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WHITE PAPER ON THE THEORY, ECONOMICS AND PRACTICE OF

PUBLIC BENEFIT ZONING

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About East Bay Housing Organizations:

East Bay Housing Organizations (EBHO) is a non-profit membership organization dedicated to working with communities in Alameda and Contra Costa counties to preserve, protect and expand affordable housing opportunities for the lowest income communities through education, advocacy, organizing, and coalition building. Founded in 1984, EBHO is the leading voice for affordable housing in the East Bay.

Source: Metropolitan Transportation Commission

EXECUTIVE SUMMARY

The San Francisco Bay Area will add more than two million people by 2040. To accommodate this growth while protecting our quality of life and our environment, the Association of Bay Area Governments (ABAG) and the Metropolitan Transportation Commission (MTC) have adopted a State-mandated Sustainable Communities Strategy—a regional land use and transportation plan called Plan Bay Area. It calls for most new residential development to take place in already built up areas close to public transit. These areas are called Priority Development Areas (PDAs). Part of this strategy is to produce vibrant "complete communities" near major transit stations or hubs with a mix of commercial, civic and residential uses. The challenge is how to ensure that these communities preserve and maintain a diverse mix of residents by income, age, disability, and racial and ethnic backgrounds over the long term.

This approach towards accommodating growth has the potential to make life better and healthier for all of us, but it also has the potential to lead to a significant increase in land values for real estate investors. Compact growth—and the strategies to accommodate it—will increase land values in three ways:

- Regional and local policies that encourage new development in Priority Development Areas at the center of the Bay Area region will make the land located in these areas more valuable.
- The Bay Area region will invest billions of local and federal dollars in transportation improvements—with a significant portion going to mass transit in these central areas—thus increasing the value of properties benefitting from those investments. Economic studies have shown that when property is located near the Bay Area Rapid Transit System (BART), its value increases significantly.
- Many local jurisdictions have or will change their land use plans to accommodate greater densities in the priority areas. Increases in these densities will further increase land values.

Together, these three factors will increase land values substantially. Increased land values can have unintended consequences harmful to low- and moderate-income people living or working in the Priority Development Areas. The benefits of increased land value accrue to the landowners or the developer--who is also the land owner and do not benefit the rest of the community. These market trends can result in displacement, which in turn can mean higher housing and transportation costs, and longer commutes for those families who area forced to move. This has the potential to impact adversely the health and well-being of low-income and working families and communities of color, and minimize any reduction in greenhouse gas emissions these policies were intended to achieve.

But, there are solutions! We can have equitable, compact development, if those who profit from public actions also provide public or community benefits.

The process of requiring community benefits from landowners whose land has increased in value due to government actions is called "Land Value Recapture" (LVR). LVR is also known as Public Benefit Zoning (PBZ), Community Benefits Strategy (CBS), or Public Benefit Bonus (PBB)[1].This approach has generated great interest in the Bay Area and, to a lesser extent, in the rest of the country in the past few years, stemming from several factors, most importantly the severe fiscal crisis of government at all levels.

With climate change, higher gasoline costs, lifestyle and population changes, we are witnessing a historic shift in how land is used near transit. Public investments in transportation are increasingly moving to non-automobile choices, and land use patterns now emphasize the creation of high-density, mixed use locations and corridors served by mass transit and pedestrian and bicycle paths. All these factors lead to higher land prices.

The Economics of Public Benefit Zoning

The economics behind Public Benefit Zoning is straightforward. The easier it is to travel to a location the more desirable that location is for development, which, in turn, makes the land more valuable as well. We should remind ourselves that it has been government investment in transportation projects, from the land grants to railroad companies in the late nineteenth century, to the Federal Highway Act of 1956 to the BART system of the 1970s that improved accessibility, and expanded economic and social opportunities in the Bay Area and the country as a whole.

When land is more desirable, both private developers and public officials generally encourage higher density development which requires a change in zoning regulations. When up-zoning—or an increase in density occurs—commercial and residential land becomes more valuable because more development can occur on the same parcel of land. Some of this increase in value can be spent on public benefits under a PBZ Program.

What are the prospects of a Public Benefits strategy in the Bay Area at this particular time? To succeed, a Public Benefits policy only works in a strong, or at least stable, real estate market. Another necessary condition is that properties have not yet been up-zoned. While land values in central locations, such as PDAs, might increase on the basis of the expectation that densities will be allowed to increase, it is at the time of plan change or up-zoning that those values are solidified.

With up-zoning, the possible revenues—due to the ability to construct additional housing units or additional square feet of office space—go up and with them the value of the land and what a developer can pay for land, assuming that the developer can receive higher sales prices and rents in such a location. A system of community benefits and affordable housing requirements will increase development costs and lower the price the developer can pay for the land. The landowner, in turn, will not be able to raise the price of the land as much as would be possible if the density were simply increased without any community benefit requirements. In the long run, the land market will adjust to the additional regulatory costs. Instead of a windfall to landowners, they get a lesser profit and the community shares some of the benefits.

Differences between Public Benefit Zoning and Other Value Capture Tools

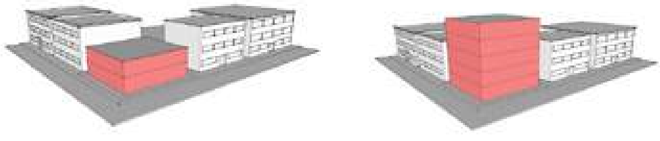
This paper focuses on Public Benefit Zoning, but there are additional mechanisms that capture development value, other than PBZ. There are at least five additional value capture mechanisms.

1) Incentive Zoning/Density Bonus
2) Housing Overlay Zoning
3) Tax Increment Financing
4) Community Benefits Agreement
5) Special Assessment Districts

Of these mechanisms, incentive zoning is the closest to PBZ, and the two are easily confused, but there are important differences. The major difference between PBZ and incentive zoning is that, generally, incentive zoning does not recapture land values but extracts community benefits from the additional density. It is reasonable to assume then, that when the incentive's value is slighter higher than the cost of the community facilities, the value of the land should not be affected. With the exception of Special Assessment Districts – that recapture some of the land value increases resulting from the building of infrastructure – and possibly incentive zoning, all the others capture value resulting from the development process, not necessarily land values.

Implementation of a Community Benefits Program

There are two implementation approaches to a Community Benefits Program: (1) Plan-based and (2) Negotiated.



1) Plan-based

With a plan-based approach, community benefits are tied to specific increases in the density of development (or land use changes) for a particular area. It is important that these benefits be established before the plan is adopted. The planning activities currently underway for the Priority Development Areas in the Bay Area represent an opportunity to adopt a plan-based Community Benefits requirement. One of the principal advantages of a plan-based approach is certainty for both the landowner/developer and the local jurisdiction.

2) Negotiated

Under a negotiated approach, land use changes and increases in density and community benefits are negotiated between the locality and the landowner/developer. These benefits are spelled out in a signed development agreement. The advantage of this approach is creativity. However, it takes more staff time and usually applies to larger developments.

For smaller tracts of land, both approaches might be too cumbersome. For these parcel sizes, a discretionary approval process that ties increased densities to a point system of benefits or a ministerial approach might be desirable.

Under any of these approaches, several steps are required. These include the following:

- How to determine the increase in land value resulting from plan changes/upzonings.
- How to determine which benefits to require, the "correct" level of benefits, and their potential impact on development financial feasibility.
- How to define options to provide benefits, such as paying fees or dedicating land.
- How to develop administrative procedures to operate a program.

Cities contemplating a Community Benefits Zoning strategy should conduct an economic feasibility study to determine how to structure zoning and development standards to allow community benefits requirements, while taking into account current and anticipated market conditions. EBHO's staff, members, and consultants can provide technical guidance when it comes to creating and implementing a Community Benefits Program.

Fox Courts: Successful outcome of affordable housing campaign: 80 affordable homes for very low-income families and people with special needs in Oakland developed by Resources for Community Development. Photos Courtesy PYATOK.

What Can Be Done When Market Conditions Make Public Benefits Zoning Unfeasible?

The value of urban land also changes based on the economic cycle. During the most recent cycle, (2008-2011) the value of real estate, particularly residential real estate, declined precipitously in some areas. Land values also declined during this period, as future development plans were put on hold. However, markets have rebounded, and development has revived in Bay Area locations located near job growth, such as Silicon Valley and San Francisco. However, not all submarkets in the San Francisco Bay Area can support higher densities due to market conditions. For those submarkets, options to consider include:

(1) A jurisdiction can wait for the real estate market to pick up before adopting this strategy.

(2) A jurisdiction can establish the community benefit levels at the time of plan changes or up-zoning, and wait for the market to improve. Then, these requirements can be phased in over an extended period of time.

Legal Aspects of Public Benefit Zoning

Under current state and federal constitutional law, if a city requires a fee or a dedication of land, it must establish through a nexus analysis that the condition's requirements (fees or land) are related and proportional to the impact of the development. If fees are required as part of PBZ, then a proportional nexus needs to be established. The community benefits gained through PBZ should be in addition to those obtained through existing Development Impact Fees, Inclusionary Zoning In-Lieu Fees, or Commercial Linkage Fees.

In most jurisdictions with Development Impact Fees, required fees are not set at the maximum that would be legally justifiable. PBZ fees, then, while "additional," can generally be set within the limits already established under the previous nexus analysis.

In the situation in which a city is already exacting Development Impact Fees that are close to the legal limits established through a nexus analysis, it would be necessary to make the case that higher density generates "additional" burdens making it necessary to require applicants to pay additional fees to mitigate projects impacts.

However, if PBZ requirements are established through development agreements, they may not require a nexus analysis.

Potential Community Benefits

There are many community benefits that can be funded through a land value recapture approach. Affordable housing is one of the most critical benefits, but others, such as public open space and public facilities, are also important.

Affordable Housing

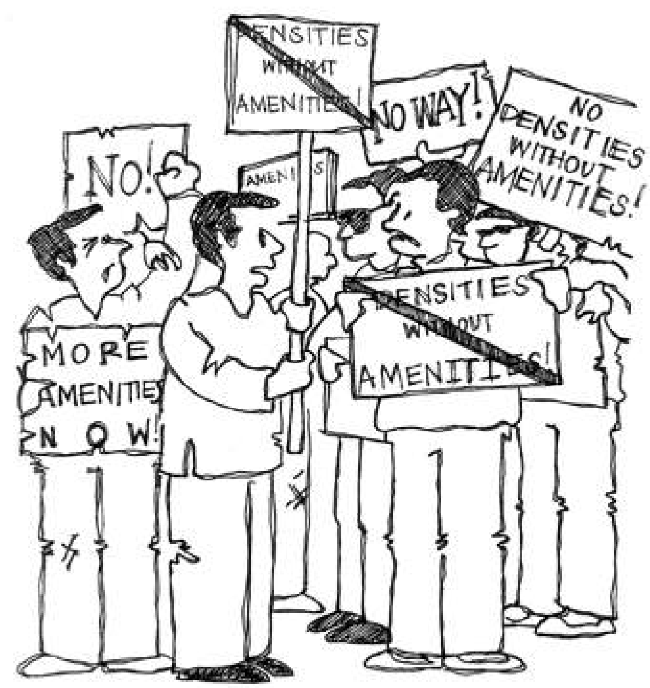
One important approach to achieve public benefit zoning is to enhance a community's existing inclusionary housing program by requiring a higher percentage of inclusionary units than under the existing system. In jurisdictions that already have inclusionary housing policies in place, this new approach could redefine inclusionary housing as a two-tiered process. The first tier would impose inclusionary housing requirements within the existing zoning framework. Thus, if a developer does not receive additional density or a land use change, the existing inclusionary housing policy will apply. The second and higher tier(s) of inclusionary housing beyond the required baseline would be associated with substantive plan changes or up-zonings of either specific parcels or larger areas. This can be accomplished without significant additional costs to the developer and be consistent with the principle of land value recapture[2].

Similarly, Commercial Linkage Fees and Housing Impact Fees could be based on a two-tiered approach. The first tier would apply to existing zoning, and the second tier would be associated with plan changes/re-zonings. Since a majority of jurisdictions with commercial linkage fees and housing impact fees have adopted fees at levels lower than justified by nexus studies, this approach may not require new nexus studies.

Additional Community Benefits

New development generates a need for new facilities. To meet that need, developers pay development impact fees that are reasonably related to the impacts created by new development. Community benefits policies represent a creative opportunity to make sure that additional development and increased densities contribute to, not detract, from the community. This becomes imperative in the case of infill and densification. "No densities without amenities" could be the cry of neighborhoods impacted by densification and infill. A community benefits system could go a long way toward providing a portion of the necessary funding to pay for neighborhood improvements that would be in addition to the public benefits obtained through existing impact fee programs.

"NO DENSITIES WITHOUT AMENITIES"



Case Studies

This report covers the experiences of four California cities that adopted a Public Benefit Zoning program. The cities with the most experience so far with LVR are San Francisco and Santa Monica. These case studies are useful since they demonstrate successful approaches in implementing PBZ policies. What follows is a brief description of the PBZ programs in those two cities.

1) San Francisco: A Tiered Program of Combined Fees and Housing Options

As part of the preparation of a plan for the Eastern Neighborhoods the City established a "Tier" approach to baseline fees and public benefit fees, to reflect the relationship between higher densities and increased value for land and development.

Baseline impact fees are paid by projects that remain at current height (referred to as Tier 1), because there is no increment in value resulting directly from governmental action.

In existing mixed-use areas, a second and third tier of impact fees are triggered for sites where the Plan grants additional heights. Specifically, Tier 2 applies to an increase of one to two stories, and Tier 3 applies when three or more stories are permitted. The fees for Tiers 2 and 3 constitute baseline fees plus additional public benefit zoning fees.

To fulfill the goal of increased affordable housing production in the Eastern Neighborhoods, the Plan also requires that in areas rezoned from industrial to mixed uses (mostly residential), more affordable housing be produced than is required under the City's inclusionary program. Within these zones, the Plan provides greater flexibility in the way affordable housing requirements can be met so that higher percentages of affordability are actually achievable. For example, if affordable units are provided on-site, a lower percentage of units need to be affordable. However, if these units are provided off-site, or if land is dedicated, or if affordable rents are targeted at middle incomes, then a higher percentage is required.

To help implement the Plan, the Eastern Neighborhoods Citizen's Advisory Committee (EN CAC) was established by the City. The EN CAC provides input to City agencies and decision makers with regard to all activities related to the implementation of the Eastern Neighborhoods Area Plans.

Tier One	Establishes the base height & FAR
Tier Two	Allows additional height & FAR when community benefits are added
Tier Three	Even more height & FAR are allowed in exchange for higher levels of community benefits

2) Santa Monica: A Flexible, Tiered Approach

Santa Monica has a long-standing tradition of achieving community benefits through development agreements, including parks and park improvements, community health access, and child care centers with subsidies for low-income families. In 2010, after many years of extensive community engagement, the City adopted the Land Use and Circulation Element (LUCE). A fundamental tenet of the LUCE program was that future development should fund a range of measurable public benefits, from open spaces and parks to affordable housing.

As part of the LUCE preparation, preliminary economic studies were undertaken that analyzed the extent of enhanced land value resulting from higher densities. These analyses indicated that projects that would provide community benefits under LUCE were able to achieve financial feasibility.

LUCE established a community benefits tier structure for projects requesting an increase in the base height of 32 feet. There are three tiers.

- Tier 1 establishes the base height and FAR. No community benefits in addition to the existing ones are required, and the approval process is ministerial. Three to seven extra feet are allowed if affordable housing is provided on-site or close to transit corridors.
- Tier 2 allows additional height and FAR when community benefits are provided.
- With Tier 3 even more height and FAR are allowed in exchange for higher levels of community benefits. It is when developers seek Tier 3 density increases that development agreements are required. This process requires additional public review and flexibility and encourages high-quality projects. Tier 3 projects are larger in scale, and development agreements provide developers with a greater degree of entitlement certainty.

Given the high costs of development agreements, the City is now pursuing a ministerial approach as part of its zoning code update. When a developer chooses to exceed densities from Tier 1 up to Tier 2, he or she will be required to provide additional community benefits. The quantity (additional fees or affordable housing units) of these community benefits will be defined in 2014 as part of the Santa Monica Zoning Update, and presumably will be based on an updated nexus analysis.

"FUNDAMENTAL RULE: DO NOT UPZONE WITHOUT TYING GREATER DENSITIES TO COMMUNITY BENEFITS INCLUDING AFFORDABLE HOUSING"

At a time when local governments search for ways to pay for needed improvements, services, and affordable housing, there is a valuable tool, Public Benefit Zoning (PBZ), available for many cities to consider. This White Paper describes this tool and provides examples of its use in cities in California. It works as follows:

When land is up-zoned or a plan updated to allow greater intensity of development, the value of the land generally increases. Most of this increase in value is the result of a public action and, for the most part, not due to actions undertaken by the landowner. When understood in this light, a strong argument can be made for the public to receive a reasonable share of the increased land value, to be used for community benefits. The technical planning term for this approach is "Land Value Recapture."

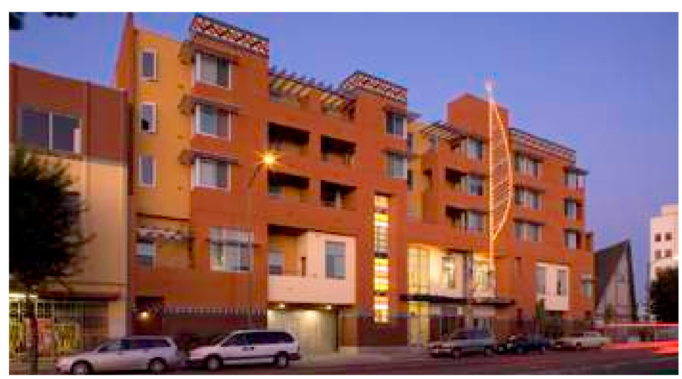
What should localities do when contemplating Public Benefit Zoning (PBZ)? In short, localities should evaluate their market strength and analyze the value of the land before and after land use/zoning changes. Then it is up to the legislative body to decide how much of the "value enhancement" to recapture with community benefits. For more specific recommendations, see page 11.

In localities where the market is weak, usually places struggling to attract development, it is very tempting to upzone properties, with the hope that they will become more attractive to developers. While that is understandable, the upzoning would eliminate any possibility for community benefits when the market turns around. Downtown and Chinatown in Oakland are examples of areas where development interest is growing, but upzonings occurred prematurely.

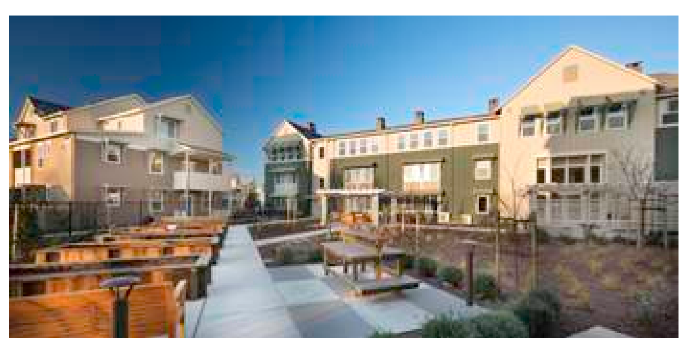
This point warrants repeating: localities—all localities—should delay rezoning until Public Benefit Zoning policies are established. In weak markets, it could be possible to establish a "trigger mechanism" that phases in Public Benefit Zoning (see page 12).

Although PBZ is not as well known in this country as other mechanisms that harness market forces to bring benefits to the public (incentive zoning, for example), it is the only one that explicitly attempts to recapture land value increases.

PBZ is based on the understanding that in large part the increases in land value are due to the growth of the region, public funded infrastructure and, more specifically, planning decisions—that is, public actions. Seen in this light it is only fair and equitable that landowners should share the benefits that the rest of us have bestowed upon them, by contributing to making the public city better. ❖



Seven Directions, Oakland, EBALDC. Photo courtesy PYATOK



Emerald Vista, Dublin. Photo Courtesy Eden Housing

Endnotes

[1]In this paper we will use these terms interchangeably

[2]By providing concessions, including increased density, an inclusionary housing mandate would be consistent with California State Law under the Palmer Decision.

[3]There have been numerous studies documenting the impact of BART on property values. For the most recent study, see the research study prepared by the Center for Neighborhood Technology.

[4]The great majority of PDAs coincide with "Communities of Concern," defined as areas of concentrations of socioeconomically disadvantaged or vulnerable populations.

[5]In this paper we will use these terms interchangeably

[6]Landis and Cervero.

[7]It is in those situations (negative residual land values) that government intervention is necessary to subsidize private developers – the situation that had applied to publicly assisted urban redevelopment.

[8]In real estate investment, rental property's value is based on net income flows (gross rents minus all operating expenses) that the property can generate over the intended holding period. The potential value is estimated by solving the following equation:

Property Value = Net Operating Income divided by a Capitalization Rate.

The capitalization rate varies by market conditions and may be estimated based on recent sales of income property.

[9]Communities of concern are defined as areas with low-income and minority populations.

[10]It should be noted that the level of community benefits desired by community members is almost always greater than the level that is financially feasible for new development.

[11]One example of a trigger used in an inclusionary housing program is an increase in annual building permits above a defined threshold. The threshold is based on historic building permit data.

[12]For example, in FY 2009-10, California redevelopment agencies reported that over $ one billion was available and unencumbered to be spent on affordable housing. These funds are no longer available on an ongoing basis.

[13]This is no longer an option for California cities.

[14]City of Santa Monica (2008), p. 3.

[15]"These fees and contributions represent baseline requirements and constitute a negotiation floor for development agreements" (City of Santa Monica. 2012. p. 14).

[16]This code applies to specific streets within the City.

[17]City of Culver City, California, City Council Agenda Item Report February 11, 2008, accessed at http://www.culvercity.org/sirepub/pubmtgframe.aspx?meetid=273&doctype=Agenda. Note that affordable housing is not mentioned as a specific benefit.

[18]This section is based on information provided by Keyser Marston at the Sustainable San Diego Workshop – Crafting the New Normal: Tools for Urban [Re] Investment, December 7, 2012 and from Culver City's revised Ordinance (Section 17.400.065 of the Zoning Code).

[19]Since the actual profit could be below or above the 15% benchmark, the actual profit percentage to be used would be negotiated between the developer and the City.

[20]The City Council rescinded the Plan, so this measure was never placed on the ballot.

[21]According to Berkeley's Planning Director, it is possible that a vote would be required to approve any changes to the Downtown Area Plan that would be inconsistent with Measure R. Since most plans are not passed through a vote of the electorate, this makes Berkeley's Downtown Area Plan somewhat unique.

Endnotes

[22]The Green Pathway development review process provides a streamlined permit process in return for requirements to mitigate air quality, noise, and shorter-term construction impacts, as well as possible disturbance of archeological resources. In addition, other benefits are required, including 20% affordable rental housing or payment of a housing fee, and employment of local construction workers. The Green Pathway option would not be considered a value capture policy, because developers do not receive higher densities, and instead benefit from streamlined review.

[23]See Policy LU-2.2: Additional Community Benefits for Buildings Exceeding 75 feet (Downtown Area Plan, page LU-13). This is also cited in the Municipal Ordinance (23E.68.090).

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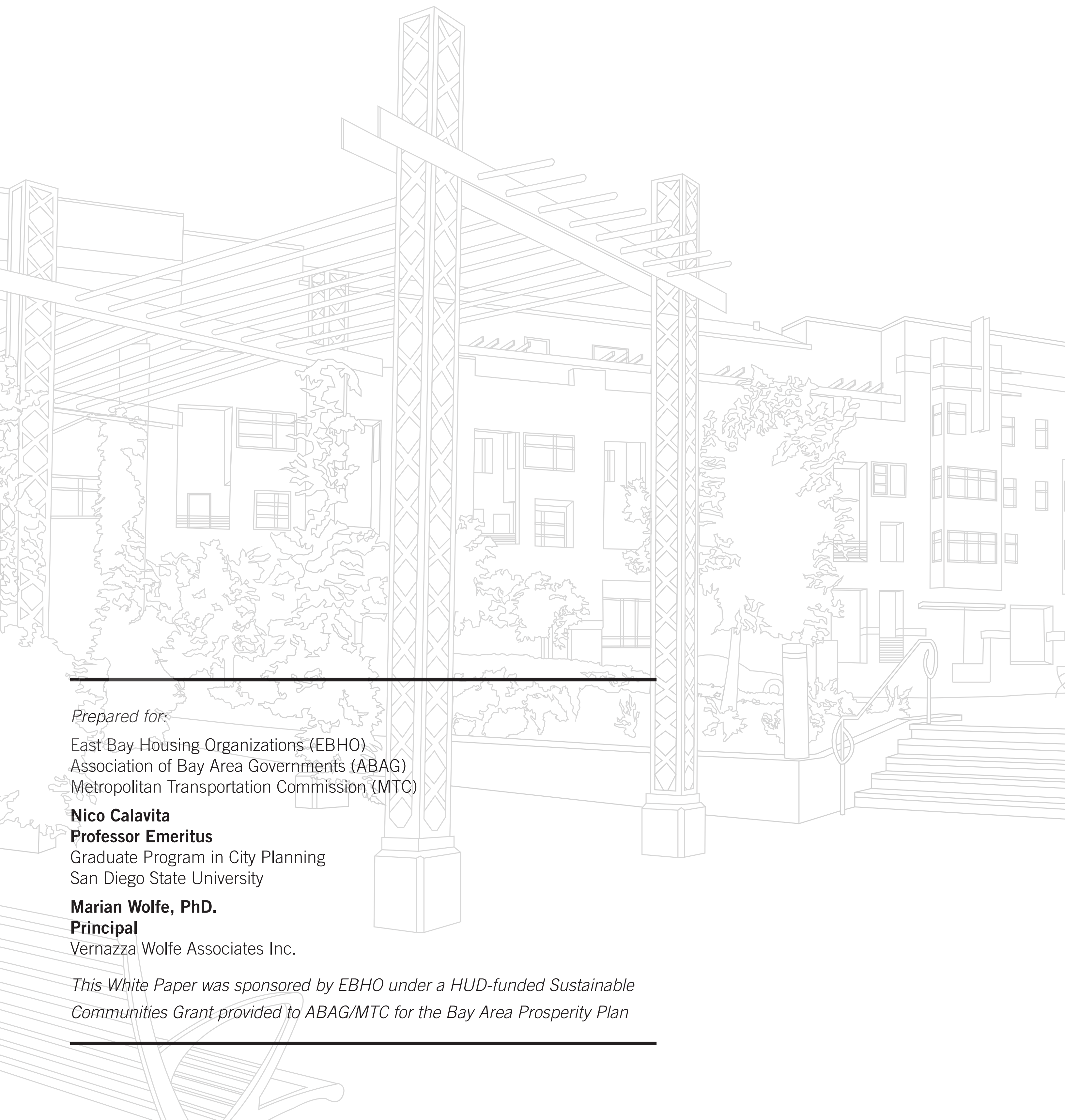

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