.3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

34. *Id.* at 142, 550 P.2d at 1011, 130 Cal. Rptr. at 475.

35. *Ex parte* Daniels, 183 Cal. 636, 192 P.442 (1920): "[W]ith no unmistakable signs to guide us between the domain of state and local powers, it becomes us to exercise more than the usual caution not to refuse the sanction of judicial authority to legislation which is supposed to have exceeded a boundary so difficult . . . to define." *Id.* at 640, 192 P. at 444. *See also In re* Murphy, 190 Cal. 286, 212 P. 30 (1923). *See generally* 35 CAL. JUR. 2d *Municipal Corporations*, § 234 (1970).

36. CAL. REV. & TAX. CODE §§ 11901-11934 (West 1970).

37. CAL. CONST. art. XIII A. This amendment which was adopted through the initiative process limits ad valorem taxes on real property to one percent of value except to pay indebtedness previously approved by voters. It rolled back assessed valuations to those of 1975-76 and limits annual increases in value. The amendment requires a two-thirds vote of the legislature in order to enact any change in state taxes which would increase revenue; however, it prohibits any new ad valorem, sales, or transaction taxes on the sale of real estate.

38. *Id.* §§ 3-4.

39. *Id.* § 5.

by its very operation, is a tax on the "transaction" which occurs upon the sale of certain real property, and therefore, is specifically prohibited by the new constitutional amendment. However, this amendment is highly controversial and is currently being challenged in the courts. Therefore, until the constitutionality of any or all of the provisions of the Jarvis-Gann amendment are decided by the courts, communities must table any consideration of anti-speculation ordinances based on the Documentary Transfer Tax Act. When the validity of each section of the Jarvis-Gann amendment is determined, the cities may decide to again reconsider this type of ordinance not only as a means of curbing inflation in the residential housing market, but also as an additional revenue raising measure.

However, even if an anti-speculation ordinance based on the Documentary Transfer Tax Act is not barred by the Jarvis-Gann amendment, a transfer tax which does not conform to the Act[40] may also be challenged as being an invalid attempt to impose a tax on income. As such, it would appear to fall within the state's exclusive domain over the collection of income taxes.[41] A transfer tax which is calculated on the difference between the purchase price and selling price of a piece of property may be characterized as a tax on profit, which is a specific type of income: "[G]ross income means all income from whatever source derived, including . . . [g]ains derived from dealings in property . . . ."[42] However, the statutory income tax scheme "shall not be construed so as to prohibit the levy or collection of any otherwise authorized license tax upon a business measured by or according to gross receipts."[43]

In *City of Huntington Beach v. Superior Court,*[44] the city's

40. CAL. REV. & TAX CODE §§ 101-11934 (West 1970). This Act allows a specific amount of transfer tax to be levied by counties, *id.* § 1911, and further allows one half of that amount be credited to cities which enact ordinances that authorize a transfer tax in that amount. *Id.* Cities that enact ordinances which authorize a transfer tax in a greater amount than suggested by the Act will not have their tax collected by the county and will lose the credit from the county's transfer tax. *Id.* Such ordinances are said to be out of conformity with the enabling Act.

41. CAL. REV. & TAX CODE § 17041.5 (West Supp. 1978). *See generally,* ABC Distrib. Co. v. City & County of San Francisco, 15 Cal.3d 566, 542 P.2d 625, 125 Cal. Rptr. 465 (1975); Hansen, *Municipal Income Tax and State Preemption in California,* 11 SANTA CLARA LAWYER 343 (1971).

42. CAL. REV. & TAX CODE § 17071(a)(3) (West 1970).

43. *Id.* § 17041.5 (West Supp. 1978).

44. 78 Cal. App. 3d 333, 144 Cal. Rptr. 236 (1978).

nonconforming documentary transfer tax was challenged. The challengers charged that the transfer tax which was based on the "value of consideration"[45] was actually a property tax. The court of appeals held that the transfer tax was an excise tax[46] even though

> [t]he fact that the tax is based on the "value of consideration" which in turn may have some relationship to the assessed value of the property does not make the tax a property tax. A privilege tax does not become a property tax simply because it is proportioned in amount to the value of the property used in connection with the privilege which is taxed.[47]

As noted in *Huntington Beach,* the fact that the transfer tax rate is based on the profit from the sale of the property is not

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45. *Id.* at 337. 144 Cal. Rptr. at 237. The Huntington Beach ordinance defined the term

> "value of consideration" [as] the total consideration, valued in money of the United States, paid or delivered, or contracted to be paid or delivered in return for the transfer of real property . . . . "Value of consideration" also includes the amount of any special assessment levied or imposed upon the property by a public body, district or agency . . . .

Id. at 337, 144 Cal. Rptr. at 237.

46. *Id.* An excise tax is

> any tax not falling within the classification of a poll or property tax, and embraces every form of burden or taxation not laid directly on persons or property, and every form of charge imposed by public authorities for the purpose of raising revenue on the performance of an act, enjoyment of a privilege, or the engaging in an occupation.

885 C.J.S. *Taxation* § 121 (1954).

With the above definition in mind, the court in *City of Huntington Beach,* 78 Cal. App. 3d at 340-41, 144 Cal. Rptr. at 240, stated that

> the transfer tax imposed and collected by the City of Huntington Beach was not a property tax. Real property taxes are imposed on the ownership of property as such; they recur annually on a fixed date; and no personal liability arises from their nonpayment, the sole security for the taxes being the property itself . . . . The absence of those characteristics distinguishes the instant transfer tax from a real property tax. Liability for the tax in question arises only when property is conveyed; the transferor and transferee become jointly and severally liable for the tax upon delivery of the instrument of transfer; and the tax is a debt collectible by an action against the persons liable. The tax is, therefore, on the exercise of one of the incidences of property ownership and as such is an excise tax.

Id. (citation omitted).

47. City of Huntington Beach v. Superior Court, 78 Cal. App. 3d at 341, 144 Cal. Rptr. at 240.

conclusive in determining the character of the tax as an income tax. In its evaluation the court will read the enacted ordinance as a whole and weigh the legislative intent.[48]

The latest case to discuss the question of whether a tax imposed by a city which is measured by a percentage of gross income is to be characterized as an income tax or not was *Weekes v. City of Oakland*[49] decided by the California Supreme Court on May 30, 1978. The court held that an employee license fee which is measured by the employee's gross receipts for services performed in Oakland was not a municipal income tax which is barred by state legislation.[50] In determining the character of the subject tax the court noted: (1) the difference between what income is traditionally taxed under a municipal income tax and what is being taxed under the Oakland ordinance;[51] (2) the similarity between the Oakland license fee and other recognized business fees;[52] (3) the precedent that the method of measuring a tax was not conclusive as to its character;[53] (4) that some weight is to be given to how the enacting legislature characterizes or labels the tax;[54] and last, (5) that California Government Code section 50026 which bars discriminatory occupation taxes measured by an employee's income "is pointless and redundant if [California Revenue and Taxation Code] section 17041.5 is construed as enjoining *all* municipal occupation taxes measured by employee compensation, on the theory that they are necessarily income taxes."[55]

It appears that the issues raised about the Oakland employee license fee are analogous to the anti-speculation documentary transfer tax. First, the tax is imposed only upon specific sales of specific types of property, and, by definition, the tax is imposed upon the document, not on the property. Therefore the tax is imposed only to one specific type of income rather than the "traditional assessment commonly recognized as an income tax [which] is ordinarily a tax upon net income: that is, gross income reduced by other taxes, business expenses and costs in-

48. Ingels v. Riley, 5 Cal. 2d, 159, 160, 53 P.2d 939, 942 (1936).
49. 21 Cal. 3d 386, 579 P.2d 449, 146 Cal. Rptr. 558 (1978).
50. *Id.* at 391, 579 P.2d at 451, 146 Cal. Rptr. at 560.
51. *Id.* at 392-93, 579 P.2d at 452, 146 Cal. Rptr. at 561.
52. *Id.* at 394, 579 P.2d at 453, 146 Cal. Rptr. at 562.
53. *Id.* at 396, 579 P.2d at 454, 146 Cal. Rptr. at 563.
54. *Id.* at 397, 579 P.2d at 455, 146 Cal. Rptr. at 563.
55. *Id.*

curred in the production of the income."[56] Therefore, a court might conclude that such an anti-speculation tax "though closely tied to 'income or [a] part thereof' in terms of the designated *measure* of tax liability, bears no immediate, compelling resemblance to the more familiar income taxation models which [California Revenue and Taxation Code] section 17041.5 unquestionably purports to bar."[57]

Second, the anti-speculation documentary transfer tax is similar to other documentary transfer taxes currently being imposed[58] which do not conform to the Documentary Transfer Tax Act.[59] The major difference between these nonconforming taxes and the anti-speculation tax is that the former is imposed on a flat rate whereas the anti-speculation tax is imposed on a graduated scale. In *Weekes*[60] the court held that even though the fee differed in that it encompassed all trades and professions rather than specifically enumerated ones and that it reached employees rather than employers, those differences did not take it out of the realm of license fees.[61] Whether the differences between the nonconforming documentary transfer taxes which are imposed strictly for the purpose of raising revenue[62] and the same type of tax which is imposed for the purpose of both raising revenue and deterring speculation are significantly different and, therefore, the former deemed valid and the latter invalid, must be determined by the court. However, under the rationale of *Weekes*[63] it appears that the court may not consider the type of taxes significantly different.

Further, the court will also weigh the fact that the measure of tax is not conclusive as to its character and that the title given the tax by the enacting legislature does aid in characterizing the tax.

Therefore, from the above discussion it appears that *Weekes* provides a strong argument for the proponents of the anti-

56. *Id.* at 393, 579 P.2d at 452, 146 Cal. Rptr. at 561.

57. *Id.* at 394, 579 P.2d at 453, 146 Cal. Rptr. at 562.

58. *E.g.*, San Jose, Cal., Ordinance No. 16251 (May 22, 1972) and San Mateo, Cal., Ordinance No. 1977-9 (July 1, 1977).

59. CAL. REV. & TAX CODE §§ 11901-11934 *supra* note 40.

60. 21 Cal. 3d 386, 579 P.2d 449, 146 Cal. Rptr. 558.

61. *Id.* at 394-95, 579 P.2d at 453, 146 Cal. Rptr. at 562.

62. *See* Bishop v. City of San Jose, 1 Cal.3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969).

63. Weekes v. City of Oakland, 21 Cal. 3d 386, 579 P.2d 449, 146 Cal. Rptr. 558.

speculation documentary transfer tax to counter the challenge that the tax is a thinly disguised municipal income tax which is barred under California Revenue and Taxation Code section 17041.5.

II. VIOLATION OF DUE PROCESS

Article XI, section 7, of the California Constitution grants a municipality police power as broad as that of the state.[64] The police power is one of the most essential and least limitable powers of government.[65] Though its operation may at times seem harsh, the imperative need for its existence precludes any limitation upon its exercise unless it is unreasonably and arbitrarily invoked.[66] Any ordinance which furthers the public health, safety, morals and general welfare is valid[67] as long as it is in furtherance of a legitimate public interest[68] or if it promotes the public welfare.[69]

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64. Birkenfeld v. City of Berkeley, 17 Cal. 3d at 140, 550 P.2d at 1009, 130 Cal. Rptr. at 473 (1976). *See also* Stanislaus v. Stanislaus, 8 Cal.2d 378, 383-84, 65 P.2d 1305, 1307 (1937).

65. Hadacheck v. Sebastian, 239 U.S. 394 (1915) *aff'g Ex Parte* Hadacheck, 165 Cal. 416, 132 P. 584 (1913).

66. Wholesale Tobacco Dealers Bureau v. Nat'l Candy & Tobacco Co., 11 Cal.2d 634, 644, 82 P.2d 3, 17 (1938); Miller v. Bd. of Pub. Works, 195 Cal. 477, 484, 234 P. 381, 385 (1925); Candlestock Properties Inc. v. San Francisco Bay Conservation Devel. Comm., 11 Cal. App. 3d 557; 570, 89 Cal. Rptr. 897, 905 (1970); DeAryan v. Butler, 119 Cal. App. 2d 674, 681, 260 P.2d 98, 102 (1953).

67. Birkenfeld v. City of Berkeley, 17 Cal. 3d at 160, 550 P.2d at 1024, 130 Cal. Rptr. at 487. *See also* McKay Jewelers, Inc. v. Bowron, 19 Cal.2d 595, 122 P.2d 543 (1942); Wholesale Tobacco Dealers Bureau v. Nat'l Candy & Tobacco Co., 11 Cal. 2d 634, 82 P.2d 3; People v. Associated Oil Co., 211 Cal. 93, 249 P. 717 (1930); Miller v. Bd. of Pub. Works, 195 Cal. 477, 234 P. 381 (1925).

> [T]he state possesses . . . —and therefore municipal bodies— the power to prescribe such regulations as may be reasonable, necessary, and appropriate for the protection of public health and comfort, and no person has an absolute right to be free at all times and in all circumstances wholely free from restraint. Thus, persons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health, welfare, and prosperity of the state.

Cal. Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 318 (1905).

68. Miller v. Bd of Pub. Works, 195 Cal., at 485, 234 P. at 384 *citing* Consolidated Rock Prods. v. Los Angeles, 57 Cal.2d 515, 521-22, 370 P.2d 342, 346, 20 Cal. Rptr. 638, 642 (1962). *See* Birkenfeld v. City of Berkeley, 17 Cal. 3d, at 160, 550 P.2d at 1024, 130 Cal. Rptr. at 487 (1976).

69. McKay Jewelers, Inc. v. Bowron, 19 Cal. 2d 595, 122 P.2d 543; Wholesale Tobacco Dealers Bureau v. Nat'l Candy & Tobacco Co., 11 Cal. 2d 634, 82 P.2d 3; Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 1977, *aff'd* 299 U.S. 198 (1936); Chow v. Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933); People v. Associated Oil Co., 211 Cal. 93, 249 P. 717 (1930); Miller v. Bd. of Pub. Works, 195 Cal. 477, 234 P. 381.

A. Anti-speculation Ordinances and the Scope of the Police Power

Public welfare is a term that is impossible to define precisely. Courts have held it to embrace regulations to promote the economic welfare, public convenience, and general prosperity of the community.[70] The courts have purposely left the definition vague because its concept must be kept flexible and dynamic in order to allow legislatures to enact laws that meet the current and ever-changing needs of the community.[71] The courts have recognized that each community's legislative body is in a better position than the judiciary to understand and appreciate the community's problems, to analyze their causes, and to determine the most reasonable solutions.[72]

The major stated purpose of anti-speculation legislation is to reduce that portion of the rapid inflation of residential housing attributable to speculator's exploitation of housing shortages.[73] Each community has a statutory duty to ensure that a wide variety of housing is available to meet the needs of all economic segments of its population.[74] The community's legislature discharges this responsibility in various ways, such as by the adoption of comprehensive master plans, the regulation of the issuance of building permits, as well as by an infinite variety of exercises of the zoning power. This responsibility can also be met by enacting ordinances to minimize exploitation of the housing mar-

70. Chicago B. & Q. Ry. v. Drainage Comm'rs, 200 U.S. 561, 592 (1906).

71. In Miller v. Bd. of Pub. Works, 195 Cal. 477, 234 P.381, the court said:

> What was a reasonable exercise of the police power in the days of our fathers may today seem so utterly unreasonable as to make it difficult for us to comprehend the existence of conditions that would justify it. What would have been rejected by our ancestors as unthinkable is today accepted as proper and reasonable . . . . Thus it is apparent that the police power is not a circumscribed prerogative, but is elastic, and in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral and intellectual evolution of the human race. In brief, there is nothing known to the law that keeps more in step with human progress than does the exercise of this power.

Id. at 484-85, 234 P. at 383.

72. *Ex Parte* Hadacheck, 165 Cal. at 421, 132 P. at 586 *aff'd sub nom* Hadacheck v. Sebastian, 239 U.S. 394 (1915). *See also* Munn v. Illinois, 94 U.S. 113 (1976).

73. *See* note 21 *supra.*

74. Cal. Gov't Code § 65302(c) (West Supp. 1978).

ket when there is a critical shortage in certain types of housing.[75] For example, when a rental housing shortage developed in Berkeley, California, the price of rental units skyrocketed.[76] An initiative charter amendment establishing rent controls was passed by the Berkeley voters.[77] When the charter amendment was challenged as a violation of due process in *Birkenfeld v. City of Berkeley,*[78] the California Supreme Court stated:

> The charter amendment includes in its stated purpose for imposing rent control the alleviation of the ill effects of the exploitation of a housing shortage by the charging of exorbitant rents to the detriment of the public health and welfare of the city and particularly its underprivileged groups. The amendment thus states on its face the existence of conditions in the city under which residential rent controls are reasonably related to promotion of the public health and welfare and are, therefore, within the police power.[79]

In deciding whether a valid public purpose is to be served by an anti-speculation ordinance, however, a mere declaration that a social problem requires remedial action will not be enough. The courts will require a showing of actual facts[80] testifying to the need for such legislation. Similarly, in *Birkenfeld,* the court stated that "[t]he constitutionality of residential rent controls under the police power depends upon the actual existence of a housing shortage and [its] concomitant ill effects."[81] The existence of housing inflation and its attendant ills seems unquestionable. The crisis in the California residential housing market rose to national attention in the spring of 1977.[82] A *U.S. News & World Report* article showed that the national average for the price of a new home purchased through a conventional home mortgage was up 8.4% from January, 1977 to January, 1978.[83] However, in the only California area that was surveyed, the San Francisco-Oakland region, the average price of a new house had increased

75. Birkenfeld v. City of Berkeley 17 Cal. 3d at 137, 550 P.2d at 1008, 130 Cal. Rptr. at 472 (1976).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 160, 550 P.2d at 1023, 130 Cal. Rptr. at 487.
80. *Id.*
81. *Id.*
82. *See* notes 1 & 2 *supra.*
83. *News You Can Use,* U.S. NEWS & WORLD REPORT, March 13, 1978, at 89.

14% during the same period, and the average price of a used home had increased 16.3%.[84] The situation in the San Francisco Bay Area is not atypical of most of California's other major metropolitan areas.[85]

Many communities are finding that the rapidly rising inflation of the cost of residential housing has eliminated the possibility of purchasing homes for many families, especially those in the low and middle income categories.[86] This inflationary spiral in some areas has been approximately two percent per month.[87] Therefore, it seems there may be sufficient evidence to conclude that legislation which has as its main purpose the diminution of spiraling inflation in the residential housing market will be

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84. *Id.*

85. The following is an abstract from an undated report prepared for the use of San Francisco's Board of Supervisor's Finance Committee in evaluating the proposed (and subsequently defeated) anti-speculation ordinance:

> *Prices*
>
> According to the Consumer Price Index for the San Francisco/Oakland metropolitan area, the cost of homeownership more than doubled in the last ten years, a much faster rate of increase than for other goods and services. For the period 1971-1977, the cost of rents increased 30.6% and ownership costs increased 63.41%. This index reflects the cost of homeownership (including taxes and insurance) to those buying a home (not for those occupying a previously acquired home). The monthly survey conducted by the Federal Loan Bank Boards shows even a greater increase in the price of purchasing a home. For the years 1973 to 1977 they found the average purchase price of new and used housing in San Francisco jumped from $41,000 to $76,000, an increase of 85%.
>
> The Real Estate Research Council publishes an index of price trends for single-family residential properties in San Francisco . . . . As of April 1977, single-family residential properties were increasing in value at an annual rate of 30%. This pace is being kept by houses at all price levels and for all dates of construction. Indeed the Council reports that speculative buying has undoubtedly contributed to the current market spiral.
>
> Rapid price appreciation at rates above inflation and material costs indicate excess demand. These price increases cannot be explained by household formation alone. Increases in the cost of home ownership can be separated into three parts:
> *Increases attributed to inflation;
> *Increases attributed to household demand;
> *Increases attributed to non-household demand (speculation).

Id.

86. Immel, *supra* note 2, § F, at 1, col. 2.

87. *Id.*

deemed by the courts as declaring a valid public interest which is substantiated by facts.

The claim that the legislative purpose is to preserve the residential homeowner character of neighborhoods[88] also states a valid public objective. Preserving the specific character of residential neighborhoods in order to provide a safe and healthy environment for family living is a traditional goal of the zoning power[89] which has been sustained by the courts. In the most noted case on point, *Village of Belle Terre v. Boraas,*[90] the United States Supreme Court held valid an ordinance which restricted occupancy of single family houses to specifically defined families.[91] Regarding the permissible scope of the police power, the Court observed:

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88. Davis Ordinance, *supra* note 5:

> Section 1. Purpose:
>
> . . . .
>
> (g) That the inflation in housing prices and the conversion of residences to rental properties has had the following effects:
>
> (1) The property taxes of homeowners have increased dramatically. Such increases have been especially harsh to persons of moderate means and to persons with fixed incomes. Further, such increases in the cost of home ownership tend to force such persons out of the residential ownership category.
>
> (2) The conversion of homes to rentals has resulted in an increase in complaints by Davis homeowners regarding a variety of conditions including a proliferation of automobiles, lack of maintenance, excessive noise and other changes in residential neighborhoods.
>
> (3) The City's housing allocation process is being subverted by the conversion of ownership units to investment properties thereby failing to meet the demand of prospective home buyers for new ownership units.
>
> (h) That for the foregoing reasons it is immediately necessary in order to promote the public welfare that the City of Davis take measures to prevent further conversion of individual residential ownership units to investment properties until such trend can be fully evaluated and permanent regulations can be developed and adopted.

89. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Miller v. Bd. of Pub. Works, 195 Cal. 477, 234 P. 381 (1925).

90. 416 U.S. 1 (1974).

91. The Court recited the language of the statute as follows:

> The word "family" as used in the ordinance means, "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.

Id. at 2.

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[92]

Thus, it appears that the two stated objectives of anti-speculation ordinances are sufficient to withstand a facial constitutional attack.

B. Reasonableness of the Means Chosen

The generally accepted test for determining whether an ordinance satisfies due process is whether the ordinance proposes means which bear a rational relationship to the purpose sought to be accomplished.[93] Hence, it must be decided whether anti-speculation legislation is indeed a "rational curative measure"[94] to meet the stated goals of reducing the inflationary rise in the price of residential housing and of helping to maintain the predominantly owner-occupied character of residential neighborhoods.

It is readily apparent that anti-speculation ordinances which prohibit or penalize short-term ownership of residential dwellings will have a direct bearing on the character of residential neighborhoods and the promotion of the social values such neighborhoods are thought to provide. When short-term speculators, who are usually nonresident homeowners, purchase property in substantial numbers within a specific neighborhood, the character of that neighborhood changes in ways that may be deemed detrimental to family values. Houses purchased as short-term investments are usually either rented on a month-to-month basis or left vacant while the property appreciates in value.[95] Renters tend to be relatively transient,[96] and when the character of a neighborhood is predominantly rental, the stability of the neighborhood is under-

92. *Id.* at 9.

93. Laurel Hill Cemetery v. San Francisco, 152 Cal. 464, 93 P.70 (1907) *aff'd* 216 U.S. 358 (1910).

94. Birkenfeld v. City of Berkeley, 17 Cal. 3d at 160, 550 P.2d at 1024, 130 Cal. Rptr. at 488 (1976).

95. *See* note 2 *supra.*

96. Miller v. Bd. of Pub. Works, 195 Cal., at 494, 234 P. at 387.

mined, resulting in undesirable effects on homeowners who want a stable place in which to raise their children.[97] It may also be argued that resident homeowners have a greater stake and are more concerned about the quality of life in their neighborhood.[98]

This type of "motherhood and apple pie" argument raises the hackles of real estate investors.[99] They claim that anti-speculation ordinances are actually anti-free enterprise legislation which will in fact be injurious.[100] They also cite the fact that there are many reasons for the escalating prices in housing, including the rising costs of construction materials and labor, as well as a substantial shortage of residential housing.[101] The better course to follow, argue real estate experts, is to allow the housing market to stabilize itself through the interplay of the basic economic forces of supply and demand.[102]

However, public officials need not disregard the problems of housing inflation or the deterioration of family neighborhoods either because there are a multitude of factors which account for such problems, or that the problems may ultimately disappear as a result of the balancing of supply and demand.[103] The public appears to share the view expressed in a recent *Wall Street Journal* article: "If there is a villain in the place it is the speculator who buys a house with no intention of living in it."[104] Whereas checking speculation in the family housing market may not be a panacea for the problems of the high price of residential housing or maintaining neighborhoods which appeal to families, it is susceptible of local regulation and is believed to have some impact on the rising rate of inflation and its accompanying harms.

A local government does not have to demonstrate that an anti-speculation ordinance is the only or the perfect solution to the problems which exist. Such ordinances are economic regulations, and as such, all that must be shown is that the means

97. *Id.*

98. *Id.*

99. *Editorial Comment: Vicious and Pernicious,* San Francisco Chronicle, April 9, 1978, (Sunday Punch), at 1, col. 2.

100. *Id.*

101. *See* notes 21, 22 & 85 *supra.*

102. Bray, *Speculating—Experts Say Binge Will End Gently,* Sacramento Bee, June 5, 1977, § A, at 2, col. 2.

103. Birkenfeld v. City of Berkeley, 17 Cal. 3d, 550 P.2d, 130 Cal. Rptr. *See* Galvan v. Superior Court, 70 Cal.2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969).

104. Immel, *supra* note 2.

chosen "reasonably relate to a legitimate government purpose . . . . [In determining the validity of such a measure, the courts] must not confuse reasonableness with wisdom."[105] Consistent with the presumption of the constitutional propriety of legislative exercises of the police power,[106] the courts will place a great burden on challengers of anti-speculation ordinances to show a "complete absence of even a debatable rational basis for the legislative determination"[107] that the ordinances will affect housing inflation and improve the quality of neighborhood life. It appears unlikely that prospective challengers will be able to present irrefutable evidence to that effect.

Anti-speculation ordinances may nevertheless be attacked on the ground that they are excessive limitations on the conduct of legitimate business activities or an abusive restraint on the use to which property may be devoted. In *Birkenfeld,* for example, the court declared that "the provisions [of the rent control charter amendment] are within the police power if they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property."[108] That is, the police power must yield to the prohibition against confiscation. In *Birkenfeld,* the court held the rent control measure to be arbitrary, inasmuch as it determined that the cumbersome administrative procedures established by the Berkeley charter amendment inevitably would have caused unreasonable delays in granting rent increases, thereby posing confiscatory consequences to landlords.[109]

Similarly, anti-speculation ordinances which are based on the Documentary Transfer Tax Act[110] and which tax the transfer of property on the basis of length of ownership may be subject to

105. Birkenfeld v. City of Berkeley, 17 Cal. 3d, at 159, 550 P.2d at 1023, 130 Cal. Rptr. at 487 *citing* Wilke & Holzheiser, Inc. v. Dept. of Alcohol Bev. Control, 65 Cal.2d 349, 359, 420 P.2d 735, 742, 55 Cal. Rptr. 23, 30 (1966); *accord,* Consolidated Rock Prods. Co. v. Los Angeles 57 Cal. 2d at 522, 370 P.2d at 347. *See also* Williamson v. Lee Optical Co., 483 U.S. 834 (1955); AFL v. American Sash Co., 335 U.S. 538 (1949); Simler v. Dental Examiners, 294 U.S. 608 (1935).

106. Euclid v. Ambler Realty Co., 272 U.S. 365; Consolidated Rock Products Co. v. Los Angeles, 57 Cal.2d 515, 370 P.2d 342, 20 Cal. Rptr. 638.

107. Birkenfeld v. City of Berkeley, 17 Cal. 3d at 161, 550 P.2d at 1024, 130 Cal. Rptr. at 488. *See* Hamer v. Town of Ross, 59 Cal.2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963); Lockard v. City of Los Angeles, 33 Cal.2d 453, 202 P.2d 38 (1949).

108. Birkenfeld v. City of Berkeley, 17 Cal. 3d at 165, 550 P.2d at 1027, 130 Cal. Rptr. at 491.

109. *Id.* at 173, 550 P.2d at 1033, 130 Cal. Rptr. at 497.

110. CAL. REV. & TAX CODE §§ 11901-11934 (West 1970).

challenge as being arbitrary and confiscatory in nature. However, assuming the graduated tax to be levied by municipalities may properly be characterized as an excise tax,[111] it seems that such a due process attack is destined to fail. This is made clear by a recent United States Supreme Court decision, *City of Pittsburg v. Alco Parking Authority.*[112] In *Alco Parking,* the High Court continued to refuse to pass on the reasonableness of a revenue tax measure or to hold such a tax violative of due process because it rendered a business unprofitable.[113] Under *Alco Parking,* even if the transfer tax raised insubstantial revenue,[114] and if revenue-raising was merely a secondary purpose,[115] as long as a municipality was empowered to levy the tax, no federal due process objection would be sustained. Cases interpreting the California Constitution are consonant with *Alco-Parking.* For instance, in *Auston v. Wilson*[116] the court of appeal found that a license fee on cosmetology or beauty culture schools was valid[117] and quoted *Cooley on Taxation:*

> All presumptions and intendments are in favor of the validity of the tax; . . . in other words, the mere amount of the tax . . . is not to be measured by the profits of the business taxed, and the mere fact that the particular person taxed conducted his business at a loss does not of itself make a tax unreasonable.[118]

III. IMPERMISSIBLE CLASSIFICATION

The last constitutional attack which might be leveled against anti-speculation ordinances is that they violate the equal protection clause. That is, it may be alleged that by singling out certain real estate investors as short-term speculators, such ordinances employ an impermissible classification without any compelling government justification or because such classification is arbitrary and capricious, wholly unrelated to the accomplishment of

111. *See* note 46 *supra.*

112. 417 U.S. 369 (1974).

113. *Id.* at 373. In *Alco Parking,* a number of the parking lot operators upon whom the tax was imposed claimed that the effect of the tax was to force them to conduct their business at a loss. The court indicated that federal due process rights are not abridged by the exaction of a tax which is "so high as to threaten the existence of an occupation or a business." *Id.* at 376.

114. *See id.* at 375; Sonzinsky v. United States, 300 U.S. 506, 513-14 (1937).

115. *See* 417 U.S. at 375; Hampton v. United States, 276 U.S. 394, 411-13 (1928).

116. Auston v. Wilson, 27 Cal. App. 2d 124, 80 P.2d 503 (1938).

117. *Id.* at 128-29, 80 P.2d at 505-06.

118. *Id.* at 127, 80 P.2d at 505.

any legitimate public purpose. However, anti-speculation ordinances must be characterized as local economic regulations, conditioning or taxing the purchase or disposition of real property on the duration of occupancy. Unless the classification interferes with the exercise of fundamental rights or is based on inherently suspect distinctions,[119] the regulation of local economics under either the police or taxing powers is to be accorded the same wide latitude under equal protection analysis as under due process analysis.[120]

It does not appear that the class of short-term speculators implicates any recognized suspect group—it is not aimed at any particular race, religion, alienage, or sex.[121] Nor does it appear to infringe on any fundamental interests, such as procreation, privacy, interstate travel, voting or the pursuit of a lawful occupation, that invoke special judicial scrutiny.[122] Thus, in order to withstand an equal protection challenge, all that must be shown is that the distinction drawn has some rational basis.

It may be claimed that restricting the sale of single family houses to buyers who intend to reside in them is irrational. However, in *Ector v. Torrance,*[123] equal protection was not violated by a city's requirement that its officers and employees reside within its borders.[124] The court held that the residency requirement bore a rational relationship to one or more legitimate purposes, including the promotion of ethnic balance, reduction of unemployment, enhancement in the quality of employee performance, diminution of absenteeism, availability of trained manpower in emergencies, and economic benefits to be derived from local expenditures.[125] Based on *Ector,* a municipality may contend that restricting the sale of single family houses to owner-occupants is at least arguably related to the stabilization of the price of family housing[126] and the owner-occupied character of residential neighborhoods. Given the permissive judicial review of economic regulations,

119. 13 CAL. JUR. 3d *Suspect Classifications* § 337 (1974).

120. *See* New Orleans v. Duke, 427 U.S. 297, 303 (1976).

121. While gender has not been declared a suspect classification under the United States Constitution, it has been deemed invidious under the equal protection clause of the California Constitution. Sailer Inn, Inc. v. Kirby, 5 Cal.3d 1, 22, 485 P.2d 529, 543, 95 Cal. Rptr. 329, 343 (1971).

122. 13 CAL. JUR. 3d *Suspect Classifications* § 337 (1974).

123. 10 Cal.3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973).

124. *Id.* at 135, 514 P.2d at 436, 109 Cal. Rptr. at 852.

125. *Id.*

126. *See* notes 21 & 22 *supra.*

conditioning the sale of houses on intended residency would hardly seem to transgress equal protection limitations.

It may also be claimed that disparate treatment based on the duration of residency is without any rational basis. However, in *New Orleans v. Duke,*[127] the United States Supreme Court considered a "grandfather" clause of a New Orleans ordinance prohibiting the sale of foodstuffs by pushcart vendors in the French Quarter of the city. The clause excepted those vendors "who [had] continuously operated the same business within the [French Quarter] . . . for eight years or more prior to"[128] the date of the enactment of the "grandfather" provision. The petitioner, who had operated her vending business for only two years in the French Quarter before passage of the clause, challenged the application of the "eight years-or-more" provision as a denial of equal protection. In a per curiam opinion expressing the views of seven justices, the Court held that the city officials could have reasonably decided that limiting the pushcart vending business to two operators who qualified for exceptional treatment was entirely consistent with the purpose of the ordinance's general prohibition to preserve and enhance the charm and economic vitality of the tourist business conducted in the French Quarter.[129] Thus, limiting the sale of houses to those who agree to certify that they will live in them for one year's time would seem immune to attack as a denial of equal protection.

The argument that the imposition of a higher tax rate on one class of owners than on others, which would be the case under ordinances modeled after the Documentary Transfer Tax Act, violates equal protection is even less likely to succeed: "[i]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification."[130] A municipality may levy taxes at different rates for different classes of taxpayers as long as the classification has some rational foundaton.[131] Moreover, local legislative bodies may create subclasses of businesses engaged in identical activities for the purpose of differential taxa-

127. 427 U.S. 297 (1976).

128. *Id.* at 298.

129. *Id.* at 304-05.

130. Madden v. Kentucky, 309 U.S. 83, 88 (1940).

131. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359-60 (1973); Walters v. City of St. Louis, 347 U.S. 231, 237 (1954); Fox Bakersfield Theatre Corp. v. City of Bakersfield, 36 Cal.2d 136, 142, 222 P.2d 879, 884 (1950)(in bank); Helton v. City of Long Beach, 55 Cal. App. 3d 840, 844, 127 Cal. Rptr. 737, 740 (1976).

tion as long as the classification employed is based on "natural, intrinsic or fundamental distinctions which are reasonable in their relation to the object of the legislation."[132]

In *Fox Bakersfield Theatre Corp. v. City of Bakersfield,*[133] the California Supreme Court held valid a taxing scheme which discriminated between various forms of entertainment businesses.[134] The court declined to substitute its judgment for the local legislature's decision that disparate treatment based on the nature and character of the amusement business was rationally justified. "Among other things, one of the main features of the tax is that it is imposed on those amusement businesses charging admissions, and those taxed are the ones where larger groups of people are likely to gather, with the accompanying effects on the functioning and activities of the government."[135]

In *Helton v. City of Long Beach,*[136] an ordinance imposed greater license taxes on businesses located in one area of the city than were imposed on the same or similar types of businesses in other areas. The California Court of Appeal determined that the different tax rates were justified because the enterprises subject to the higher tax rate were likely to receive a disproportionate benefit from the rehabilitation funded by the tax collected.[137] The general rule exemplified by *Fox* and *Helton* is that those who either present greater problems for municipalities or who enjoy greater benefits by virtue of the taxes collected may be taxed at a higher rate without constitutional objection.[138] Since it can be rationally concluded that short-term real estate investors are more responsible for housing inflation and its concomitant social ills than those who retain ownership for longer periods of time, graduated taxes on the transfer of real property based on length of ownership would not seem to present any constitutional infirm-

132. Fox Bakersfield Theatre Corp. v. City of Bakersfield, 36 Cal. 2d 136, 222 P.2d 879; Helton v. City of Long Beach, 55 Cal. App. 3d 840, 127 Cal. Rptr. 737.

133. 55 Cal. App. 3d 840, 127 Cal. Rptr. 737.

134. 36 Cal. 2d at 144, 222 P.2d at 885.

135. *Id.*

136. 55 Cal. App. 3d 840, 127 Cal. Rptr. 737.

137. *Id.* at 844-45, 127 Cal. Rptr. at 740.

138. Disparate taxation may also be sustained when the inherent nature of the business entities are different. *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (Illinois constitutional provision subjecting corporations and similar entities, but not individuals to ad valorem taxes on personalty is constitutionally valid). *See also* Madden v. Kentucky, 309 U.S. 88 (higher ad valorem tax on deposits out of state than in state does not constitute invidious discrimination).

ity. The fact that short-term speculators are not the exclusive or major source of the problem is irrelevant, for, as has often been stated, legislative solutions may be addressed to one phase of a problem, leaving for the future any legislation designed to alleviate the remainder.[139]

CONCLUSION

Providing adequate housing in metropolitan areas is a continuing problem. With housing being a scarce commodity, its cost will continue to increase, and in a sellers' market, speculators will invest in the hopes of making quick profits. The interests of those individuals looking at real estate as a place to live, and those looking at real estate as an investment are bound to conflict. At this point, governments may determine they must step in to find a reasonable balance between these two competing interests. Cities, counties and states will be looking for new ways of regulating land use in order to meet the housing needs of their voting population.

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139. First Unitarian Church v. Los Angeles County, 48 Cal.2d 419, 311 P.2d 508 (1957), *rev'd on other grounds,* 357 U.S. 545 (1958).