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VIA EMAIL and HAND DELIVERY

July 19, 2024

Katie Halloran, Planning Director
City of Key West Planning Department
1300 White Street
Key West, FL 33040
Email: Katie.Halloran@CityofKeyWest-FL.Gov

RE: Application for Text Amendment to the Land Development Regulations

Dear Katie,

Please allow this correspondence to serve as Stockrock SI LLC, owner of Sunset Marina Apartment Homes at 5555 College Road, Island-West Investment Corp., owner of the Stadium Mobile Home Park at 1213 14th St., Poinciana – Venture II LLC, owner of Poinciana Mobile Home Park at 1300 15th Ct. and Meisel Holdings FL – 1321 Simonton Street, LLC, owner of Southwinds Motel at 1321 Simonton St. (collectively, the "Applicants") Application for a text amendment (the "Application") to the City of Key West Code of Ordinances Land Development Regulations (the "LDRs"), pursuant to Section 90-519 of the LDRs.

The proposed text amendment is to Chapter 122, Article V., Division 10 of the LDRs regarding affordable/work force housing. The proposed text amendment text is attached. We are aware that the City of Key West Planning Department has proposed a text amendment to this same Division of the LDRs. In recent public hearings, the Planning Board and City Commission have given clear direction to the planning department to prepare a "nonresidential" inclusionary housing component to the LDRs. The Applicants agree with the Planning Department's proposal regarding nonresidential inclusionary housing with minor modifications, including expanding the area to satisfy inclusionary housing requirements further into the unincorporated lower keys and eliminating a sentence that could be interpreted to require all existing properties to provide affordable housing if they are redeveloped or improved more than 50% without a change in use.

However, we are not aware of any direction from the Planning Board or City Commission to make sweeping changes to the "residential" inclusionary housing requirements that have been in place since 1990. We have concerns with the revisions to the residential inclusionary housing requirements proposed by the Planning Department and propose this text amendment primarily to assist in facilitating the development of affordable housing for the City's workforce.

Below are three main justifications to adopt the text amendment proposed:

1. The inclusionary housing requirements adopted need to be legally defensible

Included with this Application are five articles, journals, and treatises that each analyze local governments' authority to impose inclusionary housing requirements and how the courts have treated inclusionary housing ordinances. After review of each of the publications, it is apparent that mandatory inclusionary housing ordinances nation-wide must be narrowly tailored to survive a challenge in court. Specifically applicable to Florida, the Florida Bar Journal publication *An Analysis of Affordable/Workforce Housing Initiatives and Their Legality in the State of Florida, Part I* states "inclusionary zoning ordinances requiring mandatory set-asides or fees in lieu thereof will be highly problematic and subject to considerable judicial scrutiny."

The Planning Department's proposal to increase the affordable housing requirement to 45% of all residential units would not survive judicial scrutiny. The U.S. Supreme Court has held that a local government imposing a condition on a development must be "roughly proportionate" to the impacts created by the proposed development, regardless of how commendable or needed the condition is. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In other words, no matter how large of a problem affordable housing in the community is generally, the local government needs to make a factual showing that the new development itself is causing the inability for people to find housing that is affordable.

It would be extremely difficult to be able to quantify how the development of market rate housing, which would increase total housing stock, would itself cause the inability for people to find affordable housing. For example, using the Planning Department's proposed ordinance, the City would have to show that a new development of 4 market rate units creating housing for 4 families of residents would itself create a need roughly proportionate to 4 affordable housing units. Not only would the proposed inclusionary housing requirement create a massive deterrent against developing any housing at all, but the proposed requirement is also not nearly proportionate to effects (if any) of the market rate housing.

The "nonresidential" inclusionary housing ordinance proposed by the Planning Department does a good job incorporating data related to land uses and their relation to the need for affordable housing. The "residential" inclusionary housing revisions proposed are not related to the need created by residential development. In fact, the connection between building housing and the need for affordable housing may not exist and is inversely related, i.e., building housing *reduces* the need for affordable housing. For these reasons, we do not believe there is justification to increase the inclusionary housing requirement for residential development from 30% to 45%.

Even the existing 30% affordable requirement is unprecedented. The largest mandatory inclusionary housing requirement for residential development that survived a challenge was 15% and the ordinance was only applicable to developments of 50 or more units. 63 Planning & Environmental Law No. 10, p. 3, discussing *Florida Home Builders Association, Inc. v. City of Tallahassee.*

2. Incentivizing development of affordable housing is more effective and defensible than mandatory requirements

Florida's Live Local Act, as reinforced by 2024 Senate Bill 328, provides significant State-wide land use and zoning regulations that supersede local ordinances and provide affordable housing incentives. State legislators and the authors of the publications provided with this Application have recognized that regulations that incentivize affordable housing by altering other applicable land use regulations leads to the development of more housing than mandatory inclusionary housing requirements. Incentive-based regulations have also been found to legally defensible in every instance.

Additional development incentives in the City's LDRs would similarly facilitate the development of more deed-restricted affordable housing units in the City. The text amendment proposed sets out development incentives codifying parts of Florida's Live Local Act to encourage the development of more affordable housing and provide clarity to developers.

3. The City's affordable housing ordinances should be consistent with State statutes, HUD, and Florida Housing Finance Corp. to facilitate the development of affordable housing.

Inclusionary housing ordinances nationwide have not been proven to be particularly effective in making significant changes to the affordable housing stock of any community according to the well-researched publications included with this Application. Conversely, various government-subsidized housing programs have been proven to be successful in making noticeable increases in affordable housing stock of a community. Therefore, a goal of the LDRs should be to help facilitate subsidized projects of all affordable housing or mostly all affordable housing.

There are currently discrepancies between the definitions of terms in the LDRs and the definitions of the same terms in State statutes, U.S. Department of Housing and Urban Development regulations and Florida Hosing Finance Corp. requirements. Complying with State statutes and HUD regulations is an essential requirement for receiving government-subsidized funding for housing projects. The discrepancies with the LDRs have created issues with funding

housing projects in the City before. During the approval of the Lofts at Bahama Village project, the City Commission had to approve affordable housing regulations contrary to the provisions of the LDRs to create compliance with funding standards. The text amendment proposed will create some consistencies with the other regulations.

4. Conclusion

The nonresidential provisions were requested by the City Commission and the stakeholder Applicant's support these sections with the modifications proposed.

The residential amendments were not requested by the City Commission, do not have any rational relation to the demand for affordable housing created by market rate housing regardless of the general need for affordable housing, and do not match universally accepted definitions for affordable housing and rental rates of State and Federal Agencies. Applicants have proposed amendments that will lead to Applicant's developing significant amounts of affordable housing by incentivizing such development.

Applicants recommend approving the non-residential with modifications and postponing for further discussion the residential amendments.

Sincerely,

Barton W. Smith

BWS/AJD/bg

Enclosures

Text amendment to the City of Key West Code of Ordinance Land Development Regulations. Additions are underlined and deletions are ~~struck trough~~.

DIVISION 10. WORK FORCE HOUSING[1]

Sec. 122-1465. Intent.

It is the intent of this division to create affordable housing categories to facilitate the development and redevelopment of housing designed and priced to meet the needs of people employed by the local economy in a manner that reflects the percentage of the workforce at each income level and mixes people of all incomes together and does not create high and low-income enclaves.

(Ord. No. 05-27, § 2, 10-18-2005; Ord. No. 19-11, § 2, 5-7-2019)

Sec. 122-1466. Definitions.

The following words, terms, and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Adjusted gross income means all wages, assets, regular cash or noncash contributions or gifts from persons outside the household, and such other resources and benefits as may be determined to be income by the United States Department of Housing and Urban Development, adjusted for family size, less deductions allowable under s. 62 of the Internal Revenue Code.

Adjusted for family size means adjusted in a manner which results in an income eligibility level which is lower for households with fewer than four people, or higher for households with more than four people, than the base income eligibility determined as provided in subsection (2), subsection (3), subsection (4), subsection (5), subsection (6), subsection (7), based upon a formula as established by the United States Department of Housing and Urban Development.

Affordable housing shall be defined as provided in the following classifications:

~~(1) "Adjusted for family size" means adjusted in a manner which results in an income eligibility level which is lower for households with fewer than four people, or higher for households with more than four people, than the base income eligibility determined as provided in subsection (4), subsection (5), subsection (6), subsection (7), subsection (8), subsection (9), based upon a formula as established by the United States Department of Housing and Urban Development.~~

~~[1]Editor's note(s)—Section 1 of Ord. No. 05-27, adopted Oct. 18, 2005, amended the title of Div. 10, Affordable Housing to read as herein set out.~~

~~Cross reference(s)—Fair housing, § 38-26 et seq.~~

~~(2) "Adjusted gross income" means all wages, assets, regular cash or noncash contributions or gifts from persons outside the household, and such other resources and benefits as may be determined to be income by the United States Department of Housing and Urban Development, adjusted for family size, less deductions allowable under s. 62 of the Internal Revenue Code.~~

(1~~3~~) "Affordable" means that monthly rents or monthly mortgage payments including taxes, insurance, and utilities do not exceed 30 percent of that amount which represents the percentage of the median adjusted gross annual income for the households as indicated in subsection (2~~4~~), subsection (3~~5~~), subsection (4~~6~~), subsection (5~~7~~), subsection (6~~8~~), subsection (7~~9~~).

(2~~4~~) "Extremely-low-income persons" means one or more natural persons or a family whose total annual household income does not exceed 30 percent of the median annual adjusted gross income within Monroe County.

(3~~5~~) "Low-income persons" means one or more natural persons or a family, the total annual adjusted gross household income of which does not exceed 80 percent of the median annual adjusted gross income for households Monroe county.

(4~~6~~) "Median-income persons" means one or more natural persons or a family, the total annual adjusted gross household income of which does not exceed 100 percent of the median annual adjusted gross income for households within Monroe County.

(5~~7~~) "Middle income persons" means one or more natural persons or a family, the total annual adjusted gross household income of which does not exceed 140 percent of the median annual adjusted gross income for households within Monroe County.

(6~~8~~) "Moderate-income persons" means one or more natural persons or a family, the total annual adjusted gross household income of which is less than 120 percent of the median annual adjusted gross income for households within Monroe county.

(7~~9~~) "Very-low-income persons" means one or more natural persons or a family, not including students, the total annual adjusted gross household income of which does not exceed 50 percent of the median annual adjusted gross income for households within Monroe county.

~~*Affordable housing (very low income) for a rental dwelling unit* shall mean a dwelling unit whose monthly rent, not including utilities, does not exceed 25 percent of that amount which represents 60 percent of the monthly median household income (adjusted for family size). For an owner-occupied dwelling unit, affordable housing (very low income) shall mean a dwelling unit whose sales price shall not exceed one and one-half times the annual median household income (adjusted for family size) for Monroe County, in accordance with section 122-1472.~~

~~*Affordable housing (low income) for a rental dwelling unit* shall mean a dwelling unit whose monthly rent, not including utilities, does not exceed 25 percent of that amount which represents 80 percent of the monthly median household income (adjusted for family size). For an owner-occupied dwelling unit, affordable housing (low income) shall mean a dwelling unit whose sales price shall not exceed two and one-half times the annual median household income (adjusted for family size) for Monroe County, in accordance with section 122-1472.~~

~~*Affordable housing (median income) for a rental dwelling unit* shall mean a dwelling unit whose monthly rent, not including utilities, does not exceed 25 percent of that amount which represents 100 percent of the monthly median household income (adjusted for family size) for Monroe County. For an owner-occupied dwelling unit, affordable housing (median income) shall mean a dwelling unit whose sales price shall not exceed three and one-half times the annual median household income (adjusted for family size) for Monroe County, in accordance with~~

~~section 122-1472. The definition of "affordable housing (median income)" applies to and encompasses all affordable housing under construction or built pursuant to this ordinance prior to July 1, 2005, for which deed restrictions are required.~~

~~*Affordable housing (middle income) for a rental dwelling unit* shall mean a dwelling unit whose monthly rent, not including utilities, does not exceed 25 percent of that amount which represents 140 percent of the monthly median household income (adjusted for family size) for Monroe County. For an owner-occupied dwelling unit, affordable housing (middle income) shall mean a dwelling unit whose sales price shall not exceed six and one-half times the annual median household income (adjusted for family size) for Monroe County, in accordance with section 122-1472.~~

~~*Affordable housing (moderate income) for a rental dwelling unit* shall mean a dwelling unit whose monthly rent, not including utilities, does not exceed 25 percent of that amount which represents 120 percent of the monthly median household income (adjusted for family size) for Monroe County. For an owner-occupied dwelling unit, affordable housing (moderate income) shall mean a dwelling unit whose sales price shall not exceed five times the annual median household income (adjusted for family size) for Monroe County, in accordance with section 122-1472.~~

Affordable work force housing shall include extremely low income, very low income, low income, median income, moderate income, and middle income housing.

~~*Affordable work force housing trust fund* shall mean the trust fund established and maintained by the city for revenues from fees in lieu of constructing affordable work force housing, and revenues from any other source earmarked for the trust fund by land development regulation, ordinance or donation.~~

~~*Annual Household Income* means all amounts, monetary or not, which are received by any family member of the household, except income from employment of children (including foster children) under the age of 18 years. Family shall include the traditional family, (married or not) as well as domestic partnerships.~~

~~*Development or redevelopment*, for purposes of this section, shall mean any development or redevelopment that increases the size of a unit(s), the number of units, or the need for additional affordable workforce housing as evidenced by additional services or intensity.~~

Median annual adjusted gross income ~~*Median household income*~~ shall mean the median household income published for Monroe County on an annual basis by the U.S. Department of Housing and Urban Development.

(Ord. No. 98-18, § 1, 6-3-1998; Ord. No. 02-08, § 1, 2-20-2002; Ord. No. 05-27, § 3, 10-18-2005; Ord. No. 17-09, § 1, 8-16-2017; Ord. No. 18-13, § 2, 7-3-2018; Ord. No. 19-11, § 2, 5-7-2019; Ord. No. 21-09, § 1, 3-2-2021)

Cross reference(s)—Definitions generally, § 1-2.

Sec. 122-1467. Requirements of affordable work force housing.

(1) ~~(1)~~ (a) *Affordable Housing units.*

1. At least ten percent of all new units in developments of more than ten units shall be ~~developed or redeveloped each year shall be~~affordable housing units designated for "~~-~~low~~-~~income persons" ~~affordable housing~~ of at least 400 square feet each, as defined herein, and at least twenty percent of all new units in developments of at least three units shall be affordable housing units designated for "median-income persons" of at least 400 square feet each~~-20 percent shall be affordable housing (median income) housing of at least 400 square feet each~~, as defined herein.

2. New r~~R~~esidential or mixed use projects of at least three residential units and less than ten residential ~~or mixed use~~ units shall be required to develop ~~or redevelop~~ at least 30 percent of units of at least 400 square feet each as affordable housing units designated for ~~(~~"median~~-~~income persons"~~)~~, as defined herein.

3. Redevelopment projects increasing the number of units at the development shall be required to develop at least 30 percent of increased number of units as affordable housing units designated for "median-income persons" of at least 400 square feet each, as defined herein-. Redevelopment projects increasing the square footage of transient units shall comply with Section 122-1474.

4. The 30 percent affordability requirement shall be determined on a project by project basis and not on a city-wide basis.

5. Notwithstanding subsections (1)(a)1.-3. above, a developer but may contribute a fee in lieu for each affordable housing unit required to the affordable work force housing trust fund, if approved by the city commission. The per unit fee shall be $200400,000.00 (representing construction cost, less land cost, of a 400 square foot unit).

6. The 30 percent affordability requirement shall be determined on a project by project basis and not on a city-wide basis.

1.7. Vested units shall be subject to this subsection if not otherwise governed by law or agreement. For every required affordable housing unit designated for "(median- income persons") unit, a developer may increase the sales or rental rates to an affordable housing unit designated for "middle-income persons (middle income)" so long as another unit's sales or rental rate is decreased to an affordable housing unit designated for "low-income persons." (low income).

(b) *Linkage of projects.* Two development or redevelopment projects may link to allow the affordable housing requirement of one development or redevelopment project to be built at the site of another project, so long as the affordable housing requirement of the latter development or redevelopment is fulfilled as well. Written proof of the project linkage shall be supplied by the developer to the city commission at the time of the first site plan approval. The project containing the affordable units must be built or rebuilt either before or simultaneously with the project without, or with fewer than, the required affordable units. In addition, if a developer builds or rebuilds more than the required number of affordable units at a development site, this development or redevelopment project may be linked with a subsequent development or redevelopment project to allow compliance with the subsequent development's affordable unit requirement. Written proof of the linkage must be supplied by the developer to the city commission at the time of the subsequent development's site plan approval. Linkage shall not be available if either development is entirely or in part to be constructed by public funds. Finally, all linkages under this subsection may occur within the city or on a site within the city and on a site on Stock Island in the the unincorporated part of the county west of Big Pine Key.

(c) *Affordable work force housing.* The maximum total rental and/or sales price for all affordable work force housing units in a single development shall be based on each unit being affordable housing (moderate income). The rental and/or sales price may be mixed among affordable housing (low income), (median income), (middle income) and (moderate income) in order that the total value of rental and/or sales does not exceed ten percent of the rental and/or sales of all the units at affordable housing (moderate income).

(d) *Demonstration of continuing affordability.* Demonstration of continuing affordability shall be by deed restriction or any other mutually acceptable method that effectively runs with the land and is binding on owners, successors in ownership, or assigns. The deed restriction shall be in a form provided by the city and shall be for a period of at least 5099 years. It shall be recorded in the county records. During the final year of the deed restriction, the city commission may act by Resolution to renew the affordability restriction for an additional 50-year term.

(e) *Reporting requirements.* Owners of affordable work force housing projects or units shall furnish the city manager or theirhis designee with annual information necessary to ensure continued compliance with affordability criteria, beginning one year after the date of building permit issuance and on each anniversary date thereafter. Reporting requirements shall include sworn tenant household verification

information. Property owners subject to this subsection may contract with the Key West Housing Authority to perform annual tenant eligibility verification.

(f) *Compliance with antidiscrimination policy.* All property owners offering housing under this division shall comply with the antidiscrimination policy of article II of chapter 38.

(2) *Exemptions and waivers.*

(a) The following uses shall be exempt from the inclusionary housing requirements set forth in subsection (1)(a) of this section: affordable workforce housing, nursing homes, or assisted care living facilities.

(b) The city commission may reduce, adjust, or waive the requirements set forth in this subsection where, based on specific findings of fact, the commission concludes, with respect to any developer or property owner, that:

1. Strict application of the requirements would produce a result inconsistent with the comprehensive plan or the purpose and intent of this subsection;

2. Due to the nature of the proposed development, the development furthers comprehensive plan policies and the purpose and intent of this subsection through means other than strict compliance with the requirements set forth herein;

3. The developer or property owner demonstrates an absence of any reasonable relationship between the impact of the proposed development and requirements of this subsection (b); or

4. The strict application with the requirements set forth herein would improperly deprive or deny the developer or property owner of constitutional or statutory rights.

(c) Any developer or property owner who believes that he may be eligible for relief from the strict application of this section may petition the city commission for relief under this subsection (b)(3) of this section. Any petitioner for relief hereunder shall provide evidentiary and legal justification for any reduction, adjustment, or waiver of any requirements under this section.

(3) *Sales Price of Owner-occupied affordable housing units.*

(a) Owner-occupied affordable housing units designated for "median-income persons" shall have a maximum sales price of 3.75 times the annual median household income (adjusted for family size) for Monroe County, in accordance with section 122-1472.

(b) Owner-occupied affordable housing units designated for "moderate-income persons" shall have a maximum sales price of 4 times the annual median household income (adjusted for family size) for Monroe County, in accordance with section 122-1472.

(c) Owner-occupied affordable housing units designated for "middle-income persons" shall have a maximum sales price of 4.5 times the annual median household income (adjusted for family size) for Monroe County, in accordance with section 122-1472.

(Ord. No. 98-18, § 1, 6-3-1998; Ord. No. 02-08, § 1, 2-20-2002; Ord. No. 05-27, § 4, 10-18-2005; Ord. No. 19-11, § 2, 5-7-2019)

Editor's note(s)—Ord. No. 19-11, § 2, adopted May 7, 2019, amended § 122-1467 and in doing so changed the title of said section from "Requirements of affordable work force housing; ratio of new construction" to "Requirements of affordable work force housing," as set out herein.

Sec. 122-1468. Affordable work force housing trust fund.

(a) The affordable work force housing trust fund (referred to as the "trust fund") is established. The trust fund shall be maintained with funds earmarked for the trust fund for the purpose of promoting affordable work

force housing in the city and its immediate environs. Monies received by the trust fund shall not be commingled with general operating funds of the city. The trust fund shall be in a separate dedicated fund used only for the following:

(1) Financial aid to developers as project grants for affordable housing (low income) to (moderate income) construction;

(2) Financial aid to eligible homebuyers of affordable housing (low income) to (moderate income) as mortgage assistance;

(3) Financial incentive for the conversion of transient units to affordable housing (low income) to (moderate income) residential units;

(4) Direct investment in or leverage to housing affordability through site acquisition, housing development and housing conservation; or

(5) Other affordable work force housing purposes from time to time established by resolution of the city commission.

(b) Except as provided in section 122-1471, the city commission shall determine all expenditures from the trust fund upon the advice of the city manager.

(Ord. No. 98-18, § 1, 6-3-1998; Ord. No. 02-08, § 1, 2-20-2002; Ord. No. 05-27, § 5, 10-18-2005)

Sec. 122-1469. Applicant eligibility requirements.

The following eligibility requirements shall be required of households or persons to qualify for affordable work force housing units to the extent lawful:

(1) The household or person shall derive at least 70 percent of its or his/her total income from gainful employment in the county. This section shall not disqualify an individual previously and continuously qualified who reaches the age of retirement, or becomes disabled, and is otherwise income qualified.

(2) At the time of sale or lease of an affordable housing (extremely low income) unit, the total income of eligible household or persons shall not exceed 30 percent of the median household income for the county (adjusted for family size).

(3) During occupancy of any affordable housing (extremely low income) rental unit, a household's income may increase to an amount not to exceed 70 percent of the median household income for the county (adjusted for family size). In such event, the tenant's occupancy shall terminate at the end of the existing lease term.

(4) At the time of sale or lease of an affordable housing (very low income) unit, the total income of eligible household or persons shall not exceed 50 percent of the median household income for the county (adjusted for family size).

(5) During occupancy of any affordable housing (very low income) rental unit, a household's income may increase to an amount not to exceed 90 percent of the median household income for the county (adjusted for family size). In such event, the tenant's occupancy shall terminate at the end of the existing lease term.

(6) At the time of sale or lease of an affordable housing (low income) unit, the total income of eligible household or persons shall not exceed 80 percent of the median household income for the county (adjusted for family size).

(73) During occupancy of any ~~an~~ affordable housing (low income) rental unit, a household's income may increase to an amount not to exceed 120 percent of the median household income for the county

(adjusted for family size). In such event, the tenant's occupancy shall terminate at the end of the existing lease term.

(84) At the time of sale or lease of an affordable housing (median income) unit, the total income of eligible households or persons shall not exceed 100 percent of the median household income for the county (adjusted for family size).

(95) During occupancy of any affordable housing (median income) rental unit, a household's annual income may increase to an amount not to exceed 140 percent of median household income for the county (adjusted for family size). In such event, the tenant's occupancy shall terminate at the end of the existing lease term.

(106) At the time of sale or lease of an affordable housing (moderate income) unit, the total income of eligible households or persons shall not exceed 120 percent of the median household income for the county (adjusted for family size).

(117) During occupancy of any affordable housing (moderate income) rental unit, a household's annual income may increase to an amount not to exceed 160 percent of median household income for the county (adjusted for family size). In such event, the tenant's occupancy shall terminate at the end of the existing lease term.

(12(8) At the time of sale or lease of an affordable housing (middle income) unit, the total income of eligible households or persons shall not exceed 140 percent of the median household income for the county (adjusted for family size).

(139) During occupancy of any affordable housing (middle income) rental unit, a household's annual income may increase to an amount not to exceed 180 percent of median household income for the county (adjusted for family size). In such event, the tenant's occupancy shall terminate at the end of the existing lease term.

(140) Eligibility is based on proof of legal residence in the county as demonstrated by a valid State of Florida driver license or identification card, voter registration card if eligible, and an employer verification form signed by the employer or sufficient evidence, satisfactory to the City or its designee, demonstrating income qualification through self-employment.

(151) Priority shall be given to families of four or more members for larger sized affordable work force housing units.

(162) The applicant shall execute a sworn affidavit stating the applicant's intention to occupy the dwelling unit.

(173) The income of eligible households shall be determined by counting the full amount, before any payroll deductions, of wages, salaries, overtime pay, commissions, fees, tips, bonuses, Social Security, annuities, insurance policies, retirement funds, pensions, disability or death benefits, unemployment compensation, disability compensation, worker's compensation, severance pay and any net income from the operation of a business or profession of all household members. Expenditures for business expansion or amortization of capital indebtedness shall not be used as deductions in determining net income from operation of a business or profession. Unrelated adults may be qualified individually for rental purposes provided the total lease payment to the Owner does not exceed the rent limits established by the City.

(184) In the event that a tenant's income shall exceed the maximum allowable income under this section, and such shall occur for the first time during the last three months of a tenancy, then the landlord and tenant may extend a lease for a period of one year at the affordable rental rate.

(195) The planning board may review a household's income and unique circumstances to determine eligibility and conformance with the intent of this ordinance to assure that people in need are not excluded and people without need are not included.

(Ord. No. 98-18, § 1, 6-3-1998; Ord. No. 02-08, § 1, 2-20-2002; Ord. No. 05-27, § 6, 10-18-2005; Ord. No. 08-04, § 29, 5-20-2008; Ord. No. 17-09, § 2, 8-16-2017)

Sec. 122-1470. Accessory unit infill.

(a) In all mixed use zoning districts of the city, the city shall encourage the addition of affordable work force housing on the same site as commercial properties and institutions to promote employee housing. Such development shall be known as accessory unit infill. Tenants shall be eligible persons under section 122-1469. Applicants under this section may provide two bicycle or scooter parking spaces per unit as an alternative to applying to the planning board for parking variances. Provided that units of 600 square feet or less are treated as an 0.78 equivalent unit and all units provided must be made available through the city's building permit allocation system.

(b) The maximum total rental and/or sales price for accessory unit infill in a single development or redevelopment shall be based on each unit being affordable housing (moderate income). The rental and/or sales price may be mixed among affordable housing (low income), (median income), (middle income) and (moderate income) in order that the total value in rental and/or sales does not exceed ten percent of the rental and/or sales of all the units at affordable housing (moderate income).

(Ord. No. 98-18, § 1, 6-3-1998; Ord. No. 02-08, § 1, 2-20-2002; Ord. No. 05-27, § 9, 10-18-2005; Ord. No. 08-04, § 30, 5-20-2008; Ord. No. 13-19, § 3, 11-6-2013; Ord. No. 19-11, § 2, 5-7-2019)

Sec. 122-1471. Community housing development organization.

The city commission may promote the establishment of a nonprofit community housing development organization (CHDO), pursuant to federal regulations governing such organizations, to serve as developer of affordable workforce housing units on city-owned property located in both the city and in the community redevelopment areas, including excessed U.S. Navy property, or located in Key Haven and Stock Island in the unincorporated part of the county, upon interlocal agreement. In such event, the city may delegate to the community housing development organization all or partial administration of the affordable housing trust fund.

(Ord. No. 98-18, § 1, 6-3-1998; Ord. No. 02-08, § 1, 2-20-2002; Ord. No. 05-27, § 10, 10-18-2005)

Sec. 122-1472. Family size.

When establishing a rental or sales amount, one shall assume family size as indicated in the table below. This section shall not be used to establish the maximum number of individuals who actually live in the unit.

Size of Unit	Assumed Family Size	Minimum Occupancy
Efficiency (no separate bedroom)	1	1
One bedroom	2	1
Two bedroom	3	2
Three bedroom	4	3
Four or more bedrooms	5	1 per bedroom

(Ord. No. 02-08, § 1, 2-20-2002; Ord. No. 05-27, § 11, 10-18-2005)

Sec. 122-1473. Affordable workforce liveaboard vessels.

Notwithstanding the permitted and conditional uses of Chap. 122. Art. IV. Land Use Districts, liveaboard vessels within duly permitted marinas/docking facilities subject to the provisions of the affordable workforce housing requirements of sections 122-1465, 122-1466, 122-1467, and 122-1469 may be allowed as a conditional use. Schedule of off-street parking requirements by use generally per Sec. 108-572(6) Marinas and offshore activities is 1 space per liveaboard boat. Any owner or his authorized agent may submit an application for a variance to off-street parking requirements, upon which the planning board shall hold a public meeting in accordance with the procedures cited in section 90-393.

(Ord. No. 18-26, § 1, 10-16-2018)

Secs. 122-1474. Live Local Act Implementation.

Notwithstanding any other chapter of the Land Development Regulations and in conformity with the State of Florida's Live Local Act, any existing or new developments or redevelopments that provide a minimum of 65% of the total density and intensity as affordable housing shall be entitled to the following applicable density, height, setbacks, parking, landscaping and other development standard requirements for development or redevelopment within the City:

(1) Density. Density for affordable housing in any multifamily district that permits more than two units per acre or lot shall be forty (40) units per acre.

(2) Height. Height shall not include mechanical equipment including elevator shafts or roof lines or parapets utilized to hide mechanical equipment and elevator shafts.

Setbacks.

(3) All setbacks may be reduced to the greatest extent practicable to develop the maximum number of dwelling units.

(4) Parking.

a. In the Historic District, parking shall be one (1) parking space per two (2) dwelling units and two (2) bicycle racks per dwelling unit.

b. Outside the Historic District, parking shall be one (1) parking space per one (1) dwelling unit and two bicycle racks per dwelling unit.

(5) Landscaping.

a. Landscaping requirements shall be waived to the greatest extent practicable to develop the maximum number of dwelling units.

(6) Development standards not identified herein shall not require a hardship variance but may be waived or altered by the planning board to the greatest extent practicable.

Sec. 122-1475. -Nonresidential Inclusionary housing requirements.

(1) Purpose. Consistent with the Comprehensive Plan, the purpose of this subsection is to ensure that the need for affordable housing is not exacerbated by nonresidential and transient development, as follows:

a. Promote the health, safety, and general welfare of the citizens of the City through the implementation of the goals, objectives, and policies of the City of Key West Comprehensive Plan; and

b. To ensure that affordable housing opportunities are available throughout the entire community and to maintain a balanced and sustainable local economy and the provision of essential services; and

c. To increase the supply of housing affordable to targeted income groups within the community; and

d. To provide a range of housing opportunities for those who work in the City of Key West but may be unable to pay market rents or market housing prices in the community; and

e. To increase the percentage of the workforce living locally and to provide housing opportunities for lower income groups in order to meet the existing and anticipated housing needs of such persons and to maintain a socio-economic mix in the community; and

f. To address the affordable workforce housing needs generated by the construction and expansion of nonresidential/transient development, and the employment that occurs at the nonresidential/transient development after the construction or expansion is completed; and

g. To ensure that affordable workforce housing is provided to the local workforce by the employee generating development proportionate with the demand for affordable workforce housing the development creates; and

h. To address market demands that show that the workforce in the City of Key West continues to require moderately priced housing units, particularly those whose earnings range from 50 percent up to 120 percent of the County's median income (the target income groups); and

i. To stimulate the private sector production of affordable workforce housing and encourage the widespread distribution of affordable workforce housing opportunities throughout all portions of the community, including within new and expanding developments.

(2) Intent. Nonresidential and transient use development or redevelopment generates a direct impact on housing for the workforce.. The intent of this section is to ensure that there is an affordable supply of housing for the local workforce. This will be accomplished by requiring workforce housing be provided for all new development and redevelopment in an amount proportionate to the need for affordable workforce housing that the nonresidential and transient use development or redevelopment creates. The intent of this subsection is to permit nonresidential and transient use owners to continue to establish uses consistent with the current building and safety standards and to ensure that as development and redevelopment occurs, comprehensive plan policies regarding affordable housing are implemented. The technical support and analysis upon which the nonresidential inclusionary housing requirements are established are based upon the 'Affordable Workforce Housing Support Study for Non-Residential Development,' prepared by Clarion Associates, LLC, prepared in June 2017.

(3) Applicability. Except as provided in subsection (4) of this section, the nonresidential inclusionary housing requirements set forth below shall apply. This will be accomplished by requiring workforce housing be provided for all new development and expansions in an amount proportionate to the need for affordable workforce housing that the nonresidential and transient uses create. Expansion as used in this section means extending a use or structure to occupy a greater amount of floor area or square footage beyond that which it occupied. Determinations regarding the applicability of this subsection shall be made by the Planning Director. The applicant shall provide the necessary information to determine compliance with the nonresidential inclusionary housing requirements on the forms prescribed by the Planning Director. For purposes of calculating the number of affordable workforce housing units required by this subsection, density bonuses shall not be counted, and only fractional requirements equal to or greater than 0.5 shall be rounded up to the nearest whole number.

a. New Development. Each new development project not exempted by subsection (4), shall mitigate 50% of the workforce housing demand created by the proposed development by one or a combination of the methods identified in subsection *(5)*.

b. Redevelopment with an Expansion. Each redevelopment project not exempted by subsection (4), shall mitigate 50% of the workforce housing demand created by the proposed redevelopment by one or a combination of the methods identified in subsection (5). The workforce housing required for nonresidential development when an existing use is expanded shall be calculated based on the incremental increase in size of the existing use (net additional square footage).

c. Redevelopment with a Change in Use Increasing Housing Demand. Each redevelopment project with a change of use increasing housing demand, not exempted by subsection (4), shall mitigate 50% of the

workforce housing demand created by the proposed redevelopment by one or a combination of the methods identified in subsection (5). The workforce housing required for nonresidential development when a new use replaces an existing use and increasing housing demand *(for* example from an industrial use to an office use) shall be calculated based on the square footage proposed for conversion and/or based on the incremental increase in size of the new uses (if any).

d. Unspecified Use-. If a proposed development project does not fall within one of the specific use categories in the table within subsection (5), then the Planning Director shall determine whether the use is comparable to a use category listed and assign a category or may allow the applicant to conduct an independent calculation to determine the appropriate affordable workforce housing inclusionary requirement-. If the applicant chooses to propose an independent calculation, the following applies:

1. An independent calculation shall require a public meeting with the City Commission to determine if there is a mutually agreeable approach to the calculation prior to the application proceeding to the Development Review Committee for review. The review of the independent calculation will not be scheduled as a public hearing, but as a public meeting during which the City Commission may offer their input and direction and the public may have input on the proposed methodology and calculation.

2. The applicant shall use generally accepted principles and methods and verifiable local information and data, and other appropriate materials to support the employee generation data and housing demand calculated.

3. The City Commission may agree or disagree with the independent calculation for mitigation based on generally recognized principles and methodologies of impact analysis and the accuracy of the data, information, and assumptions used to prepare the independent calculation.

4. Each development project subject to an independent calculation and not exempted by subsection (4), shall mitigate 50% of the demand for workforce housing created by the development.

(4) Exemptions and waivers.

a. The following uses shall be exempt from the nonresidential inclusionary housing requirements set forth in subsections (f)(3) and (5) of this section:

1. Affordable housing developments: and

2. Residential developments: and

3. Nursing homes, assisted care living facilities, and retirement homes: and

4. Public facilities and public buildings and uses limited to parks, public infrastructure and utilities, and wireless communication facilities: and

5. The redevelopment, remodeling, repair, or cumulative expansion of a lawfully established nonresidential use that does not increase the area of the nonresidential use by more than 1,000 square feet of gross floor area and the use is not changed to a different use category.

b. The City Commission may reduce, adjust, or waive the requirements set forth in this subsection (f), based on specific findings of fact, where the City Commission concludes, with respect to any applicant, that:

1. Strict application of the requirements would produce a result inconsistent with the Comprehensive Plan or the purpose and intent of this subsection;

2. Due to the nature of the proposed nonresidential development, the development furthers Comprehensive Plan policies and the purpose and intent of this subsection through means other than strict compliance with the requirements set forth herein:

3. The applicant demonstrates an absence of any reasonable relationship between the impact of the proposed nonresidential development and requirements of this subsection (f);

4. The strict application with the requirements set forth herein would improperly deprive or deny the applicant of constitutional or statutory rights; or

Any applicant who believes that he/she may be eligible for relief from the strict application of this section may petition the City Commission for relief under this subsection (f)(4). Any petitioner for relief hereunder shall provide evidentiary and legal justification for any reduction, adjustment, or waiver of any requirements under this section. The petitioner shall use generally accepted principles and methods and verifiable local information and data, and other appropriate materials to support the requested relief.

(5) Compliance Requirements-. Nonresidential development or redevelopment projects shall provide affordable workforce inclusionary housing as provided in subsection *(3)* of the workforce housing demand created by the new or expanded development or redevelopment in accordance with the standards in the table below.

a. The table indicates the number of workforce housing units or in-lieu fee needed for every square foot (and per 1,000 sf) of new development or redevelopment (expanded or converted square footage) for each category of non-residential land use.

TOTAL NEED CREATED BY NONRESIDENTIAL DEVELOPMENT (for construction and post-construction employees).				
Land Use Category	Total Housing Need per 1,000 sf (units/1000sf)	Total Housing Need per sf (units/sf)	Total In-Lieu Fee per 1,000 sf (monetary fee/ 1000 sf)	Total In-Lieu Fee per sf (monetary fee/sf)
Commercial Retail (Retail stores, supermarkets, shopping centers, restaurants, etc.)	0.416	0.000416	$66,722	$66.72
Office (Professional and non-professional office buildings, etc.)	0.704	0.000704	$78,492	$78.49
Industrial (Light manufacturing, lumber yards, warehousing, storage facilities, etc.)	0.226	0.000226	$24,397	$24.39
Institutional (Religious facilities, private schools, colleges, daycares, etc.)	0.337	0.000337	$36,284	$36.28
Tourist/recreational (Theatres, auditoriums, nightclubs, tourist attractions, etc.)	0.614	0.000614	$104,691	$104.69
Hotel & Motel (Transient uses)	0.295	0.000295	$49,947	$49.94
Governmental	0.427	0.000427	$38,285	$38.28

(Governmental office buildings, public schools, etc.)				
Other (Utility, gas, and electric uses, mining, and sewage disposal facilities)	0.644	0.000644	$99,838	$99.83

Data for the mitigation requirement is from the 'Affordable Workforce Housing Support Study for Non-Residential Development,' prepared by Clarion Associates, LLC, for Monroe County in June 2017.

b. The inclusionary housing unit requirement (or required number of workforce housing dwelling units) for the nonresidential development or redevelopment shall be calculated by multiplying the per square foot requirement for the appropriate type of land use category by the proposed square footage of the nonresidential development and/or the incremental increase in size of the nonresidential use (net additional square footage) and applying the appropriate mitigation standard.

c. The inclusionary in-lieu fee requirement (or required amount of monetary fee) for the nonresidential development or redevelopment shall be calculated by multiplying the per square foot requirement for the appropriate type of land use category by the proposed square footage of the nonresidential development and/or the incremental increase in size of the nonresidential use (net additional square footage) and applying the appropriate mitigation standard.

~~d.~~ Expansions to nonresidential and transient uses shall be tracked for cumulative changes and compliance with subsection *(f)*. In phased projects, the inclusionary requirements shall be proportionally allocated among the phases. ~~If a subsequent development or redevelopment is proposed following a prior development approved on the same property, after the effective date of this ordinance, the requirements in this section shall be met as part of the subsequent development or redevelopment.~~

e. The following table provides EXAMPLE calculations of the nonresidential inclusionary requirements:

	Total Housing Need per sf (units/sf)	Total In- Lieu Fee per sf (monetary fee /sf)		100% Mitigation		**50% Mitigation**		30% Mitigation	
				Units	In-lieu fees	**Units**	**In-lieu fees**	Units	In-lieu fees
Commercial Retail (Retail stores, supermarkets, shopping centers, restaurants, etc.)	0.000416	$66.72	5,000 SF	2.08	$333,610	**1.04**	**$166,805**	0.62	$100,083.00
			10,000 SF	4.16	$667,220	**2.08**	**$333,610**	1.25	$200,166
			20,000 SF	8.32	$1,334,440	**4.16**	**$667,220**	2.50	$400,332

Office (Professional and non-professional office buildings, etc.)	0.000704	$78.49	5,000 SF	3.52	$392,460	**1.76**	**$196,230**	1.06	$117,738
			10,000 SF	7.04	$784,920	**3.52**	**$392,460**	2.11	$235,476
			20,000 SF	14.09	$1,569,840	**7.04**	**$784,920**	4.23	$470,952
Industrial (Light manufacturing, lumber yards, warehousing,storage facilities, etc.)	0.000226	$24.39	5,000 SF	1.13	$121,985	**0.56**	**$60,993**	0.34	$36,596
			10,000 SF	2.26	$243,970	**1.13**	**$121,985**	0.68	$73,191
			20,000 SF	4.51	$487,940	**2.26**	**$243,970**	1.35	$146,382
Institutional (Religious facilities, private schools, colleges, daycares, etc.)	0.000337	$36.28	5,000 SF	1.69	$181,420	**0.84**	**$90,710**	0.51	$54,426
			10,000 SF	3.37	$362,840	**1.69**	**$181,420**	1.01	$108,852
			20,000 SF	6.74	$725,680	**3.37**	**$362,840**	2.02	$217,704
Tourist/recreational (Theatres, auditoriums, nightclubs, tourist attractions, etc.)	0.000614	$104.69	5,000 SF	3.07	$523,455	**1.54**	**$261,728**	0.92	$157,037
			10,000 SF	6.14	$1,046,910	**3.07**	**$523,455**	1.84	$314,073
			20,000 SF	12.28	$2,093,820	**6.14**	**$1,046,910**	3.69	$628,146

f. All nonresidential uses not exempted by subsection (4) shall mitigate the demand for workforce housing created by the proposed development or redevelopment by one or a combination of the methods identified below.

1. The construction of workforce housing dwelling units on the site of the development project. The workforce housing dwelling units shall meet the City's affordable housing restrictions as specified herein, for a period not less than 99 years;

2. The construction of workforce housing dwelling units off-site of the development project but within a 30 mile radius of the nonresidential/transient development/ redevelopment. The workforce housing dwelling units shall meet the City's affordable housing restrictions as specified herein, for a period not less than 99 years;

3. The deed-restriction of existing dwelling units within a 30 mile radius of the nonresidential/transient development/redevelopment. The workforce housing dwelling

units meet the City's affordable housing restrictions as specified herein, for a period not less than 99 years;

4. The payment of a fee in-lieu for the inclusionary housing requirement for all or a percentage of the workforce housing units required. The in-lieu fee shall be paid prior to issuance of a building permit for the nonresidential/transient development or redevelopment. All in-lieu fees shall be deposited into the affordable housing trust fund and spent solely for the purposes allowed for that fund.

5. Credit for Employer-provided housing. Employers may offset a portion or all of their obligation under the non-residential inclusionary housing ordinance by directly providing housing opportunities to their full-time employees. Employers may receive credit for each employee housing unit that they provide directly to an employee. Each of said units shall be registered with the City of Key West in a manner prescribed by the Director of Housing and Community Development. Employers shall provide confirmation of continuing compliance with this provision annually pursuant to the direction of the Housing and Community Development Director.

g. If the workforce housing requirement results in less than one (1) affordable dwelling unit, then the applicant may choose to build one (1) affordable dwelling unit or pay the fee in-lieu amount.

(6) Applicable Standards.

a. All affordable housing units shall comply with the standards contained within Sec. 122-1467. - Residential Requirements of Affordable and Work Force Housing.

(7) Monitoring and review. The requirements of this subsection (f) shall be monitored to ensure effective and equitable application. Every two years. following the effective date of the ordinance from which this section is derived, the City Commission may request the Planning Director provide to the City Commission a report describing the impact of this subsection on the provision of affordable, workforce, and employee housing and other market or socioeconomic conditions influencing or being influenced by these requirements. Issues such as affordability thresholds, inclusionary requirements, and the impacts of these provisions on the affordable housing inventory and housing needs in the City shall be addressed, in addition to other matters deemed relevant by the director.

(8) Inclusionary Requirement Reduction for Very low and Low Income Units. Certain types of workforce housing are relatively more desirable in satisfying the affordable housing needs of the workforce. To address the market demands that show that the workforce in the City continues to require lower priced rental housing units, particularly those whose earnings are up to or below 80 percent of the County's median income, an applicant with an inclusionary requirement of five (5) or more units. which builds all the required affordable units as low-income and very low-income either on site or within 5 miles of the nonresidential or transient development project, shall have a reduced inclusionary housing requirement of 25%. The workforce housing units shall meet the City's affordable housing rental restrictions as specified Section 122-1467 for a period not less than 99 years. An applicant may not propose the payment of a fee in-lieu for any portion of the inclusionary housing requirement.

(9) **Linkage of projects.**

a. Two development or redevelopment projects may link to allow the affordable housing requirement of one development or redevelopment project to be built at the site of another project. A minimum of fifty percent (50%) of the total number of housing units proposed, including both market rate and affordable units, must be set aside as affordable units pursuant to Section 122-1467 above. Building permits for the proposed market rate units shall not be issued until all permits required in connection with the affordable, workforce, or employee housing units associated with the project have been issued. A Certificate of Occupancy for any of the proposed market rate units shall not be issued until all Certificates of Occupancy have been issued for any of

the proposed affordable, workforce, or employee housing units. In the event, a payment-in-lieu of fee is provided as an alternative to the construction of affordable, workforce, or employee housing units, said fee shall be submitted to the City prior to the issuance of any permits associated with the proposed market rate housing units.

b. Linkage shall not be available if either development is entirely or in part to be constructed by public funds. Finally, all linkages under this subsection may occur within the city or on a site within the city and on a site on Stock Island in the unincorporated part of the county.

c. All linkages must be approved via a covenant running in favor of the City, and if the linkage project lies within the jurisdiction of another municipality, also in favor of that municipality. The covenant shall be placed upon two or more projects linked, stating how the requirements for affordable housing are met for each project.. The covenant shall be approved by the City Commission and, if applicable, the participating municipality.

(10) **Affordable housing trust fund.** The affordable housing trust fund (referred to as the "trust fund") is established. The trust fund shall be maintained with funds earmarked for the purposes of furthering affordable housing initiatives in municipalities and unincorporated areas of the county. Monies received by the trust fund shall not be commingled with general operating funds of the City. The trust fund shall be in a separate dedicated fund used only for the following:

a. Financial aid to eligible homebuyers of affordable, workforce, and employee housing as mortgage assistance;

b. Financial incentive for the conversion of transient or market rate units to affordable housing, workforce, and employee residential units;

c. Direct investment in or leverage to housing affordability through site acquisition, housing development and housing conservation; or

d. Other affordable, workforce, or employee housing purposes from time to time established by resolution of the city commission.

e. The purchase of deed restrictions for the creation of employee housing units pursuant to this Chapter.

(11) **Community housing development organization.** The City Commission may establish a nonprofit Community Housing Development Organization (CHDO), pursuant to federal regulations governing such organizations, to serve as developer of affordable housing units on City-owned property, including or located in the municipalities of the county, upon interlocal agreement. In such event, the City may delegate to the community housing development organization all or partial administration of the affordable housing trust fund.

City of Key West
Planning Department

Authorization Form
(Where Owner is a Business Entity)

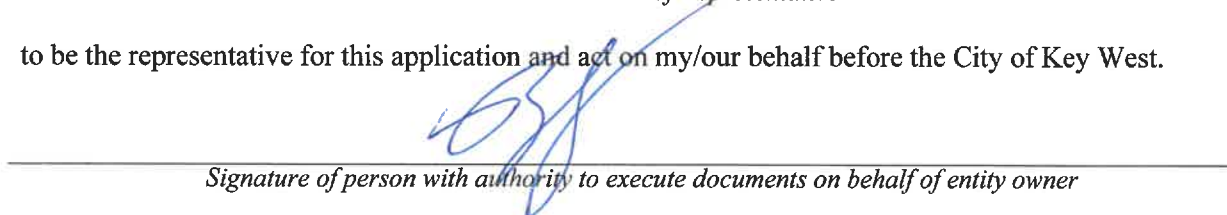
Please complete this form if someone other than the owner is representing the property owner in this matter.

I, BARTON W. SMITH as
Please Print Name of person with authority to execute documents on behalf of entity

MANAGER of STOCKROCK SI LLC
Name of office (President, Managing Member) *Name of owner from deed*

authorize SMITH HAWKS, PL
Please Print Name of Representative

to be the representative for this application and act on my/our behalf before the City of Key West.



Signature of person with authority to execute documents on behalf of entity owner

Subscribed and sworn to (or affirmed) before me, by means of physical presence on July 19, 2024
Date

by Barton W. Smith, as Manager of Stockrock SI LLC, who is personally known to me.
Name of person with authority to execute documents on behalf of entity owner

Notary's Signature and Seal

BRANDI GREEN
Name of Acknowledger typed, printed or stamped

HH 511317
Commission Number, if any

City of Key West
Planning Department
Verification Form
(Where Applicant is an entity)

I, BARTON W. SMITH, in my capacity as MANAGING PARTNER
(print name) *(print position; president, managing member)*

of SMITH HAWKS, PL
(print name of entity)

being duly sworn, depose and say that I am the Authorized Representative of the Owner (as appears on the deed), for the following property identified as the subject matter of this application:

5555 College Road, Key West, FL 33040
Street address of subject property

I, the undersigned, declare under penalty of perjury under the laws of the State of Florida that I am the Authorized Representative of the property involved in this application; that the information on all plans, drawings and sketches attached hereto and all the statements and answers contained herein are in all respects true and correct.

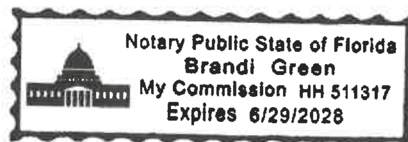
In the event the City or the Planning Department relies on any representation herein which proves to be untrue or incorrect, any action or approval based on said representation shall be subject to revocation.

Signature

Subscribed and sworn to (or affirmed) before me, by means of physical presence on July 19, 2024

By: BARTON W. SMITH, as Managing Partner of SMITH HAWKS, PL, who is personally known to me.

Notary's Signature and Seal



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HH 511317
Commission Number, if any

63 Planning & Environmental Law No. 10, p. 3

Planning & Environmental Law
October, 2011

Commentary

WORKFORCE AND AFFORDABLE HOUSING: LOCAL GOVERNMENT INCLUSIONARY HOUSING PROGRAMS AND THE COURTS[1]

David L. Callies, FAICP, Leigh Anne King, AICP, James C. Nicholas, Cecily Talbert Barclay[a1]

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The current surplus of housing should not disguise the fact that there is a chronic national affordable housing supply crisis. Aside from building public housing with decidedly mixed success, local governments have addressed the problem by means of mandatory affordable housing set-asides for new construction or the application of affordable housing fees to private developments during the land use entitlement process. However, measures meant to address the dearth of affordable housing have struggled in the courts, which have repeatedly pointed to three flaws in these programs: a lack of local authority, a lack of nexus between the proposed development and the need for affordable housing, and affordable housing requirements disproportionate to the need created by the development project.

LOCAL AUTHORITY UNDER STATE LAW

Local government's authority to impose affordable housing requirements depends on state legislative and common law. Though this is a diverse area of state law, four clear themes emerge, two governed primarily by targeted state legislation, and two by court interpretations of general enabling legislation.

A few states have taken strong legislative positions prohibiting or protecting local involvement in affordable housing. For example, Hawaii's impact fee statute, Hawaii Revised Statutes §§ 46-141 to 148, does not apply to housing linkage fees, and, indeed, expressly excludes such fees from the authority granted to Hawaii's four counties to levy impact fees for public facilities. Conversely, only a few states—mainly California, Massachusetts, and New Jersey—specifically legislate for local inclusionary housing programs, though more than half the states require or provide for some measure of affordable housing, often in the form of comprehensive planning requirements to meet regional housing needs.[2]

Most local government powers derive from state enabling legislation. In such states, the power to require mandatory housing set-asides would need to be delegated, and even some home-rule states might require such authority depending upon the theory of home rule in that particular state. The general language of the majority of state enabling statutes leaves open to debate the ability of local governments to mandate affordable housing through the zoning process.

State courts have taken different approaches in applying these enabling statutes to local affordable housing programs, with many state courts interpreting broadly worded enabling acts to permit affordable housing exactions and impact fees as part of the general zoning powers granted. By contrast, a Virginia court has ruled that Arlington County lacks the authority to include a requirement that a developer provide affordable housing as part of the land development process at the zoning stage and also lacks the authority to require an affordable housing contribution as part of the site plan approval process. In *Kansas-Lincoln, L.C. v. Arlington County Board*,[3] the court found that the requirement was outside the legislative authority granted to Arlington County by the Virginia General Assembly and was, therefore, illegal and invalid.[4] The court was persuaded that if the General Assembly wanted counties to have such powers it would have specifically included that grant of power in the act.

This decision accords with an earlier decision, again from Virginia, in *Board of Supervisors v. DeGroff Enterprises*.[5] There, Fairfax County amended its zoning ordinance to require "the developer of fifty or more dwelling units in [several] zoning districts to commit himself, before rezoning or site plan approval to build at least 15 percent of these dwelling units as low and moderate income housing. . . ."[6] The trial court found that the amendment was invalid on the grounds that the Board of Supervisors exceeded its authority under the State's zoning enabling act, the amendment was an improper delegation of legislative authority, and the amendment was arbitrary and capricious. On appeal, the Supreme Court of Virginia agreed with the trial court:

> [T]he zoning enabling act does not authorize the governing body of a county to control compensation for the use of lands or the improvements thereon . . . . The amendment . . . exceeds the authority granted by the enabling act to the local governing body because it is socio-economic zoning and attempts to control the compensation for the use of land and the improvements thereon . . . . Of greater importance, however, is that the amendment requires the developer or owner to rent or sell 15 percent of the dwelling units in the development to persons of low or moderate income at rental or sale prices not fixed by a free market . . . .[7]

Though not as often discussed as the constitutional questions surrounding exactions and impact fees, state law is the first line of inquiry for a local official crafting an affordable housing requirement, particularly given this wide range of state legislative and judicial approaches.

NEXUS

Local governments seeking to ensure construction of affordable housing by developers have also run afoul of the requirement that there be a rational nexus between the proposed development and the affordable housing requirement imposed to avoid a constitutional takings claim.

The scant precedent for imposing set-aside requirements requires that the local government do so only when providing a series of meaningful bonuses to help offset the cost of the mandatory affordable housing set-asides.[8] As noted in a standard treatise on land use, "There is some authority for the use of set-asides and other housing exactions and fees to provide needed low income housing, but whether this is a sufficient basis for nexus, let alone proportionality, to stave off a constitutional challenge, is not clear."[9] Indeed, as another treatise observes, when "provision of lower income housing is not linked to housing subsidies, zoning incentives may be necessary to absorb losses incurred by the developer on the lower-income units. Density bonuses are a possibility, and the ordinance can also relax site development requirements."[10]

As to the imposition of fees on residential and nonresidential development, local governments must demonstrate that the development generates a need for such housing, generally of the workforce variety.[11]

As one commentator recently noted in the commercial development context:

> A number of cities have adopted exaction programs that require downtown office and commercial developers to provide housing for lower-income groups or to a municipal fund for the construction of such housing. [Such] programs satisfy the nexus test only if the municipality can show that downtown development *contributes to the housing problem the linkage exaction is intended to remedy.*[12]

The Supreme Court's "essential nexus" test was introduced in *Nollan v. California Coastal Commission.*[13] The New Jersey Supreme Court described the Supreme Court's test in terms of linkage: "The broad concept of linkage describes any of a wide range of municipal regulations that condition the grant of development approval on the payment of funds to help finance services and facilities needed as a result of development."[14] Explaining the relevance of linkage in a commercial development context, the court said, "In the context of developing affordable housing, linkage refers to any scheme that requires developers to mitigate the adverse effects of non-residential development upon the shortage of housing either

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indirectly, by contributing to an affordable housing trust fund, or directly, by actually constructing affordable housing."[15]

Under *Nollan*, "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."[16] In addition, under *Nollan*, the government bears the burden of proving this nexus.[17] In the context of affordable housing fees in particular, fees satisfy this test "only if the municipality can show that downtown development contributes to the housing problem[18] the linkage exaction is intended to remedy." Thus, *Nollan*'s nexus test applies to linkage fees.

For example, in *Commercial Builders of Northern California. v. Sacramento,*[19] the Ninth Circuit considered an ordinance that imposed an affordable housing "fee in connection with the issuance of permits for nonresidential development of the type that will generate jobs."[20] Plaintiffs challenged the ordinance directly on *Nollan* grounds: lack of nexus or connection between the development and the affordable housing condition. The court upheld the ordinance under *Nollan*, reasoning that, "*Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld."[21] The court then explained that "the [o]rdinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be addressed . . ."[22]

The court related at some length what the City of Sacramento did to establish the "substantial connection between the development and the problem" of affordable housing. First, it commissioned a study of the need for low-income housing, the effect of nonresidential development on the demand for such housing, and the appropriateness of exacting fees in conjunction with such developments to pay for housing. The study:

Estimat[ed] the percentage of new workers in the developments that would qualify as low income workers and would require housing. [The study] also calculated fees for development. . . . Also as instructed, however, in the interest of erring on the side of conservatism in exacting the fees, it reduced the final calculation by about one-half. *Based upon this study*, the City of Sacramento enacted the Housing Trust Fund Ordinance [which] . . . included the finding that nonresidential development is 'a major factor in attracting new employees to the region' and that the influx of new employees 'creates a need for additional housing in the City.' Pursuant to these findings, the Ordinance imposes a fee in connection with the issuance of permits for nonresidential development of the type that will generate jobs.[23]

Consequently, the court found "that the nexus between the fee provision here at issue, designed to further the city's legitimate interest in housing, and the burdens caused by commercial development is sufficient to pass constitutional muster."[24]

Even courts that decline to apply the heightened scrutiny of *Nollan* to legislatively imposed fees nonetheless apply some form of *Nollan*'s essential nexus test. For instance, in *San Remo Hotel L.P. v. City & County of San Francisco*,[25] although the California Supreme Court reaffirmed that legislatively imposed, ministerial impact fees are not subject to the *Nollan* test, it nonetheless required that there "be a 'reasonable relationship' between the fee and the deleterious impacts for the mitigation of which the fee is collected."[26] Similarly, in *Holmdel Builders Association v. Township of Holmdel*,[27] although the Supreme Court of New Jersey concluded that legislative fees are not subject to the heightened scrutiny of *Nollan*'s "but-for," "rational nexus" test, it still required some relationship between the development and the harm caused.[28] The court essentially explained that the "relationship between the private activity that gives rise to the exaction and the public activity to which it is applied," must be "founded on [an] actual, albeit indirect and general, impact."[29]

Local governments sometimes "exact" the workforce or affordable housing set-asides or fees at a stage too early in the land use development and permitting process, thereby breaking the nexus between the approval at hand and the need for affordable housing. While certain legislative land use approvals, such as general plan amendments or rezonings, may be a necessary precedent to eventual land use and development, such early approvals rarely create the need or justification for exactions such as affordable housing. A local government imposing exactions for affordable housing at an early stage in the process, perhaps at the time of a rezone, without a specific development project and without the attendant analysis of the specific project's contribution to the need for such affordable housing, is exacting property in violation of the takings clause of the U.S. Constitution and perhaps some state constitutions.[30]

PROPORTIONALITY

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A second constitutional issue is this: Provided the regulation satisfies a nexus requirement, what reasonable percentage of affordable or workforce housing will meet the constitutional proportionality test under *Dolan v. Tigard*[31] or similar proportionality requirements? As one commentator recently noted, "An inclusionary zoning ordinance deserves . . . judicial deference . . . provided that the program addresses a lack of affordable housing *at a level proportionate to each development and it can be defended through sufficient planning by each municipality*."[32]

While the Court in *Dolan* made it clear that mathematical precision was not required, there must be some quantitative effort to define the extent of the housing burden imposed by the proposed development and the proportionate or fair share of that burden that should be borne by the developer.

In a process similar to the more familiar traffic impact study, data with respect to wages and earnings by employees at various types of developments are available and can be used to identify those potential employees that will have limited ability to participate in the housing market as it exists in the particular community. The result of such an analysis would be an estimate of the portion of anticipated employees unable to achieve market housing and the extent of that inability. Such data would be a sufficient basis for a set-aside or mitigation fee requirement that is roughly proportional to the impacts of a particular development in a specific community.

The importance of proportionality rivals nexus as an essential element of mitigation programs. Basing such programs on data and analysis tailored to the individual community is a strong basis for establishing that the *Dolan* proportionality requirement has been met while also demonstrating the nexus that is essential to *Nollan*. In states such as Virginia, explicit state authority is required for mandatory inclusion programs and neither nexus nor proportionality will compensate for lack of such authorization.

Though subsidiary issues remain open,[33] compliance with state law as well as the bedrock *Nollan* and *Dolan* opinions are relatively settled legal guideposts. Because no magic bullet for increased affordable and workforce housing has been found, communities continue to experiment with methods to both effectively increase the number of such units and remain within these relatively well-defined statutory and constitutional boundaries.

CASE STUDIES: AFFORDABLE HOUSING IN AFFLUENT AREAS

Local government concern about affordable housing is most prevalent in areas with high housing costs. These areas are commonly in resort or resort-type locales where housing is demanded by buyers who do not derive their incomes or wealth from the local economy. When the income or wealth of housing buyers is substantially different from that typical within a local market, "unaffordable" prices can be expected, and this is frequently the case in resort-like locations. Local government affordable housing programs are commonly found in California, Rocky Mountain resort areas, and Florida and are particularly alive and well in two of the nation's rapidly growing Sun Belt states: Florida and California. Most such programs provide for affordable housing in the range of 20 to 25 percent of units constructed and are either incentive-based and not mandatory in nature or are based on nexus and proportionality studies.

FLORIDA

Affordable housing has long been a cause of concern for many jurisdictions in Florida. Many of the state's resort communities, particularly those in the Florida Keys, have had to address the problems that result from the rising costs of land and homes as demand for vacation housing increased, limited supplies of land for development, and the need to provide housing to a workforce employed predominantly in lower wage tourist and service jobs. In response, several Florida communities have sought new tools to help fund and construct affordable workforce housing units.

Creating Workforce Housing in a Constrained Growth Context

In the late 1990s, the City of Key West was one of the first communities to establish a mandatory inclusionary housing

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requirement. This program requires all new residential developments in Key West to set aside 30 percent of a project's units as deed-restricted affordable housing. Developers were given alternatives to actually developing affordable housing units, including a $40,000 per affordable unit in-lieu fee; the fee has since increased to $200,000 to better represent the local cost of housing. To offset the burden placed on developers to construct or pay for these new units, Key West originally provided a density bonus that allowed developers to produce more units than allowed under the base zoning district. This incentive is no longer available. The city also enacted, and has maintained, an Accessory Infill Units program that encourages and permits by-right the development of residential units on the second stories of commercial structures.

The success of Key West's program has been directly impacted by the Monroe County Rate of Growth Ordinance, administered locally as the Building Permit Allocation System. This system sets annual allocations for the number of new residential units that can be permitted, based on hurricane evacuation requirements, and sets out growth allocations for both affordable and market-rate units. This ordinance requires that "under no circumstances will the allocations for affordable housing constitute less than 30 percent of the total unit allocations made available since 1990." Prior to the market downturn, approximately 140 units had been developed through this program. Likely due to the tenure of the program and the affordable housing requirements being tied to growth allocations, this program has been successful at developing more affordable units than any other inclusionary housing program in Florida.

Florida's Inclusionary Housing Case Law

In 2005, Tallahassee established a voluntary inclusionary housing program that included a 25 percent density bonus incentive to developers of affordable units. The City Council encouraged developers to meet the demand for affordable housing by developing units under this voluntary program with the stipulation that the program would become mandatory if no units were produced. Within a year, no affordable housing projects had been proposed, and the City Council passed a mandatory Inclusionary Housing Ordinance that applies to all new residential developments of 50 units or more. Tallahassee's mandatory affordable housing set-aside for residential developments depends upon the type of project—10 percent for owner-occupied developments and 15 percent for rental developments. Tallahassee offers an in-lieu fee mitigation option based on the median sales price of units in the development, ranging from approximately $10,000 to $25,000 per affordable unit.

Developers contested Tallahassee's mandatory requirement in 2006 in *Florida Home Builders Association, Inc. v. City of Tallahassee.*[34] In the trial court opinion issued in November 2007, the judge ruled that the inclusionary ordinance was valid "because it did not constitute a physical or regulatory taking of property without just compensation" and that it was "an exaction which is subject to the holdings of the Supreme Court in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*."[35] The Association appealed this decision, and it was dismissed as the court deemed the plaintiff to lack standing. *Florida Home Builders* stands today as precedent supporting inclusionary housing programs in Florida.

Improving Inclusionary Housing Program Flexibility

Similar to Tallahassee, Palm Beach County enacted a voluntary inclusionary housing program in 2004. When no affordable housing projects were proposed, the county created a mandatory Inclusionary Workforce Housing Program in 2006. The program is tailored to the county's regulatory context and provides multiple types of incentives and regulatory relief measures designed to offset the economic burden of the mandatory requirements. The ordinance requires specific set-asides based on whether residential projects are located in standard residential zoning districts or in Planned Unit Developments (PUDs). Because developers have more flexibility in determining the building program and development standards under PUD zoning, the county decided that more affordable units should be required. PUDs provide an opportunity for project innovation and creative design that can result in the development of more affordable units.

In 2010, Palm Beach County worked with members of the local development community to amend the original program by providing more flexible options for developing workforce housing units and increasing incentives. Under the revised program, builders must select one of three alternatives for developing units. The first option (full bonus/incentive) provides a higher percentage of required affordable units in combination with a higher density bonus option. A second option (limited

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bonus/incentive) requires a lower percentage of affordable units than the first option, with a commensurate reduction in the density bonus, and requires that half of the workforce housing units meet affordability guidelines for households earning 60 to 80 percent of the area median income and half for households earning 80 to 100 percent of that amount. The third option, intended for affordable housing developers, required all project units to be affordable to workforce-income households. The first two options permit payment of an in-lieu development fee instead of affordable housing construction, and the original fee has been reduced for rental units from $81,500 to $50,000. Originally, only 75 percent of units could be "bought out" with an in-lieu fee. Today, all units built under options one and two are eligible for buyout.

Density bonus provisions are dependent upon the zoning of the project and can permit as much as 100 percent greater density than allowed under the base zoning. Developers also can qualify for an additional density bonus through the county's transfer of development rights program. Developments that are approved for a density bonus of 30 percent or more must demonstrate that the affordable units will not be clustered and will be dispersed within a given sector of the county to ensure that socioeconomic homogeneity in neighborhoods is not a result of project design. In addition, bonus units must be located in close proximity to urban amenities such as transit, medical facilities, and employment opportunities, as well as provide access to social services. In addition to the density bonus provisions, developer incentives include relief from open space, parking, and landscaping development standards and from traffic concurrency requirements.

Developers of workforce housing units are now provided a "release of obligation process" that provides relief should an affordable unit not sell within six months of being on the market. Provided the developer can prove that the unit meets eligibility requirements, including proof that marketing requirements were met and that 80 percent or more of the project's market rate units have binding contracts, the developer can be released from the obligation of selling the unit as workforce housing, permitting them to sell it at a market price. The market sale price of that unit determines the release of obligation payment. Payment amounts are determined based on the difference between the market sale price and the workforce housing unit price. If the difference is less than $20,000, then the release of obligation payment is $10,000. If the difference is between $20,000 and $81,250, the payment is 50 percent of the difference. And if the difference is $81,250 or more, the payment is $40,750. Payments are made to the county's Workforce Housing Trust Fund to assist with home buyer assistance programs.

New Approach: Comprehensive Workforce Housing Mitigation

Islamorada (Village of Islands), located in the middle section of the Florida Keys, adopted the first comprehensive housing mitigation program in Florida in October 2007. The program is based on a nexus study that assesses the affordable and workforce housing needs of both residential and nonresidential developments. For residential development, the study demonstrates the relationship between the size of a home, in square feet of living area, being developed in Islamorada and the number of affordable workforce units demanded as a result of its development. The concept is based on employee generation—a larger home is shown to employ more low-wage earners who operate and maintain the home than a smaller home. In addition, homes that are used as vacation rentals and second homes require more employees to operate and maintain the properties than homes owned by full-time occupants. As a result, the mandatory requirement for residential developments is based on the size and tenancy of the home and is provided as both a unit that must be constructed on- or off-site, as well as alternative forms of mitigation should the developer be unable to construct the unit. If the affordable housing requirement results in less than one affordable residential dwelling unit, then the Village will accept a fee in-lieu payment. Preference is given to construction of units, but if it is deemed impracticable to construct, developers can choose to satisfy the requirements by converting market-rate units to workforce housing through deed restrictions, conveying land to the Village for the development of workforce housing, paying an in-lieu fee, or some combination of these options. The Village provides additional incentives to offset the mitigation burden by increasing the base densities for development of affordable units in most zoning jurisdictions and waiving building permit fees for affordable units.

To provide relief to developers of modestly scaled homes, units of less than 1,000 square feet are exempted from the requirement, and homes in the 1,000 to 2,000 square-foot range must mitigate based on a sliding scale. A developer of a 3,000-square-foot, full-time occupancy unit would be required to construct 0.0441 of a unit or pay an in-lieu fee of $2,885; a developer of a 3,000-square-foot second home or vacation rental unit would be required to construct 0.0513 of a unit or pay $3,205. To be eligible for the full-time occupancy mitigation rate, developers must show valid documentation that verifies that new homes will be owned by full-time occupants.

The relationship between nonresidential development and the demand it creates for affordable workforce housing was also assessed. The study shows that there is a relationship between the type of land use (i.e., office, institutional, retail, industrial, etc.) and the number of affordable workforce units needed to house lower wage employees. Because Islamorada's economy is based in the tourist industry, tourist development was further broken down into new tourist development and expansion/redevelopment of existing tourist developments. New tourist developments were shown to demand more workforce units than expansions of existing facilities, because in most cases new developments will create more new jobs than expansion of existing developments. A developer of a new tourist development would be required to construct 0.00029 of a unit or pay a mitigation fee of $25 per square foot, and a developer of an expansion/redevelopment of an existing tourist use would be required to construct 0.00019 or pay $16.45 per square foot of development.

Many other communities in Florida are considering development of comprehensive mitigation programs and have developed nexus studies to assess the extent to which new residential and nonresidential developments generate demand for new workforce housing. Because of the housing market downturn, these efforts have been put on hold and will likely be resurrected when housing markets improve. While Tallahassee has set precedent for the adoption of inclusionary housing ordinances, no such precedent has yet been set for comprehensive mitigation programs that require mandatory mitigation from residential and nonresidential developments that may include in-lieu fees. Florida communities are waiting to see if Islamorada's comprehensive program will be contested and if the program will be upheld by state courts. Because the mitigation requirements are based upon statistical studies of local housing prices, employment, and wages, and because the ordinance also provides an alternative mitigation calculation for unique developments that can demonstrate that the demand for workforce housing created by the development is less than the mitigation requirement published in the ordinance—the independent calculation for alternative mitigation—it is likely that the ordinance would be upheld by the courts in the event of a challenge.

CALIFORNIA

While several other states have had experience with inclusionary zoning and mandatory housing set-asides, California, in all likelihood, has the most comprehensive experience. "Affordable By Choice: Trends in California Inclusionary Housing Programs," a study of housing produced through inclusionary housing programs between January 1999 through June 2006 commissioned by the Non-Profit Housing Association of Northern California, the California Coalition for Rural Housing, the San Diego Housing Federation, and the Sacramento Housing Alliance, reported that nearly one-third of California jurisdictions have inclusionary programs.[36] Among the report's key findings:

• The jurisdictions producing the most inclusionary housing offer financial subsidies; the most frequent source of local funds is redevelopment funding.[37]

• Density bonuses are "the second most common incentive . . . offered by half of the top-producing jurisdictions."[38]

• Permit-related incentives, offered for deferral, reduction, or waiving of permit and impact fees, are offered in most top-producing programs.[39]

• Eighty thousand Californians have housing through inclusionary programs.[40]

• When market-rate developers work with affordable housing developers to meet their inclusionary requirement, the units are more likely to serve lower income households.[41]

California case law reflects a tendency to question the legality of mandatory set-asides without some sort of bonus, unless a nexus and proportionality are readily apparent. *Commercial Builders of Northern California v. City of Sacramento*, where the Ninth Circuit held that a City of Sacramento ordinance was constitutional under *Nollan*, is discussed above and further held that:

> We . . . agree with the City that *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill

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> question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld. Where, as here, the Ordinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be addressed, the Ordinance does not suffer from the infirmities that the Supreme Court disapproved in *Nollan*.[42]

Also in *Home Builders Association of Northern California v. City of Napa*,[43] the court upheld the City of Napa's inclusionary zoning ordinance requiring that 10 percent of all newly constructed units must be affordable, but only after the city made significant findings and provided a 700-page report studying possible affordable housing solutions, much like the City of Sacramento.[44] Moreover, the court specifically recognized that not only did the City's inclusionary zoning ordinance impose "significant burdens on those who wish to develop their property,"[45] it also provided "significant benefits to those who comply with its terms" such as "expedited processing, fee deferrals, loans or grants and density bonuses."[46] Finally, the court found dispositive in this facial challenge to the ordinance that it contained an administrative relief clause that allowed for a complete waiver of the exclusionary requirements should the developer establish that the requirements were unconstitutional or unlawful.[47]

Moreover, this decision must be read in the context of California's statutory, mandatory bonus requirements.[48] The statute provides density bonuses for *very low-income*, *low-income*, and *moderate-income* set-asides as follows: (1) a 20 percent density bonus for developments that make five percent of units affordable to *very low-income* households, with density bonus increases of two-and-a-half percent for each additional one percent increase of *very low-income units*;[49] (2) a 20 percent density bonus for developments that make 10 percent of units affordable to *low-income* households, with density bonus increases of 1.5 percent for each additional one percent increase of *low-income units*;[50] and (3) a five percent density bonus for developments that make 10 percent of units affordable to *moderate-income* households, with increases of one percent for each additional one percent increase in *moderate-income* units.[51] Under California statute, maximum density bonuses peak at 35 percent when a project provides 11 percent *very low-income* units, 20 percent *low-income* units, or 40 percent *moderate-income* units.[52]

Furthermore, in at least one subsequent interpretation of the *Napa Valley* case, a California superior court held that where a city (San Diego, in that case) fails to provide for a review of the constitutionality of a housing set-aside as a ground for waiving it, the ordinance on its face is an unconstitutional taking.[53] The court reasoned:

> [O]n its face, the ordinance does not provide for the granting of a waiver solely because of an absence of any reasonable relationship or nexus between the impact of the development and the exclusionary requirement. *The City can, therefore, impose the exclusionary requirement on a development not reasonably related to the need for that requirement. Inasmuch as [this] does not allow the City to avoid the unconstitutional application of the ordinance, the ordinance on its face results in an unconstitutional taking.*[54]

In one of the two most recent cases evaluating the legality of affordable housing requirements in California, the court concluded in *Building Industry Association of Central California v. City of Patterson*[55] that an increased in-lieu housing fee was invalid and not "reasonably justified" because the fee did not bear any reasonable relationship to the project's deleterious impact.[56] The City of Patterson had adopted a resolution in 2006 setting the affordable housing in-lieu fee at $20,946 per new single-family home based on a Fee Justification Study.[57] The fee was calculated by dividing the total cost to construct the affordable housing needed in the city (642 units at a total cost of $73.5 million) by the estimated number of dwelling units that remained to be constructed in the general plan area but had not yet obtained entitlements (3,507).[58] The court examined the city's Fee Justification Study and "located nothing that demonstrates or implies the increased fee was reasonably related to the need for affordable housing associated with the project."[59] In a footnote, the court observed that if the "214 units in the Developer's two subdivisions had been the only unentitled units" in the city, the city's fee calculation method would have yielded a per-unit fee of $343,458.[60]

Following this decision, the City of Patterson changed its fee structure to require builders to either provide 15 percent of units as affordable or pay an amount that will fully fund the development of the units. Also in response to *Patterson*, some cities are planning to revise their in-lieu fee and on-site inclusionary requirements, while others have completed nexus studies to

demonstrate there is a "reasonable relationship" between the affordable housing requirements and the "deleterious impact" of the project. Yet other cities have taken the position that their inclusionary in-lieu fees are distinguishable because of the unique fee calculation in *Patterson* and have chosen not to amend their in-lieu fees.

The second recent California case affecting affordable housing properties in California is *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*.[61] In *Palmer*, the city adopted a specific plan requiring developers to provide low-income housing units subject to monthly rent limits. Developers were required to either provide low-income housing units or pay an in-lieu fee.[62] The court reasoned that requiring a developer to provide affordable housing units at regulated rental rates (or to pay a fee in lieu of such reduced rental inclusionary units) in order to obtain project approval was "hostile or inimical" to an owner's rights under the Costa-Hawkins Act.[63] The court held that under the Act, when the owner of a residential property has not received a state or local subsidy, only the owner may establish the initial and subsequent rental rates.[64] The Act, therefore, preempted the specific plan and invalidated both the inclusionary requirement and the fee.[65] Rejecting the city's argument that the in-lieu fee should be upheld under the statute's severability clause, the court concluded the severability clause did not apply because the in-lieu fee provision was "inextricably intertwined with the invalid portion of the Plan's affordable housing requirements."[66] The court reasoned, "[s]evering the invalid in-lieu fee provision from the invalid affordable housing requirements would serve no useful purpose."[67]

The *Palmer* decision does not affect inclusionary requirements applicable to for-sale units. As is the case with *Patterson*, cities have responded to *Palmer* in various ways. Some cities have chosen not to amend their inclusionary rental requirements in anticipation that *Palmer* might be reversed or addressed by legislative action. Other cities have temporarily suspended affordable housing requirements for new rental housing developments or amended the requirements by imposing impact fees per square foot, rather than based on the amount of in-lieu fees the city would require to provide the inclusionary units itself. However, under the impact-fee approach, cities are still required by *Patterson* to demonstrate a nexus between the fees imposed and the impact of the proposed development project.

California Senate Bill 184, proposed by state senator Mark Leno in response to *Palmer*, seeks to amend the Costa-Hawkins Act to clarify that the Act does not apply to inclusionary rental housing programs. If enacted and upheld in the event of legal challenge, this bill would undo the effects of *Palmer* and would make clear that requiring inclusionary housing or fees is a permissible land use power to be exercised by cities and counties in California. The bill would authorize the legislative body of any city or county to adopt ordinances to establish, as a condition of development, inclusionary housing requirements, as specified, and would declare the intent of the Legislature in adding this provision. However, the bill was refused passage on June 2, 2011, and ordered to inactive file on request of Senator Leno on July 1, 2011.[68] Whether the California legislation will revisit reversing *Palmer* or otherwise endorsing affordable housing requirements for nonsubsidized market-rate housing projects will not be known for at least a year, and perhaps many more.

CONCLUSION

This extensive experience with affordable and workforce housing programs in Florida and California is reflected in other jurisdictions, particularly in terms of the average rate of set-asides and the prevalence of density bonuses. However, it is not clear that such programs are an effective means of actually providing affordable housing. Perhaps the most current data is contained in a survey by urban planner Douglas Porter for the Urban Land Institute entitled *Inclusionary Zoning for Affordable Housing*, published in 2004. The author notes in his introductory materials that inclusionary zoning is not a particularly productive or efficient way of approaching our national crisis in affordable housing. Thus, for example, the highly successful program in Montgomery County, Maryland, produces only about eight percent of the total yearly addition to the county's stock of affordable housing. In an oft-touted Boston program, of the 20,340 subsidized low-income housing units produced between 1990 and 1997, a mere 1,200 came from inclusionary zoning programs. The rest comes from various government-subsidized housing programs.

Additionally, inclusionary housing programs require tradeoffs. All the programs we surveyed provide some sort of bonus to developers who set aside part of their projects for affordable or workforce housing. Some examples of programs that provide bonuses: Fairfax, Virginia, 10 to 20 percent density bonuses, plus relaxed setback and yard requirements; Longmont, Colorado, up to 20 percent density bonuses; Burlington, Vermont, 15 to 25 percent density bonuses; Cambridge, Massachusetts, 15 percent density bonuses; Somerville, Massachusetts, 20 percent density bonuses; Ft. Collins, Colorado,

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negotiable density bonuses plus expedited or waived development processes; and Denver, cash payments ranging from $5,000 to $10,000 per affordable unit, plus negotiated density bonuses. Other communities are reportedly even more generous with respect to bonuses and incentives for affordable housing: Highland Park, Illinois, for example, permits one additional market-rate unit for each affordable unit constructed and waives building permit, sewer and water tap-in, and impact fees for affordable units.

The recent sharp decline in housing demand and prices has lessened but by no means eliminated the need to address affordable and workforce housing. To date, most local, affordable housing efforts have been inclusionary housing requirements imposed on newly approved developments, most commonly as a percentage of total units authorized. Some of these requirements allow for options such as an in-lieu payment, and others provide various bonuses and incentives that at least partly alleviate the economic burden imposed on the developer. Additionally, many such requirements have been imposed *ad hoc*, that is, without the passage of an ordinance. Rather, the requirements are simply written into a development order or agreement that accompanies the development approval. Evidence to date would suggest that the success of these inclusionary housing efforts has been modest.[69]

Inclusionary housing efforts are new for most jurisdictions. For many, their authority to impose such requirements on developers is not yet clear, and for most, the requirements to achieve constitutionality are unclear. The Supreme Court and many state courts have given clear guidance with respect other forms of exactions. To the extent that affordable housing requirements are subjected to the same constitutional criteria, the nexus between the need for affordable housing and the development being assessed is, as Justice Scalia described it, "essential." Moreover, the burden to provide affordable or workforce housing to be imposed on a developer must be proportional to the impact of the development on the need for affordable and workforce housing, and many communities have based their efforts on studies that establish a nexus and achieve proportionality. As communities continue to experiment with improved means of affordable housing delivery, there is a need for planners to continually survey these new efforts as new strategies are tested for effectiveness in the community and acceptance in the courts.

Footnotes

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1 This article was inspired by a panel on workforce housing at the American Planning Association's 2008 Planning Conference in Las Vegas and is authored by the panelists.

2 Douglas Porter, *Inclusionary Zoning for Affordable Housing*, (Urban Land Institute 2004) at 7-8 and 16-19.

3 66 Va. Cir. 274 (Va. Cir. Ct. 2004).

4 *Id.* at 286. "[T]here is no authority for the County Board to require site plan applicants to make affordable housing contributions to the County Housing Reserve Fund or provide affordable housing units as part of the County's site plan approval process. Moreover, the County is not authorized to require site plan applicants who seek to provide affordable housing through the density bonus program to also make a contribution to the affordable housing fund as that requirement is specifically prohibited by Va. Code § 15.2-2304."

5 198 S.E.2d 600 (Va. 1973).

6 *Id.* at 601.

7 *Id.* at 602.

8 Douglas Porter, *Inclusionary Zoning for Affordable Housing* (2004).

9 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, Vol. 7 (Bender 2007) at § 9.06.

10 DANIEL R. MANDELKER, LAND USE LAW (Lexis Law Pub 2003) at § 7.27.

11 Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir., 1991).

12 Mandelker, *supra* note 10, at § 9.23.

13 483 U.S. 825, 837 (1987).

14 Holmdel Builders Ass'n v. Holmdel, 583 A.2d 277, 284 (N.J. 1990).

15 *Id.*; accord John A. Henning Jr., *Comment Mitigating Price Effects with a Housing Linkage Fee*, 78 CALIF. L. REV. 721, 711 (1990) (linkage fees are a form of exactions that levy "fees on downtown office development to subsidize low and middle income housing") (footnote omitted); Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011, 1011 (1991) ("Housing linkage programs require or offer inducements to private developers to produce affordable housing or to pay a sum for development of affordable housing into housing trust funds."); Mandelker, *supra* note 10, at § 9.23 ("A number of cities have adopted exaction programs that require downtown office and commercial developers to provide housing for lower income groups or contribute to a municipal fund for the construction of such housing." (footnote omitted)).

16 Nollan, 483 U.S. at 836 (emphasis added).

17 Dolan, 512 U.S. 391 n.8 (citing Nollan, 483 U.S. at 836).

18 Mandelker, *supra* note 10, at § 9.23. A "housing problem," is the typical interest which the Counties of Hawaii identify as a legitimate state interest in their ordinances, see, e.g., Maui (Hawaii) County Code § 2.94.010 ("The council finds that there is a critical shortage of affordable housing in the county."); Hawaii County Code § 11-2(5) (setting forth the objective of "Requir[ing] large resort and industrial enterprises to address related affordable housing needs as a condition of rezoning approvals, based upon current economic and housing conditions."). In Ass'n of Owners v. Honolulu, 7 Haw. App. 60, 742 P.2d 974 (1987), the Intermediate Court of Appeals of Hawai'i acknowledged the legitimacy of this interest in the context of a challenge to a condominium declaration, stating that "affordable housing and public parking for downtown Honolulu were important to the welfare of the community." *Id.* at 985.

19 941 F.2d 872 (9th Cir. 1991).

20 *Id.* at 873.

21 *Id.* at 875.

22 *Id.*

23 *Id.* at 873 (emphasis added).

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[24] *Id.* at 875.

[25] 41 P.3d 87 (Cal. 2002).

[26] *Id.* at 103 (citations omitted).

[27] 583 A.2d 277 (N.J. 1990).

[28] *Id.* at 288.

[29] *Id.*

[30] DAVID L. CALLIES, ROBERT H. FREILICH, AND THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE (West 2004) at 254. "Finally, we note again that land development conditions—whether dedications, exactions, or impact fees—are development driven. Without a demonstrable and relatively immediate need for such facilities it is unconstitutional to 'charge' them. Therefore, levying such land development conditions on rezoning alone is almost certainly unconstitutional. The fees and other conditions should be levied or charged at some development permit or subdivision approval step, rather than as conditions for land reclassification."

[31] 512 U.S. 374 (1994)

[32] Brian R. Lerman, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383 (2006) at 398-399 (emphasis added).

[33] *See* Alto Eldorado Partnership v. County of Santa Fe, 634 F.3d 1170 (2011), discussing applicability of Nollan to facial invalidity claims unrelated to physical invasion takings.

[34] 2007 WL 5033524.

[35] *Id.* at 4-8.

[36] *See* NON-PROFIT HOUSING ASSOCIATION OF NORTHERN CALIFORNIA ET AL., AFFORDABLE BY CHOICE: TRENDS IN CALIFORNIA INCLUSIONARY HOUSING PROGRAMS 5 (2007), *available at* http://www.nonprofithousing.org/pdf_ attachments/IHIReport.pdf.

[37] *Id.* at 30.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 5.

[41] *Id.*

[42] 941 F.2d 872, 875 (1991).

[43] 108 Cal. Rptr. 2d 60 (Cal. Ct. App. 2001).

[44] *Id.* at 63.

[45] *Id.* at 64.

[46] *Id.*

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[47] *Id.* at 67.

[48] Cal. Gov. Code Section 65915-65918, as amended.

[49] Cal. Gov. Code Section 65915(f)(2), as amended.

[50] Cal. Gov. Code Section 65915(f)(1), as amended.

[51] Cal. Gov. Code Section 65915(f)(4), as amended.

[52] *See* Cal. Gov. Code Section 65915(f)(1), (f)(2), (f)(4), as amended.

[53] Building Industry Association of San Diego County, Inc. v. City of San Diego, (Not Reported in Cal. Rptr. 3d) 2006 WL 1666822 (Cal. Super. Ct. 2006).

[54] *Id.* at 2 (emphasis added).

[55] 171 Cal. App. 4th 886 (Cal. Ct. App. 2009).

[56] *Id.* at 898.

[57] *Id.* at 891.

[58] *Id.* at 891, 899. $73.5 million (total cost of construction) divided by 3,507 (unentitled units) equals $20,946.

[59] *Id.* at 898-99.

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[60] *Id.* at 892 n.8 ("$73.5 million/214 unit").

[61] 175 Cal. App. 4th 1396 (Cal. Ct. App. 2009).

[62] *Id.* at 1403.

[63] *Id.* at 1410.

[64] *Id.* at 1411.

[65] *Id.* at 1408-09.

[66] *Id.* at 1412.

[67] *Id.*

[68] *See* Current Bill Status, S.B. No. 184, *available at* http:// www.leginfo.ca.gov.

[69] Douglas Porter, *Inclusionary Zoning for Affordable Housing*, (Urban Land Institute 2004).

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Comment
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IN DEFENSE OF INCLUSIONARY ZONING: SUCCESSFULLY CREATING AFFORDABLE HOUSING

A CALIFORNIA COURT of appeal has decisively upheld the constitutionality of inclusionary zoning--a program that in the past twenty-five years has housed over 50,000 low- and moderate-income families[1] in new homes that they would otherwise have been unable to afford. Inclusionary zoning requires a developer of new residences to make a certain percentage of its homes available to low- and/or moderate- ***972** income households at an affordable price.[2] In Home Builders Ass'n v. City of Napa,[3] Napa's inclusionary zoning withstood a major takings[4] challenge mounted by the Home Builders Association of Northern California ("HBA") and the Pacific Legal Foundation, both leaders in the property rights movement.[5] The California Supreme Court and the United States Supreme Court have denied certiorari, and thus local governments can continue to use inclusionary zoning as an effective tool to provide affordable housing.

Inclusionary zoning ordinances are used extensively in California, New Jersey, and Montgomery County, Maryland,[6] and sporadically elsewhere.[7] They were instituted as a response to suburban zoning policies that tended to exclude low-income residents ("exclusionary ***973** zoning"),[8] to severe shortages of affordable housing combined with a reduction of federal housing subsidies,[9] and to legal pressures in California and New Jersey.[10] Policymakers and citizens in areas as diverse as Brookline, Massachusetts,[11] Chicago, Illinois,[12] Leon County, Florida,[13] Denver, Colorado,[14] and Madison, Wisconsin,[15] continue to promote inclusionary zoning as a way to solve shortages of affordable housing.

An inclusionary program works like this: A developer proposes to build a new subdivision, called Sweetbriar, in Suburbia Ritz, USA. The developer plans 100 homes and 100 apartments. Suburbia requires that ten percent of all new homes be sold at prices affordable to moderate-income families and that ten percent of all new apartments be rented at prices affordable to lower income families (the affordable units are sometimes called "inclusionary units"). While the market price of the new homes is $500,000, requiring an annual income of $144,000,[16] the ten inclusionary homes are sold to moderate-income families earning a maximum of $89,400 per year, for $308,000.[17] Similarly, while the market rent of the luxury two-bedroom apartments is $2,135 per month, requiring an annual income of $85,400,[18] the ten inclusionary apartments are rented to lower income families, who earn a maximum of $46,400 per year, for $894 per month. Suburbia ***974** controls the resale price of the homes and rent increases in the apartments so that they remain affordable for at least fifty years. The net effect is that twenty families are able to live in Sweetbriar who could not otherwise have done so. The families are happy, as is Suburbia, which created affordable housing at no public cost. However, the developer finds himself with $1,920,000 less in proceeds from sales (3.8% less than the $50 million he would otherwise receive) and with $12,410 less per month in rent (5.8% less than the $213,500 he would otherwise receive).

A program that so clearly reduces developers' incomes while subsidizing low-income households can be expected to be controversial. While inclusionary zoning is not used widely when viewed on a national basis, it has attracted significant hostile commentary,[19] balanced by equally strong support.[20] Opponents argue that cities have created a housing shortage

through their exclusionary policies and then, to solve the problem, have forced developers to subsidize affordable housing, rather than changing their own policies.[21] Worse, opponents argue, inclusionary zoning actually reduces the supply of affordable housing in the long run.[22] Proponents counter that inclusionary zoning merely corrects suburban exclusionary zoning that artificially raises prices.[23] Most importantly, they argue, mandatory inclusionary ***975** zoning creates more affordable housing than any voluntary program.[24]

These contrary policy views are reflected in a legal debate about how inclusionary ordinances should be characterized. Since the early 1970s, commentators have argued variously that inclusionary zoning is an "exaction," or that it is a rent and price control, or that it is just a run-of-the-mill land use ordinance akin to traditional zoning district regulations.[25] How the ordinance is viewed is critical in determining whether it will be upheld by the courts. The rigor of the constitutional scrutiny applied depends on this characterization.

Suburbia's ordinance illustrates how an inclusionary ordinance may be viewed as any one of the three alternatives. "Exactions" are requirements imposed by public entities as a condition to development of property.[26] They include dedications of property, installation of public improvements, and monetary fees of various kinds. From the developer's viewpoint, Suburbia's inclusionary ordinance is certainly an exaction: it requires a public benefit in exchange for the right to develop, not different from a requirement to build a road, install a sewage line, or donate a park. From the developer's viewpoint, the ordinance is also a price control; it controls the prices and rents that may be charged for his homes and apartment. Suburbia, however, views it as merely another land use ordinance that controls the use of a small amount of the developer's property--no different from a requirement for a large front yard.

***976** In general, courts are far more deferential to land use controls than they are to exactions.[27] Both of the appellate court decisions upholding inclusionary zoning[28] viewed it as a land use control. Courts are also deferential in their constitutional scrutiny of rent and price control ordinances.[29] However, state statutes may strictly limit local rent control.[30] If inclusionary ordinances are held to be rent control ordinances, they may be struck down as a violation of state law.[31]

City of Napa[32] is significant because it is the first appellate court decision reviewing the constitutionality of inclusionary zoning following the United States Supreme Court's formulation of its current takings doctrine in Nollan v. California Coastal Commission[33] and Dolan v. City of Tigard.[34] In these two cases, the Supreme Court considered the constitutionality of exactions applied to new development: a required public access easement in Nollan[35] and a floodplain and pedestrian/bicycle easement in Dolan.[36] With these two cases, the Court established an intermediate scrutiny test requiring that there be an "essential nexus"[37] between the government's interest and the exaction, and "rough proportionality"[38] between the impact of the development and the extent of the exaction. The court in City of Napa resolved that, in California, an inclusionary ordinance is not subject to the Nollan/Dolan test and reviewed Napa's ordinance under a deferential land use regulation standard.[39] However, the decision did not entirely foreclose ***977** scrutiny of inclusionary ordinances as either exactions or rent control ordinances.

Part I of this Comment describes the development of inclusionary zoning and reviews the policy debates. It concludes that, in a setting where housing supply is constrained by local zoning, inclusionary programs are a fair and reasonable way to provide affordable housing. Part II describes the legal standards applicable to review of land use regulations as opposed to exactions and discusses unresolved constitutional issues. Part III presents City of Napa and analyzes its likely impact on future takings challenges to inclusionary ordinances. Part IV reviews the legal issues involved when an inclusionary ordinance is considered to be a rent or price control. Part V discusses features that should be incorporated into inclusionary ordinances to withstand a constitutional challenge. In particular, it concludes that most inclusionary ordinances, as now drafted, can be viewed as either exactions or land use ordinances and that cities may be in a stronger legal position if they draft their ordinances to more clearly reflect one, but not both, of those positions.

I. The Development of Inclusionary Zoning and the Policy Debate

A. History of Inclusionary Zoning

Fairfax County, Virginia adopted the first inclusionary zoning ordinance in the country in 1971,[40] and it was shortly followed in 1973 by Montgomery County, Maryland.[41] The inclusionary zoning technique is now used extensively in California and

New Jersey, with scattered use elsewhere,[42] although it is increasingly discussed in other ***978** communities as housing costs rise.[43] Adoption of programs grew rapidly in the 1980s largely in response to double-digit increases in housing prices and to legislative and court-imposed mandates. A severe housing affordability crisis developed in urban coastal markets in California; by 1992 only twelve percent of families in San Francisco, Los Angeles, and Orange Counties could afford the average priced home.[44] While in the 1970s California's housing costs had been close to the national average, by 1992 the average price of a resale home in the state was 190 percent of the national average.[45] The steep price increase was attributed to domestic migration to California in the 1970s and 1980s, the inability of the housing industry to meet demand, increasing use of impact fees by local agencies, and local growth controls.[46] At the same time, federal subsidies for low-income housing dropped steeply, making it far more difficult for communities to create affordable housing by use of subsidies; the Reagan and Bush administrations cut the United States Department of Housing and Urban Development's funding authority by $21 billion between 1981 and 1992.[47]

However, the intervention of the courts in New Jersey and the passage of state legislation in California were the "central element[s]" in the two states' widespread use of the program.[48] In New Jersey, Southern Burlington County NAACP v. Township of Mt. Laurel[49] ("Mt. Laurel II") mandated that local governments adopt "inclusionary devices such as mandatory set-asides" of some new development for affordable housing to ensure that each community met its fair share of the regional need for low-income housing.[50] The California legislature required that each municipality adopt a housing element[51] that calculated each city's share of the regional housing need and required each city to "make adequate provision" for that need.[52] One study ***979** found that a local community's fear of lawsuits based on an inadequate housing element was a significant factor in local jurisdictions' adoption of inclusionary zoning.[53]

Since 1975, over eighty California cities and counties have adopted such ordinances, resulting in over 25,000 affordable housing units.[54] Inclusionary ordinances in New Jersey are credited with creating 15,000 to 20,000 units of low- and moderate-income housing[55] and a "substantial amount of middle-income housing in suburban areas, consisting of market-rate units in inclusionary developments."[56] Montgomery County, Maryland, has created some 10,000 "moderately priced dwelling units" over twenty-five years.[57] Inclusionary zoning, requiring no governmental subsidy, has, in total, provided housing for over 50,000 families who would not otherwise have been able to purchase or rent new housing in their communities.

B. A Primer on Typical Features of Inclusionary Ordinances

The details of inclusionary programs vary widely. How the ordinances are reviewed by the courts may be determined, in part, by how they are drafted. For instance, an ordinance that establishes set requirements for affordable housing, as opposed to one that reviews each project on an ad hoc basis, will be treated much more deferentially by the California courts.[58] While some inclusionary programs are voluntary, this Comment is concerned only with ordinances and policies mandating inclusion of low- and moderate-income units in new housing developments.

Understanding the requirements typically contained in an inclusionary ordinance may help to explain the disagreement over whether these ordinances should be characterized as exactions or land use regulations. To determine common features, the author reviewed thirty- ***980** four California inclusionary ordinances and/or policies.[59] This section briefly summarizes the range of key provisions included in these ordinances, concentrating in particular on the characteristics discussed by the court of appeal in City of Napa.

1. Required Affordable Housing

At the heart of these inclusionary zoning ordinances is a requirement that some portion of newly constructed housing be affordable to very low- income, low-income, or moderate-income families.[60] Most require that either ten or fifteen percent of the housing be affordable; six cities, however, require that twenty percent or more of the housing be affordable, with the most aggressive city requiring thirty-five percent affordability. The ordinances also prescribe the required level of affordability (whether for very low-, low-, or moderate-income households) and the length of time the units must remain affordable. In about half the ordinances, rental units are required to be more affordable than for-sale housing. For instance, one city requires ten percent of ownership housing to be affordable to moderate-income families (earning up to 120 percent of the median income), while ten percent of rental housing must be affordable to low-income families (earning only eighty percent of the median income). Some cities require greater affordability in larger projects, while others require a higher percentage of affordable units in more dense projects. The period of affordability ranges from ten to ninety-nine years to perpetuity; most

typically, the units are required to remain affordable for thirty years. In almost every case, rents and sale prices are tied to median incomes, rather than to the developer's construction costs. Typically, monthly payments are set at thirty percent of income. Two cities do provide, however, that sale prices may be increased if they do not cover the developer's financing and construction costs.

2. Alternatives to On-Site Provision of Affordable Units

Almost every ordinance allows a developer to build the affordable housing on another site if it is infeasible to construct the housing as part of the project. It remains the developer's responsibility to find ***981** the site and negotiate an agreement with its owner. In most cases, the developer can pay a fee to the local government instead of providing the affordable housing if the project is small (typically less than ten units) or if the usual calculation would result in a fractional unit (for instance, ten percent of thirteen units equals 1.3 units). Somewhat more than half of the cities also allow a project of any size to pay "in-lieu" fees--fees paid in-lieu of actually providing affordable housing in the project, to be used for creating affordable housing elsewhere. In a few cases, the in-lieu fees are determined individually on a project-by-project basis. However, in most communities, they are set by ordinance or resolution.

3. Incentives

About thirty-five percent of the ordinances provide no incentives whatsoever to a developer providing inclusionary housing. Others list a variety of possible incentives to be granted only at the city's discretion or list such low-value incentives as "priority processing" or "fast track review." (When every residential project qualifies for "priority processing" because all are required to provide inclusionary housing, priority processing has little value.) Only one city specifically lists financial assistance as an incentive. About half of the cities authorize their City Council to grant a density bonus,[61] often on a one-to-one basis: for each affordable unit provided, the developer is entitled to one additional market-rate rate unit. Whether cities actually grant these bonuses, however, is unknown;[62] in almost all cases, the density bonuses are discretionary, not mandatory, on the part of the city.

***982** 4. Complete Waivers from the Terms of the Ordinance

Five of the ordinances permit developers to apply for a complete waiver of the terms of the ordinance.[63] In two cities, the ordinance's requirements can be waived if the inclusionary units are financially infeasible; in one city, a waiver can be granted if there are extraordinary site development costs (such as for a toxic cleanup); and in a fourth, if the developer can show that the ordinance as applied constitutes a taking, he may be granted a waiver. The Napa ordinance permits a complete waiver if the developer can show that there is no "nexus" between his project and the ordinance.[64]

C. The Policy Debate

1. Support for Inclusionary Zoning

Proponents of inclusionary zoning argue that it is an effective way to create more affordable housing[65]--more effective than any voluntary program.[66]

> Developers have no incentive to participate in a voluntary program unless they are better off as a result of such participation. Even being equally well off is probably not a sufficient incentive, given the potential problems in implementation. . . . [T]he cost side is the only place in which an incentive can be created, and the incentive must be sufficiently large to more than offset lower prices on non-market units.[67]

Even where a "relatively generous" density bonus is given for voluntary participation, developers often fail to participate because they do not understand the economics of the program[68] or possibly because of concern that a density bonus may increase public opposition to a project. Mandatory inclusionary zoning ensures that affordable housing will be provided.

Inclusionary zoning is also supported as a means of correcting the detrimental effects of exclusionary zoning.[69] Exclusionary

zoning separates the poor from the non-poor, leading to such problems as underfunded public institutions, economically depressed communities, ***983** and increased racial segregation.[70] Inclusionary zoning, by contrast, promotes socioeconomic integration. Positive benefits include providing the poor with higher quality educational opportunities and the ability to live in a middle-class community with lower crime rates. As low-skill jobs migrate to the suburbs, inclusionary units provide better access to those jobs and may substantially decrease commute times.[71] Inclusionary zoning can also be considered a means to recapture land prices that have been artificially inflated by communities' exclusionary policies.

Finally, from a local agency standpoint, inclusionary zoning provides affordable housing at no public cost. Incentives such as density bonuses, expedited processing, and reduced parking requirements can all be provided without public funding.

2. Critiques of Inclusionary Zoning

Detractors argue that the program unfairly requires landowners, developers, and middle-income homebuyers to subsidize affordable housing. More importantly, they argue that the program will not achieve its goal of creating more affordable housing and may, in fact, have directly opposite effects. These policy arguments have been far more influential in limiting the use of inclusionary zoning than legal attacks, which have been few.[72] In addition, these policy critiques often inform the legal challenges.

a. Unfair Burdens on Landowners, Developers, and Other Homebuyers

The cost of the inclusionary units must be borne by someone, whether landowners, developers, or market-rate buyers in a project. The usual argument made in opposition to inclusionary ordinances is that the developer will raise the price of the remaining homes by the difference between the inclusionary price and the market price. In the case of Suburbia, for example, the developer would raise the cost of ***984** the ninety market-priced single-family homes by $21,333 each ($1,920,000 divided by ninety market-priced homes) to compensate for the reduced prices of the ten inclusionary units. Using an identical analysis, the Northern California Homebuilders Association charged that a fifteen percent inclusionary requirement proposed in Union City, California, would raise the price of each market-rate unit by nearly $31,000 to make up for the reduced prices of the inclusionary units.[73] However, this assertion is too simplistic. It assumes that developers can raise their prices without constraint; or, viewed another way, that developers would charge less than the market can bear if they did not have to provide inclusionary housing.[74]

In a more sophisticated and very influential 1981 article,[75] Robert Ellickson[76] concluded that the costs might be borne by other homebuyers or renters, the developer, or the landowner.[77] Theoretically, programs could be designed that would create no additional costs for anyone; communities could provide density bonuses large enough to cover the entire cost of the inclusionary units. In practice, however, they rarely did so.[78] Who bore the costs in the long run would depend on the desirability of the community and its place in the regional housing market. If the community were highly desirable, the developer would be able to raise his prices to cover at least part of the reduced price for the inclusionary units, and at least part of the cost would be borne by the buyers or renters of the market-rate units.[79] However, if the city were not particularly sought-after, and the developer could not raise his prices to compensate for the decreased profits, the developer would bear the entire cost initially. Once the ordinances were in effect, owners of residential land would bear at least part of the cost. Developers would bid less for residential land ***985** because of the inclusionary requirements.[80] In other words, builders would pay less for land because the inclusionary zoning would lower their profits. In a city that was not sought-after, "in the long run, the owners of underdeveloped land bear all of the burden."[81] Where the city was unique, landowners would bear only "part of the burden,"[82] in which case part of the cost would be passed on to buyers.[83] Ellickson concluded that most cities imposing these requirements were highly desirable; hence the programs increased costs to market-rate homebuyers and renters in almost all cases.[84]

b. Reductions in Housing Affordability

Ellickson's most devastating charge was that inclusionary zoning actually decreased the supply of affordable housing. He concluded that most inclusionary units were bestowed on families in the middle third of the income distribution,[85] but that only a "tiny fraction" of even those families benefited.[86] At the same time, the costs of the inclusionary housing acted as a tax on housing and reduced its profitability to developers, lowering the overall housing supply by discouraging housing development.[87] The reduced supply resulted in less housing "filtering down" to lower-income families, and overall housing

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prices became much higher.[88] The result? Higher housing prices for the majority of middle-income families that did not benefit from the program.[89] Thus, the irony of so-called "inclusionary" programs.

3. Responses and Conclusion

a. Who Pays for Inclusionary Housing?

The assertion that other homeowners will pay for inclusionary housing is a particularly potent political argument, because it seems inherently unfair that new homebuyers should be forced to subsidize ***986** others. The argument continues to be used by opponents of inclusionary ordinances.[90]

Cities and others that have conducted economic analyses have found results that are similar to--but not identical with--those of Ellickson. They have usually concluded that, in the long run, regardless of the desirability of the community, most of the costs are borne by landowners.[91] Initially, before land prices have had time to adjust, either the market-rate buyers or the developer pays, depending on whether the market allows the developer to increase his prices.[92] If the developer cannot raise the price for the market-rate units or lower his total costs, or some combination, his profits will decline.[93] However, ***987** "[i]n the long run . . . the price effects . . . [are] borne by landowners who sell land to builders."[94]

The real disagreement is over whether this is unfair. Proponents argue that many zoning controls affect land values. More broadly, because land values are primarily a reflection of the community's economic activity and the government's investment in infrastructure, rather than a result of the landowner's efforts, proponents argue that it is not unfair for the landowner to bear the costs.[95] There is also a substantial body of literature concluding that high housing prices are the result of local zoning policies that create artificial shortages of developable land for housing.[96] The shortages have inflated land costs, and landowners have gained windfall profits due solely to cities' zoning policies. In this scenario, inclusionary zoning can be viewed as a way for the public to share in the windfall profits it created.[97] Exclusionary zoning is converted, in effect, into subsidies for inclusionary housing.[98]

Nonetheless, landowners and developers believe strongly that they are paying for a public good whose cost should be borne by the community at large. In the end, this perceived unfairness may have brought about the City of Napa litigation: "Instead of everybody sharing the cost [of building affordable housing], we target a few individuals because they happen to own some land."[99]

***988 b. Does Inclusionary Zoning Increase Housing Costs?**

An extensive review of Ellickson's article criticized his economic assumptions regarding filtering mechanisms, the operation of the housing market, and the design of inclusionary programs. It concluded that not only will inclusionary ordinances create more affordable housing than would be built without them, but also that, with density bonuses, inclusionary ordinances will expand the aggregate supply of all housing.[100] Even Ellickson conceded that an adequate density bonus could reduce, or even eliminate, the "tax" an inclusionary program places on a developer[101] and thus its impact on the housing supply.

Nonetheless, concerns remain that inclusionary ordinances, if unaccompanied by density bonuses, may reduce housing production or increase housing costs. For instance, landowners faced with declining land costs will most likely wait to sell until market inflation is great enough to cover the costs of the inclusionary units. Until the market catches up, there will be fewer land sales and less housing development.[102] The need to absorb more costs into a project may force a developer to build more luxurious, higher priced market-rate units. Finally, if the inclusionary requirements are excessive and undercut profits too much, they may reduce housing production to a level where the program does indeed have an exclusionary effect.[103]

Because of the number of variables, the available evidence does not demonstrate conclusively that inclusionary zoning either lowers overall housing production or increases it, nor whether it raises the market price of housing or reduces land costs.[104] Given the current prevalence of restrictive suburban land use controls, inclusionary zoning appears a rational way to produce affordable housing, reduce income segregation, and recapture some of the windfall increases in land costs created by restrictive zoning ordinances. However, inclusionary requirements should be accompanied by real compensatory measures--in particular, substantial density bonuses--to minimize any effects on the overall housing supply.

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***989 II. Inclusionary Ordinances: Land Use Regulations or Exactions?**

In its brief in opposition to a grant of certiorari, the City of Napa stated bluntly that its ordinance "does not require either a dedication or an exaction. Rather, it is a land use regulation."[105] The Home Builders Association responded, "[c]learly, the requirement here is an exaction. Landowners must dedicate a portion of their development efforts and property to a low-income housing subsidy, or pay cash and substitute one form of exaction for another."[106] The judicial scrutiny applied to inclusionary ordinances--and hence their ability to survive a legal challenge--depends significantly on how they are characterized. While the courts have applied a deferential standard to requirements that can be characterized as generally applicable land use regulations, exactions may be subject to an intermediate level of scrutiny developed by the United States Supreme Court, or to various levels of scrutiny developed by state courts. However, there is no settled jurisprudence regarding precisely which regulations are subject to intermediate scrutiny. In City of Napa, the HBA attempted to subject inclusionary zoning-- and by implication a wider range of regulations--to intermediate scrutiny.[107] This section describes the background to the legal issues raised in City of Napa.

A. The Agins Standard for Takings

Prior to the takings cases of the past twenty years, courts had long applied a deferential standard of review to local land use ordinances. Euclid v. Ambler Realty Co.[108] established that the legal basis for zoning is the "police power" of a city to protect the "health, safety, morals, and general welfare" of its residents.[109] In Euclid, the United States Supreme Court applied substantive due process review to local zoning ordinances and upheld them so long as they were not "arbitrary and unreasonable, having no substantial relationship" to the police power.[110] The Court agreed that if it was fairly debatable that an ordinance ***990** was reasonably related to the general welfare, it would be upheld.[111]

However, in Agins v. City of Tiburon,[112] the Supreme Court reviewed a local zoning ordinance under the Takings Clause of the Constitution,[113] rather than under the Due Process Clause. The Agins brought suit after the City of Tiburon, California, zoned their five-acre property for one to five houses. The Agins never applied for permission to develop but rather claimed that the zoning on its face constituted a "taking" of their property.[114] The Court held that a "general zoning law" would not, on its face, effect a taking if it "substantially advance[d] legitimate state interests," and did not deny an owner all "economically viable use of his land."[115] In relation to the Agins' property, the Court found that the ordinance substantially advanced legitimate government goals of limiting urbanization and protecting open space and on its face permitted the economically viable use of single-family homes.[116]

Although the Agins "substantially advance" standard sounds similar to, and appears to have been derived from, Euclid's substantive due process "rational basis" test,[117] it is in actuality somewhat less deferential; the state interest must be legitimate and the regulation must "substantially advance" the state interest, requiring a greater correspondence between means and ends.[118] In Nollan v. California Coastal Commission,[119] Justice Scalia emphasized that it is a more rigorous test.[120] Nonetheless, as most courts have interpreted the "substantially advance" test, it continues to leave great room for governmental discretion in developing land use regulations. The burden rests on the applicant to demonstrate that a regulation represents an "arbitrary" deprivation of property rights by not advancing legitimate state ***991** interests or by denying all economically viable use of the property.[121] Local regulations have not often been overturned based on the Agins standard alone.[122]

B. The Standard for Review of Exactions

1. Intermediate Scrutiny: The Nollan/Dolan Standard[123]

Between 1987 and 1994, the United States Supreme Court elaborated the "substantially advance" prong of Agins and developed an intermediate level of scrutiny--often called "heightened scrutiny" or the Nollan/Dolan test--to examine certain conditions applied to development projects. Heightened scrutiny requires cities to "provide greater policy justifications to landowners and developers."[124]

Both Nollan and Dolan involved property owners who were required to dedicate property to a public agency as a condition of

development approval. In Nollan, the California Coastal Commission demanded a public access easement across the beach at the front of Nollan's lot to mitigate the view blockage from Highway 1 caused by his new house.[125] The Supreme Court found no nexus between the project's impact (blocking views from Highway 1) and a pedestrian access across the front of the property that provided no views from the highway.[126] Because a portion of Nollan's property was clearly being taken for public use (for a public easement), the Supreme Court required that there be an "essential nexus" between the condition of approval and the impacts of the Nollans' project to meet Agins' requirement ***992** that a governmental action "substantially advance" a legitimate state interest.[127]

In Dolan, the City of Tigard, Oregon, required that the Dolans, in exchange for permission to expand their store, dedicate land to the city for a storm drainage system and for a pedestrian and bicycle path.[128] The Court agreed that there was an "essential nexus" between the conditions and the impacts of the project. The project would in fact generate additional runoff which could be mitigated by a storm drainage system and would create additional traffic which could be reduced by creating routes for pedestrians and bicyclists.[129] However, the Court held that the city had not shown that the required dedications were proportional to the impact of the Dolans' project. The Court held that there must be "rough proportionality" between the impact of the project and the conditions imposed. To establish rough proportionality, it required the city to make some sort of "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[130] The Court specifically placed the burden of proof on the city to demonstrate that its conditions were closely related to the specific impact of the project[131]--as opposed to the Agins "substantially advance" standard, where the burden of proof is on the applicant.[132]

The Nollan/Dolan standard is greatly preferred by the development community because it places an increased burden on local agencies to justify the constitutionality of their policies. In relation to an inclusionary zoning ordinance, the Agins standard would require only that a city demonstrate that the ordinance "substantially advances" the legitimate governmental purpose of providing affordable housing and that it not deny developers all economically viable use of their property. Requiring a project to include affordable housing is clearly related to a city's legitimate interest in providing affordable housing. The case would be particularly strong where, as in California and New Jersey, a state has placed an affirmative obligation on cities to provide affordable housing.[133] Similarly, requiring a small percentage of affordable housing would be unlikely to deprive an owner of all economically viable use. Evidence that others had complied with the ***993** standards, economic studies, and incentives such as density bonuses could all be used to support the economic viability of the ordinance.

Under the Nollan/Dolan standard, however, the burden of proof would be on the city. Showing an "essential nexus" and "rough proportionality" between a project's impact and the inclusionary requirement would be far more difficult. The city would first need to show that construction of market-rate housing created a need for affordable housing and then would need to make specific findings to demonstrate the "rough proportionality" between the project's specific impact on the need for affordable housing and the inclusionary requirements imposed--clearly a more daunting prospect. Even supporters of inclusionary zoning have noted that such ordinances could be attacked on the basis that there is no nexus between the development of market-rate housing and the creation of a need for more affordable housing.[134]

The issue, then, is whether the Nollan/Dolan test applies outside the particular facts of Nollan and Dolan, where public agencies required dedications[135] of property during the individualized review of applications to develop property. Not surprisingly, the property rights movement has sought to expand the applicability of the test, even to the extent of its being applicable to any zoning requirement.[136] However, in City of Monterey v. Del Monte Dunes, Ltd.,[137] in a conclusion concurred with by all nine justices, the Court in dicta appeared to expressly limit heightened scrutiny to exactions.

> [W]e have not extended the rough-proportionality test of Dolan beyond the special context of exactions--land-use decisions conditioning approval of development on the dedication of property to public use. The rule applied in Dolan considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts.[138]

***994** What has not been defined by the Court is an "exaction;" and whether the Nollan/Dolan test applies to all exactions.[139] To date, there is not a "consistent jurisprudence" for applying the test.[140] Even where a requirement is clearly an exaction--such as the payment of fees and construction of public improvements--the Nollan/Dolan test is not always applied. Some courts, in fact, have limited the test to the dedication of land.[141] A further issue is whether the test applies to exactions imposed pursuant to generally applicable legislative acts as well as to conditions applied during the review of individual

development applications.[142] There is a "recently emerging body of case law" holding that generally applicable fees applied on a uniform basis to development projects are not subject to Nollan/Dolan.[143] Since Del Monte Dunes, the lower courts have tended to further restrict the applicability of Nollan/Dolan to individualized exactions.[144]

In California, the Supreme Court has specifically limited Nollan/Dolan to fees and dedication of property required on an "individualized ***995** basis as a condition for development,"[145] because under those circumstances there is a heightened risk that local governments could use the police power to exact unconstitutional conditions. However, "generally applicable legislation is subject to the ordinary restraints of the democratic political process"[146] and, thus, warrants a more deferential standard of review. The most deferential standard of review is reserved for "essentially legislative determinations that do not require any physical conveyance of property."[147] In California, then, an inclusionary ordinance, which is a legislative determination not requiring any physical conveyance of property, would be entitled to the most deferential standard of review, even if the inclusionary requirements can be characterized as exactions.

2. State Law Standards for Exactions

Regardless of the United States Supreme Court's standards for review, most states review exactions under rules more rigorous than Agins' "substantially advance" standard but less demanding than the Nollan/Dolan "rough proportionality" test. The strictest standard is applied in Illinois and Rhode Island, which permit dedications and fees only to mitigate impacts that are "specifically and uniquely attributable" to a development.[148] Most states, including California,[149] apply a "rational nexus" or "reasonable relationship" test, limiting fees and exactions to "needs created by, and benefits conferred upon" a project.[150]

This "reasonable relationship" test was recently elaborated by the California Supreme Court in San Remo Hotel v. City and County of San Francisco.[151] The court considered a takings challenge to a San Francisco ordinance having some similarity to an inclusionary ordinance. It required that any hotel converting a residential hotel room[152] to ***996** another use either replace each room lost on a one-for-one basis, or pay a fee equal to the cost of a replacement site plus a portion of the new construction costs.[153] After being assessed a fee of $567,000 to convert its sixty-two room hotel to tourist use,[154] the San Remo Hotel alleged (among other claims) that the ordinance did not "substantially advance a legitimate government interest" because the fee was not "roughly proportional" to the impact of the project (the Nollan/Dolan test).[155] While rejecting the application of Nollan/Dolan to a generally applicable fee and upholding the city's ordinance (both facially and as-applied),[156] the court stated:

> As a matter of both statutory and constitutional law, [development mitigation] fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development . . . . While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees . . . the arbitrary and extortionate use of purported mitigation fees . . . will not pass constitutional muster.[157]

If, then, an inclusionary ordinance is examined as a generally applicable mitigation fee, rather than as a land use regulation, it will need to have an adequate factual basis to demonstrate a "reasonable relationship" between the ordinance's requirements and the impact of the development. As opposed to the Nollan/Dolan "rough proportionality" test, this test places the burden of proof on the plaintiff, gives more deference to the legislative judgment, and does not require quite as close a fit between means and ends.[158] However, under this test a city would still need to show that the inclusionary requirements were reasonably related to the impacts of residential development on the need for affordable housing, rather than to the government's legitimate interest in providing affordable housing.

***997 C. Other Courts' Review of Inclusionary Ordinances**

Prior to City of Napa, the constitutionality of inclusionary ordinances had been reviewed in only three cases. Two of the three cases were decided prior to Nollan, and all three prior to Dolan.

1. An Early Loss: Board of Supervisors of Fairfax County v. DeGroff Enterprises[159]

The first inclusionary ordinance in the country was adopted on September 1, 1971 by the Fairfax County Board of

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Supervisors. It required any developer of fifty or more housing units to make at least fifteen percent of the units affordable to low- and moderate-income families.[160] The Supreme Court of Virginia agreed that the provision of affordable housing served a legitimate state interest.[161] However, it concluded that the state's zoning enabling act permitted localities to enact only zoning ordinances that were directed at traditional physical characteristics of developments and not ordinances directed at including or excluding "any particular socio-economic group."[162] Further, the ordinance's attempt to "control compensation" for property not only exceeded the authority granted by the zoning enabling act but also constituted a taking of property under the Virginia constitution.[163] The ordinance was consequently invalidated.[164]

The Virginia court's lead was not followed elsewhere in the country. In fact, one treatise states flatly, "[t]his case was wrongly decided. The loss that a mandatory lower-income housing requirement is likely to impose on a developer is not substantial enough for a taking."[165] Even the Virginia courts seem to have come to this conclusion; in 1989, the Virginia legislature adopted legislation permitting Fairfax County to adopt an inclusionary zoning ordinance,[166] and the County is currently implementing its inclusionary program.[167]

***998** 2. New Jersey's Mt. Laurel II and Holmdel Decisions

The last major case regarding inclusionary zoning was decided in 1983 by the New Jersey Supreme Court, in Southern Burlington County NAACP v. Township of Mount Laurel.[168] In considering remedies for the exclusionary zoning practices of several New Jersey cities, the New Jersey court rejected the Virginia court's distinction between socioeconomic and other zoning. The court noted that all zoning, such as that for "[d]etached single family residential zones, high-rise multi-family zones of any kind, . . . indeed[,] practically any significant kind of zoning" had inherent socioeconomic characteristics.[169] The court held that, where a community's obligation to provide housing for all income groups could not be met by the removal of zoning restrictions, "inclusionary devices such as . . . mandatory set-asides keyed to the construction of lower income housing, are constitutional and within the zoning power of a municipality."[170]

The court found that it was essential for communities in New Jersey to provide realistic opportunities to construct lower income housing[171] and that inclusionary zoning--even though it involved control of resale prices and rents to create affordability for a particular income group--was an appropriate way to accomplish that.[172] "We know of no governmental purpose . . . that is served by requiring a municipality to ingeniously design detailed land use regulations . . . actually aimed at accommodating lower income families, while not allowing it directly to require developers to construct lower income units."[173] The court analogized inclusionary requirements to requirements for single-family homes on large lots, a form of zoning intended to create housing for high-income groups.[174] By holding that there is no real difference between physical zoning requirements used to create high-income housing and price controls used to create lower income housing, the case provides a strong argument for viewing inclusionary requirements as land use ordinances.

In 1990, in Holmdel Builders Ass'n v.Township of Holmdel,[175] the New Jersey Supreme Court revisited the issue while reviewing the constitutionality of affordable housing fees required by several New Jersey ***999** cities. The court continued to view inclusionary devices as zoning ordinances rather than as exactions similar to "off-site infrastructure improvements occasioned by a particular development."[176] Consequently, the court refused to apply the Nollan "essential nexus" test, concluding that "the rational-nexus test is not apposite in determining the validity of inclusionary zoning devices generally."[177] Rather than basing affordable housing requirements on the impact of a project, "the relationship is to be founded on the relationship that . . . development has on both the need for lower-income residential development and on the opportunity and capacity of municipalities to meet that need. . . ."[178]

Mt. Laurel II and Holmdel Builders Ass'n provide the strongest published justification to date for viewing inclusionary ordinances as land use regulations--not exactions[179]--designed to carry out the state's strong interest in providing housing for all income groups.[180] In this the New Jersey courts went further than the City of Napa court, which did not need to consider whether the ordinance was an exaction to reach its decision.[181]

III. Home Builders Ass'n v. City of Napa[182] and Future Takings Challenges to Inclusionary Ordinances

City of Napa is the first appellate court decision to review the constitutionality of inclusionary zoning since the United States Supreme Court's decisions in both Nollan and Dolan. The latter two cases have created the "specter of a possible constitutional challenge"[183] to inclusionary zoning despite the technique's success in creating affordable housing. Had the

HBA been successful in invalidating Napa's ordinance--in particular, had the HBA been granted certiorari and succeeded in having the ordinance invalidated by the Supreme Court--it would have greatly expanded the application of the Nollan/Dolan test ***1000** to a generally applicable legislative requirement that required no dedication of property. In that sense, the case was largely declaratory of existing law regarding the limited applicability of Nollan/Dolan to inclusionary ordinances. However, it confirmed that inclusionary zoning can withstand a constitutional challenge and provided greater assurance to cities desiring to enact an inclusionary ordinance.

A. The Case

1. The Parties

The HBA was represented by its chief counsel and by the Pacific Legal Foundation ("PLF").[184] Both have been active in bringing litigation involving takings issues on behalf of developers and property rights advocates.[185] PLF has filed a brief in favor of the property owner in every important Supreme Court takings case. It has offices in five states, a budget of $4 million, and, in 1998, had a litigation docket of sixty takings cases.[186] The National Association of Home Builders ("NAHB"), HBA's parent organization, represents residential developers and is one of the "nation's best organized and most powerful lobbying organizations."[187]

The City of Napa, in the heart of Napa Valley's wine country, was supported by several housing advocacy groups and six low-income individuals who intervened at the trial court level,[188] all represented by the California Affordable Housing Law Project, Western Center on Law and Poverty, and Legal Aid of Napa.[189]

***1001** 2. The Napa Inclusionary Ordinance

The Napa ordinance's key provision was the requirement that ten percent of all newly constructed residential units be affordable.[190] Developers who did not wish to provide the units as part of their development had several alternatives. Single-family home developers could, at their sole discretion, pay in-lieu fees or make an "equivalent alternative proposal" such as the dedication of land. Developers of multi-family housing could propose the same alternatives, although these could be approved only if the City Council found that they provided housing opportunities equivalent to the basic ten percent requirement.[191] All developers were given a variety of benefits, such as density bonuses,[192] and all could apply for a complete waiver of the inclusionary obligation "based upon the absence of any reasonable . . . nexus between the impact of the development and . . . the inclusionary require-ment."[193]

The HBA made a facial challenge to the Napa ordinance--a difficult challenge to win. "A claim that a regulation is facially invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional application. . . ."[194] Because Napa's ordinance contained so many alternatives and possibilities for various appeals, including the ability to apply for a complete waiver, it would be difficult for any court to find that it must result in an unconstitutional application. In fact, here the court of appeal did find that, since the city had the ability to completely waive the inclusionary requirements, the ordinance could not result in a taking.[195]

3. Takings Issues Raised and Their Disposition

HBA attacked the ordinance based on the Agins "substantially advance" standard typically applicable to a land use regulation. However, ***1002** the major part of its briefing represented an effort to apply the Nollan/Dolan standard to a generally applicable zoning ordinance.[196]

a. The Agins Test

HBA claimed that the ordinance constituted a taking both because it failed to "substantially advance legitimate state interests"[197] and because Napa's own restrictive zoning had created the housing shortage facing the City.[198] To show a legitimate state interest, the city, intervenors and amici provided extensive documentation regarding California cities' authority (and obligation) to foster affordable housing; evidence of the shortage of affordable housing both statewide and in Napa; and the relationship between the ordinance's provisions and Napa's goal of creating more affordable housing.[199] In

response to HBA's specific claim that Napa's zoning had created the shortage of affordable housing, the intervenors cited Pennsylvania Central Transportation Co. v. New York City[200] for the proposition that there is a legitimate state interest in a land use regulation even if the problem being addressed was caused by historical land use regulations.[201] Even if it were true that inflated prices were caused by the City's policies, the prime beneficiaries were the very landowners and developers represented by HBA.[202]

The court of appeal had no difficulty dismissing this claim. "[W]e have no doubt that creating affordable housing for low and moderate income families is a legitimate state interest,"[203] and "it is beyond question" that the city's inclusionary ordinance would advance that interest.[204] Regarding the novel proposition that Napa could not adopt the ordinance because its own actions had created the housing shortage, the court agreed that there was no authority for the claim, ***1003** and that in fact case law, such as Penn Central, was directly to the contrary.[205]

b. Heightened Scrutiny Under the Nollan/Dolan Test

HBA's principal constitutional claim was that there was no way that the construction of housing could create a need for affordable housing, violating the Nollan/Dolan requirements that development exactions be proportional to the project's impact. The HBA also contended that Napa's ordinance was a facially invalid taking because the waiver provisions improperly put the burden on the developer to show that a waiver should be granted,[206] contrary to Dolan's requirement that the burden of justifying exactions be placed on the government.[207]

Relying largely on the California Supreme Court's earlier analysis in Santa Monica Beach,[208] the court of appeal agreed that the heightened Nollan/Dolan standard applies only in the "paradigmatic permit context-where the individual property owner-developer seeks to negotiate approval of a planned development."[209] It does not apply where the challenged legislation is "generally applicable to all development in [the] City."[210] In reaching this conclusion, the court contrasted generalized legislation to individualized negotiations with a particular developer, where there is a "heightened risk of the 'extortionate' use of the police power."[211] The court in particular relied on language in Santa Monica Beach that "individualized development fees warrant a type of review akin to . . . Nollan and Dolan, whereas generally applicable development fees warrant the more deferential review . . . generally accorded to legislative determinations."[212] Ultimately, the court established that, in California, as in New Jersey, an inclusionary ordinance does not need to meet the Nollan/Dolan test.

***1004 B. Future Takings Challenges to Inclusionary Zoning**

The court of appeal decision was a victory on nearly all counts for the City of Napa. It showed that an inclusionary ordinance could withstand a facial challenge brought by well financed and experienced opponents. As one commentator stated, as a result of the decision, "[n]o doubt, more cities and counties will enact inclusionary-type housing ordinances to address the shortage of affordable housing."[213] However, HBA's attorney considered it a "narrowly written ruling" that does not preclude individual home builders from suing over inclusionary requirements once the provisions are applied to them (an "as-applied" challenge).[214] In fact, HBA suggested that, in an as-applied challenge, inclusionary zoning would likely be subject to "the heightened scrutiny standard . . . articulated in Nollan and Dolan."[215]

This statement is almost certainly wrong. In California, if the inclusionary requirements are generally applicable and not individually negotiated, they will not be subject to the Nollan/Dolan test. Nonetheless, there are potential takings issues, both on a facial and as-applied basis, that could be raised in a future challenge.

1. Future Facial Challenges to Inclusionary Ordinances

The California Supreme Court, in its Santa Monica Beach and later San Remo Hotel decisions, has, in relation to governmental fees, clearly limited the Nollan/Dolan test to cases where individualized fees are negotiated with a single developer.[216] Fees imposed by "generally applicable legislation" and not aimed at a single developer are not subject to heightened scrutiny.[217] In California, then, to survive a facial challenge, a local inclusionary ordinance need only meet the Agins tests by substantially advancing legitimate state interests and not denying an owner all economically beneficial or productive use of the land.[218] Demonstrating that an inclusionary ordinance "substantially advances legitimate state interests" is relatively easy where state law, as in California ***1005** and New Jersey, creates an affirmative obligation on local governments to provide affordable housing.[219]

However, a rule exempting legislative actions from Nollan/Dolan has not been reviewed by the United States Supreme Court. In fact, in a dissent on a denial of certiorari to Parking Ass'n of Georgia, Inc. v. City of Atlanta,[220] Justice Thomas, joined by Justice O'Connor, wrote, "[t]he distinction between sweeping legislative takings and particularized administrative takings appears to be one without a constitutional difference."[221] Following this logic, it seems unlikely that the dedications of property required in Nollan and Dolan would have been upheld had they been imposed pursuant to legislative action.[222] The court of appeal's decision in City of Napa (and, by implication, the California Supreme Court's jurisprudence in this area) has therefore been criticized as providing insufficient protection to inclusionary ordinances from a future Nollan/Dolan challenge. Rather than relying on a distinction between legislative and administrative actions, say critics, the court should have determined that "the inclusionary ordinance's required set-aside would not effect a taking if directly imposed."[223]

***1006** Viewed another way, the question may be posed as: Is an inclusionary ordinance the type of governmental action that is subject to the Nollan/Dolan test, or is it an exaction subject to the "reasonable relationship" test, or is it an ordinary land use regulation? This question--although it might be considered at the heart of the case--was, indeed, not answered by the court.

In considering how other states or the federal courts may view inclusionary ordinances, it appears most likely that the ordinances will not be subject to the Nollan/Dolan test. Inclusionary ordinances do not require the dedication of land. In fact, many do not even require the payment of fees unless the developer chooses that option. Inclusionary ordinances are usually drafted as generally applicable legislative actions that do not permit unfettered discretion by reviewing bodies. Finally, the trend in the courts is to find that ordinances setting generally applicable fees are not subject to Nollan/Dolan.[224] Inclusionary ordinances do not seem to be attractive vehicles for the expansion of the Nollan/Dolan test.

A closer question is whether inclusionary ordinances will be considered exactions subject to the "reasonable relationship" test. In City of Napa, this intermediate standard was never considered by the court of appeal because California's Mitigation Fee Act[225] requires all challenges to be made after the fee is paid,[226] and HBA made a pre-development facial challenge.[227] The City of Napa and amicus argued that the in-lieu fees permitted by the ordinance were not impact fees as defined by the Act because the underlying inclusionary requirement was not a monetary exaction, fees were paid only at the election of the developer, and the fees did not pay for public facilities as defined in ***1007** the Mitigation Fee Act.[228] However, in San Remo Hotel, the California Supreme Court reviewed a similar in-lieu fee under the "reasonable relationship" test.[229] There, the San Francisco ordinance gave the developer the choice of replacing each room lost on a one-for-one basis or paying a fee equal to the cost of a replacement site plus a portion of the new construction costs.[230] Like Napa's inclusionary ordinance, the hotel conversion ordinance's underlying requirement was not a monetary exaction, fees were paid only at the election of the developer, and the fees did not pay for public facilities. Nonetheless, it was considered to be an impact fee--a type of exaction--subject to the "reasonable relationship" test.

It may be possible to distinguish the residential hotel fee in San Remo Hotel from a typical inclusionary fee: the San Remo Hotel fee was imposed because of the impact of residential hotel conversions, while an inclusionary requirement is designed to regulate new development. However, inclusionary ordinances look like exactions when they allow developers to pay fees in lieu of actually constructing affordable units (as was the case with the San Remo Hotel). If the inclusionary requirement can be met by paying a fee--which is clearly an exaction--then perhaps the inclusionary requirement itself is an exaction. The optional fee payment may distinguish these ordinances from typical zoning and planning requirements such as maximum height and minimum setbacks. Cities do not generally allow developers to pay a fee in lieu of limiting building height, for example. If a challenger were successful in characterizing inclusionary zoning as an exaction, then a city would need to show a "reasonable relationship" between the affordability requirements and the project's impacts. This is the facial challenge most likely to succeed.[231]

***1008** 2. Future As-Applied Challenges to Inclusionary Ordinances

In California, so long as an inclusionary ordinance is generally applicable to a class of projects and leaves local officials with "no meaningful . . . discretion," the Nollan/Dolan test will not be utilized even in an as-applied challenge.[232] Only if a local inclusionary ordinance requires developers to negotiate individually, with meaningful discretion applied by the government, would Nollan/Dolan apply to a particular project. In the City of Napa, for example, a developer may negotiate with the city for individualized concessions and incentives[233] and may also negotiate for an "alternative equivalent action"[234] if she does not

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want to provide the affordable housing or in-lieu fees specified in the ordinance. Conceivably, such an individualized bargain could be challenged and reviewed under the heightened scrutiny specified in Nollan/Dolan.[235] However, in reality, this is unlikely to happen. A city faced with a developer who had requested an "alternative equivalent action" and then objected to the bargain would most probably simply tell the developer to comply with the non-discretionary standards included in the ordinance by providing the units on-site or paying established fees.

Napa's ordinance permits all inclusionary requirements to be completely waived if a developer can show that there is no nexus between his project and the city's inclusionary requirements.[236] Relying on this language-- which was construed by the HBA as an admission by Napa that Nollan's "essential nexus" standard[237] applies--the HBA stated its intent to bring an as-applied challenge.[238] If a developer were to provide a study showing that his project does not create a demand for affordable housing, and that there is consequently no nexus between the inclusionary requirement and the project, the City of Napa could be forced to prepare an expensive nexus study of its own to rebut the assertion.[239] An easier solution is simply to modify the waiver provision to base the waiver on grounds other than lack of ***1009** a nexus. While the waiver did help Napa's ordinance survive a facial challenge,[240] a waiver based on other criteria would enable an ordinance to survive a facial challenge without suggesting that Nollan's nexus analysis is appropriate.[241]

There is the final issue of finding an applicant to bring an "as-applied" lawsuit. In Napa, numerous developers have complied with the terms of the ordinance both before and after the lawsuit. In most cases, the cost of a lawsuit would be far greater than the cost of compliance. Developers also risk destroying their relationship with a community by bringing a lawsuit. The Napa ordinance has been in place for three years, and no developer has yet brought such a suit.[242]

3. Penn Central: The Final Takings Test

The final test that is often used in an "as-applied" takings claim is the Penn Central[243] multifactor test. In 1978, the United States Supreme Court reviewed the economic impact of New York's Landmarks Preservation Law as it applied to Grand Central Station[244] and established a three-factor test to decide if there had been a taking: analysis of (1) the "economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) the "character of the government action," all reviewed in an "essentially ad hoc, factual inquiry."[245] The Court found that Penn Central's property had not been taken even though its value had decreased substantially as a result of the regulation.[246] As one commentator has observed, "[t]here are few successful Penn Central takings claims as a practical matter."[247]

So long as the adoption of an inclusionary ordinance is accompanied by an economic study demonstrating that the requirements are reasonable and allow an economically viable use, it is highly unlikely that a Penn Central challenge will be able to establish a substantial economic impact or interference with reasonable investment-backed expectations. The Penn Central Court noted, for instance, that it had ***1010** approved land use controls resulting in 75 to 87.5 percent diminution in value;[248] by comparison, one study of a twenty percent inclusionary requirement (substantially higher than is usual) showed a diminution in land value of forty percent.[249] The character of the government action is the imposition of rent and price controls--a permissible governmental action recognized by the courts. The requirements would need to be much more draconian before Penn Central would likely apply. In City of Napa, the HBA stated explicitly that it did not believe that the ordinance constituted an economic taking under the Penn Central test.[250]

IV. Inclusionary Housing Viewed As Rent and Price Controls

An inclusionary ordinance controls the sale price or rent of some of the housing built by a developer. It is possible, then, to view the ordinance as a form of rent or price control, rather than as an ordinance regulating the use of land. If viewed in that way, inclusionary ordinances will be subject to an entirely separate area of constitutional and statutory restrictions.

A. Is an Inclusionary Ordinance a Rent Control Ordinance?

In City of Napa, HBA argued that the ordinance was a rent control ordinance[251] and that it violated the Due Process Clause[252] because it required the sale or rental of ten percent of housing units at a fixed price without any provision for a fair return on investment to the developer.[253] The City responded that its ordinance was not a rent or price control but rather a land use

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ordinance and that "fair return" standards had never been applied to applicants attempting to develop property.[254] While never specifically dealing with HBA's contention that Napa's ordinance was rent control, the court of appeal agreed that there was no case that held that a housing developer was entitled to ***1011** a fair rate of return.[255] Further, under the specific provisions of the Napa ordinance, no developer was actually required to rent units or to sell them at a reduced price; the developer instead could choose to build the units, donate vacant land or pay in-lieu fees.[256]

There are several rationales for distinguishing inclusionary ordinances from rent control.[257] These include inclusionary zoning's remedial character as a response to exclusionary zoning; its application to new development only rather than to existing apartments; its inclusion of both rental and owner housing; and its screening of owners and tenants (at least initially) to ensure that they are lower income households.[258] The difficulty is that inclusionary ordinances, do, on their face, limit rents.

The Colorado Supreme Court found that a similar ordinance was, indeed, a rent control law.[259] The Town of Telluride adopted an ordinance requiring developers to create housing affordable to forty percent of the employees generated by the development. The developer could satisfy the requirement by constructing new housing with controlled rents, paying fees, or dedicating land.[260] Even though the developer was not required to provide rent-controlled units, the Colorado court found that the Telluride ordinance set a base rent and then strictly limited rent increases and that the "scheme as a whole operate[d] to suppress rental values below their market values."[261] The court found that the ordinance violated the "plain language" of the Colorado statute prohibiting rent control[262] and struck it down.[263]

Even the New Jersey Supreme Court, when deciding Mt. Laurel II,[264] recognized that the limitations on rents imposed by inclusionary ordinances could be a type of rent control. The court suggested that rent increases permissible in affordable units as tenants' incomes increased ***1012** would generally parallel normal rent increases permitted under a rent control ordinance, ensuring that the owners would achieve a fair return.[265]

Although the court of appeal in City of Napa did not find Napa's inclusionary ordinance to be a rent control ordinance, the question was not clearly presented, and other courts may do so. In that case, inclusionary ordinances may be vulnerable to constitutional doctrines and state laws related to rent control.

B. Do Inclusionary Ordinances Give a Fair Rate of Return?

A price control is generally considered constitutional so long as it is not "confiscatory, i.e., . . . fail[s] to permit a landlord a fair rate of return."[266] Put another way, courts usually uphold a price control so long as it does not deprive investors of a fair return.[267] However, prices and rents in inclusionary units are usually not based on "fair return" concepts. Instead, inclusionary ordinances most typically base prices and rents on those that are affordable to lower income families. California law, for instance, states that units are affordable to lower income families if they do not exceed thirty percent of sixty percent of area median income.[268] As one example, a three-person lower income family in Oakland, California could be charged no more than $1,117 per month for rent,[269] regardless of the developer's actual construction costs. These set rents have nothing to do with taxes, maintenance costs, insurance, mortgage rates, construction costs, or other factors that affect the landlord's rate of return.

In Pennell v. City of San Jose,[270] the United States Supreme Court reviewed a constitutional challenge to a San Jose, California, rent control ordinance based on a provision that permitted the City to consider "hardship to a tenant" when setting rents[271]--a provision that could be considered akin to basing rents on tenant incomes, rather than on landlord costs. In the case of the provision reviewed in Pennell, however, there was no requirement that the rents be reduced based on tenant ***1013** hardship. The Court held that the provision was not unconstitutional absent any evidence of its actual impact.[272]

Pennell appears to stand for the proposition that rent controls cannot be challenged on their face unless they actually deny a landlord a fair return. However, a court might choose to overturn an inclusionary ordinance that sets rents and prices based on no consideration of the landlord's rate of return. There are two possible defenses. First, as in City of Napa, cities may persuade the courts that inclusionary ordinances are land use regulations rather than rent control, and that a developer has no right to a "fair rate of return."[273] Second, under the recently decided Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,[274] the economic impact of a regulation must be determined in relation to the project as a whole, not in terms of its effect on only a part of the project--in this case, the impact on the small percentage of inclusionary units.[275] A restriction on the use of a small part of a property is not a taking per se,[276] even if the developer has an inadequate rate of return on the

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inclusionary units. Instead, the case can be applied to hold that inclusionary requirements will constitute a taking only if the owner is deprived of all economic value when the property is viewed as a whole--including both the market-rate and the inclusionary units.

C. Premium Pricing

An inclusionary ordinance that does not limit the resale prices of for-sale units (creating "premium pricing" for the first buyer) may be vulnerable to attack for "not advancing a legitimate state interest." Orange County, California's inclusionary ordinance initially did not control the resale prices of single-family homes after they were first sold at an affordable price.[277] If a house were sold for a price that was, say, $50,000 less than its market value, the first buyer could sell it at the market price and pocket the premium--in effect, transferring the ***1014** $50,000 from the developer to the first buyer but not creating affordable housing, the ostensible purpose of the ordinance.

In Yee v. City of Escondido,[278] the United States Supreme Court considered a similar scheme that had the effect of permitting the existing tenants of a mobile home park to appropriate the entire difference between the market price and the rent-controlled price--benefiting only the tenant in possession at the time rent control was imposed.[279] In dicta, the Court noted that "[t]his effect might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance."[280]

The Ninth Circuit has applied this dictum to find that rent control ordinances that permit the "capture of a premium" by a tenant may not "substantially advance a legitimate state interest" and so may constitute a taking. In Richardson v. City and County of Honolulu,[281] the Ninth Circuit found that a Honolulu ordinance that restricted the land rent charged to condominium owners--but did not restrict the prices of the condominiums-- merely transferred part of the value of the land from the landowner to the condominium owner and thus did not advance the legitimate goal of creating affordable housing.[282] Similarly, in Chevron USA, Inc. v. Cayetano,[283] Chevron alleged that a Hawaii statute limiting the rents it could charge service stations permitted the operator "to sell his leasehold at a premium."[284] The Ninth Circuit agreed that this stated a valid claim for a taking under Yee and Richardson.[285]

Inclusionary ordinances may avoid this problem simply by requiring that units remain affordable for some period of years. Of the ordinances reviewed for this article, the minimum period of affordability was twenty years (where the term of affordability could be determined). Such a substantial period of time-- almost a generation--likely avoids any "premium pricing" issue.

*1015 D. Conflicts with State Statutes Related to Rent Control

Some states have adopted statutes setting limits on local governments' ability to adopt rent control ordinances. The Telluride, Colorado, inclusionary ordinance was found to be void because it conflicted with a statewide Colorado ban on rent control.[286] In California, the statewide Costa-Hawkins Act,[287] adopted in 1995 to regulate local rent control, may directly conflict with inclusionary ordinances.[288] Cities' experiences with Costa-Hawkins and the Colorado legislation illustrate the significant changes that cities may need to make in their inclusionary zoning ordinances to respond to state rent control laws.

Two provisions of the Costa-Hawkins Act may be inconsistent with inclusionary ordinances requiring affordable rental housing. First, under Costa-Hawkins, the owner of any rental unit has the right to set the initial rent[289]-- rather than having the initial rent determined based on its affordability to a lower income family. Second, under Costa-Hawkins, the owner has the right to set the rent whenever a tenant vacates the unit[290]--often referred to as "vacancy decontrol."[291] This provision also conflicts with inclusionary ordinances, which require that rents remain affordable to lower income tenants and tie rent increases to increases in median income.

Whether Costa-Hawkins was intended to apply to inclusionary ordinances is unclear.[292] Only one exception is included in the bill: ***1016** "where the owner has otherwise agreed by contract with a public entity in consideration for a direct financial contribution or any other forms of assistance specified in [the Density Bonus law]."[293] If a project receives a density bonus or other assistance under the Density Bonus law,[294] then cities can clearly require that the rents be controlled. It is also possible

to interpret section 1954.52(b) as exempting from Costa-Hawkins any inclusionary housing given a financial contribution or other form of assistance that is discussed in the Density Bonus law, whether or not the incentive was actually given pursuant to the Density Bonus law. In other words, if inclusionary housing receives any one of the forms of assistance specified in the Density Bonus law--mixed-use zoning and parking concessions, for instance--then it may be exempt from Costa-Hawkins.[295]

There are no appellate court cases regarding the applicability of the Costa-Hawkins Act to inclusionary housing programs. It is fairly debatable whether a court would apply Costa-Hawkins to an inclusionary ordinance. The strongest argument in favor of applying it to an inclusionary ordinance is the fact that inclusionary zoning does, indeed, regulate rents.[296] Arguments against applying Costa-Hawkins would likely define an inclusionary ordinance as a land use ordinance, not a rent control ordinance.[297] Given the affirmative duty of cities in California to plan for "adequate sites" for affordable housing,[298] the California courts may be more likely than the Colorado court to classify an inclusionary requirement as a land use regulation following the lead of the New Jersey Supreme Court.[299] However, if Costa-Hawkins does indeed apply to rent-controlled inclusionary units, and section ***1017** 1954.52(b) is interpreted as exempting only inclusionary units that comply with the state's Density Bonus law, then only inclusionary units complying with the Density Bonus law would comply with Costa-Hawkins.

In 1998, the Santa Monica Housing sought a declaratory judgment that the City of Santa Monica's ordinance was preempted by the Costa-Hawkins Act.[300] Subsequently, the City amended its inclusionary ordinance to permit two primary ways for developers of rental housing to meet their affordable housing obligation:

1. Pay an "affordable housing fee" to provide funds for the construction of affordable housing; or

2. Develop affordable units onsite that qualify for a density bonus under the State's Density Bonus Law. Onsite inclusionary units do not fulfill the city's inclusionary requirements unless they qualify for a density bonus under state law.[301]

In response to Telluride, the City of Boulder, Colorado also amended its ordinance to comply with state law regarding rent control. The Colorado legislature had exempted from its ban on rent control, all properties in which a city "ha[d] an interest through a housing authority or similar agency."[302] After Telluride, Boulder amended its ordinance to require that the housing authority or similar agency have an interest in all affordable rental units provided under Boulder's inclusionary ordinance.[303]

In both of these cases, localities managed to modify their inclusionary programs to comply with state laws regarding rent control. Santa Monica's ordinance is a model for avoiding conflicts with Costa-Hawkins, while Boulder's ordinance no longer conflicts with Colorado's statute. However, if most developers in Santa Monica choose to pay fees instead of building affordable units, the City of Santa Monica will be responsible for finding sites for future affordable housing projects and for finding developers or non-profit sponsors to build the units--requiring much more time and effort by the city than if the units were supplied by the developer. Boulder must make arrangements with its local housing authority to keep rental units affordable. The state rent control statutes have complicated both programs and rendered them less effective.

*1018 V. Guidelines for Practitioners

There is now an inclusionary zoning ordinance that has withstood a recent appellate court test. Features of Napa's ordinance that were cited approvingly by the court of appeal included its extensive factual record (with nearly 700 pages of reports and supporting documentation);[304] the incentives for compliance; the variety of ways to comply with the ordinance; and the ability of applicants to obtain a complete waiver from the ordinance's provisions.[305] Further, in California, these generally applicable ordinances will not be subject to heightened scrutiny; the highest level of scrutiny would be the "reasonable relationship" test.[306]

An approach that may be worth considering in drafting future inclusionary ordinances is to position them more clearly as either exactions or land use regulations. Most inclusionary ordinances are neither fish nor fowl. They appear to be exactions because in-lieu fees can be paid to comply with the ordinance--inviting the courts "to treat the entire inclusionary program as a development exaction."[307] They also appear to be exactions when they provide incentives to developers in exchange for the inclusionary units--yet keep the incentives small in relation to the restrictions on the inclusionary units. At the same time,

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most communities assert that inclusionary ordinances are not an exaction and don't complete the kind of "nexus" or even "reasonable relationship" study that would make them less vulnerable to a future challenge.

There are three approaches to drafting inclusionary ordinances that are most likely to withstand future takings challenges:

1. Draft an ordinance--like that in Montgomery County, Maryland[308]-- with a large enough density bonus to compensate developers for the restricted prices.

2. Draft an ordinance--like the Housing Element policy in San Mateo, California[309]--that looks like an ordinary land use regulation because it allows no in-lieu fees and contains no incentives.

***1019** 3. Draft an ordinance--like that in Santa Monica, California[310]--that treats inclusionary requirements like impact fees and complete the needed nexus studies.

A. The Density Bonus Approach

Even the harshest critics of inclusionary zoning, such as Robert Ellickson, concede that high enough density bonuses create affordable units at no cost to landowners, developers, or other homeowners.[311] If the goal is truly to create affordable housing, a density bonus will create the greatest number of affordable units, generate the largest overall housing supply, and maintain rates of return for developers.[312] Montgomery County, Maryland's ordinance comes closest to meeting these goals.

> The density bonus was designed to preclude developers from losing opportunities to build market-rate units and to help offset some of the production costs of the MPDUs [Moderately Priced Dwelling Units]. The law presently requires that between 12.5 and 15 percent of the total number of units . . .be moderately priced. . . .The zoning ordinance allows a density increase up to 22 percent above the normal density permitted under the zone. . . . The density bonus, in effect, creates free lots upon which the MPDUs are constructed.[313]

Montgomery County, with a population of 819,000 in 1996, has created more than 10,100 affordable units.[314] By comparison, all of the programs in the state of California, which has a population roughly 30 times as large, have together created about 25,000 units.[315] The difference? Few inclusionary programs in California have meaningful incentives[316]--most likely due to community opposition to higher densities. Density bonuses great enough to avoid costs to any of the parties will not only avoid a future takings challenge, but will also provide the most affordable housing--the goal of the program.

B. The Pure Land Use Regulation Approach

San Mateo, California, requires that ten percent of all residential projects having eleven or more units be made affordable to either low- or moderate-income families. This requirement was part of an initiative ***1020** adopted by the voters in 1990.[317] It includes no density bonuses except those required by state law and specifically states that in-lieu fees are not an acceptable alternative to providing units on-site.[318] The provisions cannot be waived because they are required by the city's general plan, and all development must conform to the plan.[319]

This approach appears most similar to a land use regulation. Like traditional zoning limitations on height, setbacks, and floor area, these policies simply regulate the use of a small portion of the property, and applicants are expected to comply with the provisions. With no in-lieu fees, this requirement looks like a land use regulation, not an exaction.

C. The Pure Exactions Approach

The City of Santa Monica chose to levy an impact fee on most new market-rate housing developments (although developers may, in some cases, have the option of providing the units off- or on-site).[320] To justify the fee, the city completed a nexus study[321] that looked at the impact of new, market-rate housing on the demand for affordable housing. It calculated the demand for goods and services created by new residents of market-rate housing; the number of low- and moderate-wage workers

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needed to satisfy that demand; and the cost of producing affordable housing needed by those workers.[322] The report concluded that an impact fee of $5.41 to $8.01 per square foot was needed to provide housing for the low-income workers who would serve the residents of the new market-rate homes.[323] As a further justification for the fee, Santa Monica included in its findings, but did not ***1021** quantify, an assertion that impact fees are needed because market-rate housing consumes land that will no longer be available for affordable housing.[324] Santa Monica anticipated that most developers would pay a fee rather than construct affordable housing on-site; anticipated that the fee might be attacked as an exaction; and completed studies to show a nexus between the fee and the impacts of new housing on affordable housing. As a generally applicable fee, Santa Monica's housing fee--and any similar fee--would likely be reviewed under the "reasonable relationship" standard established by the California courts. The nexus study completed by Santa Monica is an excellent model for cities that want to acknowledge inclusionary requirements and in-lieu fees as impact fees.

D. Other Advice for Practitioners

1. Establish an Adequate Factual Record

A city will better survive any type of challenge if it has empirical data to justify its policy judgments. (Napa had 700 pages of documents.) Some of the studies that may be particularly useful in the context of inclusionary ordinances are those listed here.

a. Demonstrate the Need for Affordable Housing in the Community and Its Relationship to the Affordability Requirements in the Ordinance

In California, regional agencies calculate each community's 'fair share' of the regional housing need every five years, dividing the total housing demand into that needed by various income groups.[325] In New Jersey, the Council on Affordable Housing has established detailed standards for affordable housing in each community.[326] Consolidated ***1022** Plans required by the Department of Housing and Urban Development as a condition of federal Community Development Block Grants and other housing grants also document housing needs.[327] All these will allow a city to demonstrate that there is a need for affordable housing in the community and that the required affordable housing "substantially advances a legitimate state interest [ ]."[328]

b. Demonstrate the Economic Feasibility of Residential Development After Passage of the Ordinance

A city should demonstrate that the requirements are not so onerous as to deny the owner "all economically viable use"[329] and that the economic impact is limited so as not to interfere with "investment-backed expectations."[330] It may help as well to show that an inclusionary ordinance will not reduce the amount of housing constructed, to demonstrate that the ordinance in fact "advances" the city's interest in affordable housing.

2. Minimize Discretion

In California and some other states, the Nollan/Dolan test will not apply to a generally applicable fee but may well apply to individually negotiated fees. The required details--percent of units required, affordability level, resale provisions, deed restrictions, physical standards for the affordable units, price and rent levels, selection of tenants and buyers--all should be determined in advance of implementing the ordinance so that the requirements are generally applicable rather than individually negotiated.

3. Consider Including a Hardship Waiver

The City of Napa court found that since Napa could grant a complete waiver from the inclusionary zoning ordinance, the ordinance could not result in a taking.[331] A waiver provision, then, can provide strong assurance that an inclusionary ordinance can withstand a facial challenge. The difficulty, however, lies in determining the basis for a complete waiver. Zoning and land use ordinances typically permit variances if the usual zoning requirements will cause a hardship. A typical ***1023** provision allows a variance when, because of a special condition of the property, literally enforcing the ordinance would cause unnecessary hardship.[332] In contrast, many of the inclusionary ordinances that permit waivers allow them if the

ordinance would cause a taking of some kind.[333] This suggests that cities (or city attorneys) are not convinced that inclusionary zoning is constitutional and wish to create an escape valve. The difficulty is that the waiver provision draws attention to that uncertain status.

A hardship provision similar to the usual variance procedure might be the best compromise, allowing a developer to request a variance based on hardship, not "takings." In the case of a facial challenge, it would allow a city to argue that the ability to apply for a variance would correct any unconstitutional application. But by relying on the standards commonly used in zoning ordinances, it would strengthen the argument that these are land use ordinances, not exactions, and would not identify inclusionary ordinances as having constitutional question marks.

4. Eliminate Conflicts with Rent Control Laws

The experiences in California and Colorado suggests that cities contemplating inclusionary ordinances should carefully research the applicable rent control laws to avoid unexpected conflicts. One strategy is to assume that rent control laws do not apply to inclusionary zoning. In that case, findings should be carefully drawn (and not pro forma) to support the contention that these are land use laws primarily --not rent control laws. The second strategy is to draft the ordinance to avoid those conflicts. For example, in California cities can avoid conflicts with the Costa-Hawkins Act by requiring the same percentage of affordable housing as needed for a density bonus under the state Density Bonus law.[334]

In addition, two provisions will help avoid an unconstitutional application. First, units need to remain affordable over a period of years (at least twenty, and ideally much longer) to ensure that the ordinance "substantially advances" its goal of creating affordable housing ***1024** and does not create "premium pricing" for the first buyer.[335] Second,[336] cities may want to consider some provision for review of future rents should unusual conditions result in rent limitations that do not result in a fair return.

Conclusion

This Comment has explored the policy basis for inclusionary housing, the unanswered legal questions, the impact of City of Napa, and strategies for drafting a defensible ordinance. Inclusionary zoning remains one of the few mechanisms that local agencies can use to create affordable housing in the absence of federal and state housing subsidies. Where it is coupled with a significant density bonus, as in Montgomery County, Maryland, it is a powerful tool to increase both affordability and the overall housing supply. However, even as usually implemented--in middle-class suburban communities more committed to low density than to affordable housing--it acts as a correction to exclusionary land policies that have artificially inflated land and house values and ensures that at least some affordable housing remains in those communities.

Although City of Napa was a case of first impression, in some ways it merely confirmed existing law. The Nollan/Dolan test was not expanded beyond conditions requiring dedications of property and development fees individually negotiated between developers and government. It would have been very big news for cities and property owners had the California courts or the United States Supreme Court accepted the HBA's definition of an exaction. Instead, California's First District Court of Appeal agreed that the ordinance should be treated like a typical land use ordinance and analyzed under the deferential Agins standard. Agencies can continue to use one of their most effective methods for creating affordable housing with more confidence that what they are doing is constitutionally sound.

Finally, although cities argue that inclusionary ordinances are not exactions, the ordinances as drafted often contradict this assertion. Typically, in-lieu fees may be substituted for on-site units (implying that the units are equivalent to an impact fee); waivers can be granted if the ordinance creates a taking (implying that the drafters think this is a possibility); and the requirements can be met in a multitude of different ways (implying that the city is looking for a commodity, i.e., ***1025** an exaction). Ordinances can, in fact, be defensible even if they are drafted to more closely resemble ordinary zoning ordinances, and they will be much easier to administer.

Inclusionary zoning is thirty years old. It remains a successful technique that should continue to create affordable housing for the next thirty years.

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*1026 APPENDIX--SUMMARY OF INCLUSIONARY ZONING ORDINANCES OR POLICIES

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Footnotes

a1 Class of 2004. A.B., Stanford University; M.C.P, University of California, Berkeley. Fellow, American Institute of Certified Planners. The author is indebted to Thomas B. Brown, City Attorney, City of Napa; Michael Rawson, Co-Director, The Public Interest Law Project; Richard Judd, Goldfarb & Lippman; and Kate Funk, Keyser-Marston Associates, for providing information on the City of Napa case. In addition, Professors Alice Kaswan and Joseph Henke, U.S.F. School of Law; Daniel J. Curtin, Jr., Bingham McCutchen LLP; Suzanne Lampert, Mundie & Associates; and Diana Elrod, Solutions for Affordable Housing, provided helpful comments on earlier drafts. Any errors are, of course, the author's alone.

1 In California, very low-income families are defined as those earning less than 50% of the median income in a Metropolitan Statistical Area ("MSA"), see Cal. Health & Safety Code § 50105 (West 1996); lower income families as those earning less than 80% of the median family income, see Cal. Health & Safety Code § 50079.5 (West 1996); and moderate-income families as those earning less than 120% of the median family income, see Cal. Health & Safety Code § 50093 (West 1996 & Supp. 2002). Incomes vary widely by county and MSA. See Cal. Dept. of Hous. & Cmty. Dev., Memorandum: Income Limits Pursuant to Title 25, § 6932 California Code of Regulations (CCR) (2002), available at http://www.hcd.ca.gov/hpd/hrc/rep/state/inc2k2.pdf (last visited July 15, 2002). In Oakland, California, for instance, a three-person, very low income family earns less than $33,550 per year, while in Fresno, California, the same family earns less than $18,150 per year. In Oakland, a lower income three-person family earns less than $52,200 per year, while a moderate-income family earns less than $80,450 per year. See id. In New Jersey, "low income" conforms with California's very low income category, while "moderate income" corresponds to California's low income category. See Nico Calavita et al., Inclusionary Housing in California and New Jersey: A Comparative Analysis, 8 Housing Pol'y Debate 109, 116 (1997).

2 See Laura M. Padilla, Reflections on Inclusionary Housing and a Renewed Look at its Viability, 23 Hofstra L. Rev. 539, 540 (1995); Marc T. Smith et al., Inclusionary Housing Programs: Issues and Outcomes, 25 Real Est. L.J. 155 (1996). In this Comment, "inclusionary housing" and "inclusionary zoning" are used interchangeably. "Inclusionary housing" as used here is sometimes called a "mandatory set-aside." See Daniel R. Mandelker, Land Use Law § 7.26, at 324-25 (4th ed. 1997). "Inclusionary zoning" may also mean any method used to create more affordable housing in a community, which may include zoning for high-density apartments, reduced development standards, and other approaches. See id. § 7.25, at 323; Stuart Meck et al., Zoning and Subdivision Regulations, in The Practice of Local Government Planning 343, 360 (Charles J. Hoch et al. eds., 3d ed. 2000). For discussions of a variety of inclusionary techniques used to promote affordable housing, see generally Jennifer M. Morgan, Comment, Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing, 44 Emory L.J. 359 (1995); Marc Settles, The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies, 14 J. Land Use & Envtl. Law 89 (1998). The inclusionary zoning reviewed here also does not include that required within redevelopment areas (such as the requirements of California's Community Redevelopment Law). See Cal. Health & Safety Code § 33000 (West 1999). The legal bases for these requirements relate to the financing mechanisms used within redevelopment areas and so are substantially different from those discussed here.

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3 108 Cal. Rptr. 2d 60 (Ct. App. 2001), review denied, Sept. 12, 2001 (2001 Cal. Lexis 6166), cert. denied, 122 S. Ct. 1356 (2002).

4 See U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

5 See Douglas T. Kendall & Charles P. Lord, The Takings Project: A Critical Analysis and Assessment of the Progress So Far, 25 B.C. Envtl. Aff. L. Rev. 509, 540-42, 545 (1998).

6 See Smith et al., supra note 2, at 157-58; Florence Wagman Roisman, Opening the Suburbs to Racial Integration: Lessons for the 21st Century, 23 W. New Eng. L. Rev. 65, 71 (2001).

7 Communities in Massachusetts have created approximately 1,000 affordable units through various kinds of "affordability zoning," some of which is mandatory. See Philip B. Herr, Zoning for Affordability in Massachusetts: An Overview, in Inclusionary Zoning: Lessons Learned in Massachusetts, NHC Affordable Housing Pol'y Rev. 3-4 (Jan. 2002). Other communities with inclusionary ordinances include Boulder and Telluride, Colorado, and Fairfax County, Virginia. See Boulder, Colo. Rev. Code § 9-6.5 (2000), available at http://www.ci.boulder.co.us/clerk/previous/2001/010102/11.html (last accessed Apr. 19, 2002); Telluride, Colo., Land Use Code Div. 7 Affordable Housing Requirements § 3-710 (2001), available at http://www.town.telluride.co.us/plan/landuse/art3div7.html (last accessed May 31, 2002); and Fairfax County, Va., Zoning Ord. § 2-800 (1998).

8 See Mandelker, supra note 2, § 7.01 at 303-04; Meck, supra note 2, at 355-56.

9 See Richard A. Judd & David Paul Rosen, Inclusionary Housing in California: Creating Affordability Without Public Subsidy, 2 J. Affordable Hous. & Community Dev. L. 4 (1992).

10 See Calavita et al., supra note 1, at 135.

11 See Joe Warner, Deal Aims To Keep All Happy--And In Town, Boston Globe, Apr. 28, 2002, at 12.

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12 See Cindy Richards, Who'll defend real pioneers? Nothing short of city's intervention will protect long time, low-income residents of gentrifying neighborhoods, Chicago Sun-Times, May 15, 2002, at 43.

13 See Steve Hollister, Home Search--Affordable Housing in East Manatee. East Manatee Communities Need Workers, But Most Can't Afford to Live There, Bradenton Herald, Apr. 7, 2002, at 1A; available at http://www.bradenton.com/mld/bradenton/archives/.

14 See Peter Blake, At City Council, Son Lobbies Mom, Rocky Mtn. News, Feb. 6, 2002, at 33A.

15 See Nino Amato, Race, Housing, Taxes, Life: There's Much Still Undone, Cap. Times, Feb. 28, 2002, at 11A.

16 Assuming 10% down, an interest rate of 7%, and 30% of income paid for housing.

17 Affordable sales prices are based on a complex set of assumptions that include down payment, interest rate, homeowners association payments, and utility costs. This calculation is based on those developed by the City of San Mateo. See San Mateo, Cal., Below Market Rate (Inclusionary) Program, Below Market Rate Housing Program Maximum Unit Rates (Feb. 2002).

18 Assuming that 30% of monthly income is used for housing.

19 For articles hostile to inclusionary zoning, see generally Lawrence Berger, Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases, 70 Neb. L. Rev. 186 (1991) (defining inclusionary zoning as a taking and as a self-defeating measure adopted by cities to correct self-created housing shortages); Robert C. Ellickson, The Irony of "Inclusionary" Zoning, 54 S. Cal. L. Rev. 1167 (1981) (concluding that inclusionary zoning aggravates housing shortages rather than correcting them and consequently is another form of exclusionary zoning).

20 For articles supportive of inclusionary zoning, see generally Andrew G. Dietderich, An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed, 24 Fordham Urb. L.J. 23 (1996) (criticizing Ellickson and concluding that inclusionary zoning will increase the supply of affordable housing); William W. Merrill III & Robert K. Lincoln, Linkage Fees and Fair Share Regulations: Law and Method, 25 Urb. Law. 223 (1993) (stating that inclusionary programs can pass legal tests if designed after appropriate studies and with procedural safeguards); Padilla, supra note 2 (finding that inclusionary programs are viable and legally valid).

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21 See Berger, supra note 19, at 227-28. For a sound bite analysis, see City Creates Housing Shortage and Makes Private Property Owners Pay, Pacific Legal Foundation, at http://www.pacificlegal.org/libertywatch/lw-oct1.htm#HBA%20of%CCCCC20N.%CCCC000ÆEEE (last visited Mar. 23, 2002) [hereinafter Housing Shortage].

22 See Ellickson, supra note 19, at 1215-16, 1270.

23 See Dietderich, supra note 20, at 25-26; Daniel R. Mandelker, The Constitutionality of Inclusionary Zoning: An Overview, in Inclusionary Zoning Moves Downtown 31, 33-34 (Dwight Merriam et al. eds., 1985).

24 See Gregory Mellon Fox & Barbara Rosenfeld Davis, Density Bonus Zoning to Provide and Low and Moderate Cost Housing; 3 Hastings Const. L.Q. 1015, 1067 (1976); Herr, supra note 7, at 4; Sam Stonefield, Affordable Housing in Suburbia: The Importance But Limited Effectiveness of the State Override Tool, 22 W. New Eng. L. Rev. 323, 343 (2001); Clark Ziegler, Introduction, Inclusionary Zoning: Lessons learned in Massachusetts, 2 NHC Affordable Housing Pol'y Rev. 1-2 (Jan. 2002).

25 See Thomas Kleven, Inclusionary Ordinances--Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing, 21 UCLA L. Rev. 1432, 1490 (1974). See also Fred P. Bosselman et al., Panel Comments, in Inclusionary Zoning Moves Downtown 41-54 (Dwight Merriam et al. eds., 1985); Mandelker, supra note 23, at 35-36; Merrill & Lincoln, supra note 20, at 274. On the other hand, many commentators simply assume that inclusionary housing is an exaction. See Berger, supra note 19, at 221; Brian W. Blaesser, Inclusionary Housing: There's a Better Way, Inclusionary Zoning: Lessons learned in Massachusetts, 2 NHC Affordable Housing Pol'y Rev. 14, 15 (Jan. 2002); Susan M. Denbo, Development Exactions: A New Way to Fund State and Local Government Infrastructure Improvements and Affordable Housing, 23 Real Estate L.J. 7, 11 (1994); Ellickson, supra note 19, at 1211.

26 See William B. Stoebuck & Dale A. Whitman, The Law of Property § 9.32, at 675 (3d ed. 2000).

27 See discussion infra Part II.

28 See Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60 (Ct. App. 2001); Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) ("Mt. Laurel II").

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29 See discussion infra Part IV.B.

30 See Cal. Civ. Code §§ 1954.50-.535 (2001) (requiring decontrol of prices when tenants vacate and establishing other restrictions on local rent control ordinances); Colo. Rev. Stat. § 38-12-301 (2001) (prohibiting local rent control except on property in which a local agency has an interest); discussion infra Part IV.D.

31 See Town of Telluride v. Lot Thirty-Four Venture L.L.C., 3 P.3d 30, 35 (Colo. 2000) (holding that Telluride's inclusionary ordinance violated Colorado's ban on local rent control). See generally Nadia I. El Mallakh, Comment, Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs? 89 Cal. L. Rev. 1847 (2001) (discussing potential conflicts between California's rent control laws and inclusionary housing programs).

32 108 Cal. Rptr. 2d 60.

33 483 U.S. 825 (1987).

34 512 U.S. 374 (1994).

35 See 483 U.S. at 827.

36 See 512 U.S. at 380.

37 483 U.S. at 837.

38 512 U.S. at 391.

39 See Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 66 (Ct. App. 2001).

40 See Fox & Davis, supra note 24, at 1036-55; Smith et al., supra note 2, at 156.

41 See Div. of Hous. & Code Enforcement, Montgomery County, Md., The Moderately Priced Dwelling Unit Program: Montgomery County, Maryland's, Inclusionary Zoning Ordinance, available at http://hca.emontgomery.org/Housing/MPDU/summary.htm (last visited Mar. 23, 2002) [hereinafter Montgomery County].

42 See Boulder, Colo. Rev. Code, § 9-6.5 (2000); Telluride, Colo., Land Use Code § 3-710 (2001); and Fairfax County, Va., Zoning Ord. § 2-800 (1998); Roisman, supra note 6, at 71; Smith et al., supra note 2, at 157-58. Although Roisman also lists Massachusetts, Oregon, and Florida as having effective inclusionary programs, see Roisman, supra note 6, at 71, the Oregon and Florida programs are statewide growth management programs with inclusionary elements, not comparable to the local zoning ordinances reviewed here, see Smith et al., supra note 2, at 157-58, while the mandatory element of Massachusetts' program involves state review of local decisions regarding affordable housing projects. However, in Massachusetts, some communities have adopted mandatory inclusionary ordinances. See Calavita et al., supra note 1, at 111; Herr, supra note 7, at 3-4.

43 See supra notes 11-15 and accompanying text.

44 See Judd & Rosen, supra note 9, at 4.

45 See Calavita et al., supra note 1, at 113.

46 See id.

47 See Judd & Rosen, supra note 9, at 4.

48 See Calavita et al., supra note 1, at 135.

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49 456 A.2d 390 (N.J. 1983). In Southern Burlington County NAACP v. Township of Mount Laurel ("Mt. Laurel I"), 336 A.2d 713 (N.J. 1975), the New Jersey Supreme Court invalidated Mount Laurel's zoning ordinance as exclusionary and ordered that every developing New Jersey municipality provide its "fair share" of low-income housing. See id. at 734, 724. Mt. Laurel II reviewed the steps taken by Mount Laurel and five other municipalities to meet their fair share requirements. See Mt. Laurel II, 456 A.2d at 410.

50 See 456 A.2d at 448.

51 See Cal. Gov't Code § 65580 (West Supp. 2001).

52 Cal. Gov't Code § 65583(c) (West Supp. 2001).

53 See Nico Calavita & Kenneth Grimes, Inclusionary Housing in California: The Experience of Two Decades, 64 APA J. 150, 165 (1998). In another article, the lead author also notes the substantial resistance from developers to inclusionary programs, no matter how designed, see Calavita et al., supra note 1, at 120-22, and it can be speculated that this opposition is responsible for the merely sporadic adoption of the program in other states.

54 See Roisman, supra note 6, at 71 n.43 (indicating 22,572 units produced and 2,439 "in the pipeline" as of 1994).

55 See John M. Payne, Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix, 22 W. New Eng. L. Rev. 365, 368 (2000).

56 Id.

57 See Calavita et al., supra note 1, at 111; Montgomery County, supra note 41, at 7.

58 See infra notes 145-47 and accompanying text.

59 See California Agencies with Inclusionary Zoning Ordinances or Policies, in Appendix. This table briefly summarizes key provisions of the ordinances for purposes of comparison. Note, however, that the ordinances are quite complex, and their actual language must be read to understand fully each city's or county's requirements. The summary statements included in this section are based on a review of the table.

60 See supra note 1 for definitions of household incomes within these categories.

61 A "density bonus" allows the construction of more housing units than would normally be permitted by local zoning ordinances or other land use controls. For instance, if a developer could normally build 100 homes, a density bonus of 10% would allow him to build 110 homes. See Smith et al., supra note 2, at 162.

62 Note that California has a Density Bonus law, see Cal. Gov't Code § 65915 (West Supp. 2002), that requires cities to grant density bonuses up to 25% of base density if developers provide a designated percentage of affordable housing. However, the Density Bonus law requires that either 20% of the units be affordable to lower income families, or that 10% be affordable to very low income households, or that 50% be designated for seniors. Most cities do not require such a large percentage of units to be affordable to families with such low incomes. However, if the developer chooses to provide housing meeting these standards, then the local agency must grant the density bonus.

63 If the terms of an ordinance can be completely waived, it may be more likely to survive a facial challenge. See discussion infra pp. 30-31.

64 See Napa, Cal., Code § 15.94.080 (A) (1999).

65 See Padilla, supra note 2, at 564.

66 See Fox & Davis, supra note 24, at 1067; Herr, supra note 7, at 4; Stonefield, supra note 24, at 343; Ziegler, supra note 24, at 1-2.

67 Smith et al., supra note 2, at 164.

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[68] See Fox & Davis, supra note 24, at 1067.

[69] See Calavita & Grimes, supra note 53, at 152; Padilla, supra note 2, at 569.

[70] See Mallakh, supra note 31, at 1853-54.

[71] For a lengthy discussion of policy reasons to support inclusionary zoning, see Padilla, supra note 2, at 564-70.

[72] See Calavita et al., supra note 1, at 120-22. Opposition to inclusionary programs remains strong. See, e.g., Hollister, supra note 13 ("opponents of the plan have called it social engineering at its worst"); Lori Weisberg, City leaders return to a simmering issue--affordable housing, The San Diego Union-Tribune, Apr. 15, 2002, at B1 ("10 years [ago] a similar program went down to defeat in the wake of strong builder opposition"); Housing Shortage, supra note 21 (opposing inclusionary zoning as requiring a subsidy from builders to make up for cities' exclusionary zoning).

[73] See Phil Serna, Impacts of inclusionary policies make housing less affordable, HBA News (July/Aug. 2001), available at http:// www.hbanc.org/news2000/JulAug2001/JulAug01feat2.html (last visited June 25, 2002).

[74] See Smith et al., supra note 2, at 164 ("[P]rice increases for market-rate units are presumably attainable without participation" in inclusionary programs.).

[75] See generally Ellickson, supra note 19. See also Dietderich, supra note 20, at 26-27 ("[R]esistance [to inclusionary zoning] is based almost entirely on Robert Ellickson's article.... Citations to Ellickson for the proposition that inclusionary zoning rules hurt the poor are legion."). Dietderich lists eleven law review articles and two books that cite Ellickson for this proposition. See id. at 27 n.7.

[76] Ellickson is a property rights advocate, now the Walter E. Meyer Professor of Property and Urban Law at Yale Law School, formerly at the University of Southern California Law School from 1970-81. See Ellickson, supra note 19, at 1167.

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[77] See id. at 1190.

[78] See id. at 1181; Berger, supra note 19, at 205.

[79] See Ellickson, supra note 19, at 1190-91.

[80] See id. at 1190.

[81] Id. at 1191.

[82] Id.

[83] See id. at 1190-91.

[84] See id. at 1192.

[85] See. id. at 1215-16.

[86] Id. at 1184.

[87] See generally Serna, supra note 73.

88 See id.; Ellickson, supra note 19, at 1203-04. The concept of "filtering down" assumes that as new market-priced housing is built, existing owners will "move up" to better housing, and eventually the least expensive existing housing will "filter down" to lower income families. See Dietderich, supra note 20, at 43.

89 See Ellickson, supra note 19, at 1215-16.

90 See, e.g., Michael Neal, Inclusionary strategies only add to housing costs, San Diego Union-Tribune, Apr. 17, 2002, at B7.

[T]he city of San Diego wants to levy a special tax on the already burdened homebuyer. The tax would pay for inclusionary housing and it would add $10,000 to $20,000 to the cost of every new home. Many people wrongly believe that the building would carry the brunt of the costs and home prices will not increase as a result of inclusionary housing. This is a myth. Homebuilders/developers do not pay this cost, the buyers do. Inclusionary housing as currently proposed by the city is delivering low-income housing on the backs of new homeowners.

Id. Neal is president of the Building Industry Association of San Diego County. See id.

91 See Smith et al., supra note 2, at 162 ("In the long run ... the price effects of inclusionary zoning may be borne by landowners who sell land to builders. Builders would incorporate the cost into a lower bid price for land."); Keyser Marston Associates, Inc., Impact Evaluation: BMR and Nexus Fee Proposal, Prepared for City of San Mateo, Cal. (May 2001), 5 (on file at the University of San Francisco Law Review office) (concluding that land prices would be reduced forty percent if an existing inclusionary requirement were increased from ten to twenty percent with greater affordability) [hereinafter Impact Evaluation]; Mundie & Associates, Analysis of Affordable Housing Requirements Incorporated in the Housing Element of the General Plan, City of San Luis Obispo, Cal. (1997 Update), 1-2, 24 (July 1997) (on file at the University of San Francisco Law Review office) (showing reduction in land value of 7 to 65 percent and increase in market price of 1 to 17 percent depending on inclusionary program selected) [hereinafter Mundie & Associates]; e-mail from Diana Elrod, Solutions for Affordable Housing, to Barbara Kautz (May 28, 2002, 02:47 PM PDT) (citing City of Mountain View, Cal., Housing Element) (on file at the University of San Francisco Law Review office) ("[A]ccording to... the consensus of a focus group of local developers, the cost of the [inclusionary housing] program is generally passed on to the property owner selling his land for housing--rather than to the price or rental of the housing units."); e-mail from Darin Smith, Economic & Planning Systems, Inc., to Barbara Kautz (May 29, 2002, 04:22 PM PDT) (on file at the University of San Francisco Law Review office) ("[T]he short answer is that, while the costs may be shared among developers and landowners, the landowners likely suffer the most loss. Prospective homeowners are least likely to be affected, as their willingness to pay is what sets the market price, not the costs incurred by the developer."). Note that, by providing adequate density bonuses, cities may design their programs so that there are no costs to anyone.

92 See Smith et al., supra note 2, at 158-61.

93 See id. at 159.

94 Id. at 162. Unusual economic conditions, however--either an expansive market accompanied by rapidly rising housing costs, when costs are likely largely absorbed by market-rate buyers, or a plummeting market, when costs are likely absorbed by developers holding overpriced land--can alter this conclusion. See Calavita et al., supra note 1, at 121, 132. Note that it could be argued that the conclusions reflect the parties' desired political ends. If new homebuyers will shoulder the costs, that will be less politically acceptable and will tend to defeat a proposed ordinance, whereas communities are typically less protective of developers' land values.

95 See Calavita & Grimes, supra note 53, at 152; Dwight Merriam, Panel Comments, in Inclusionary Zoning Moves Downtown 95-96 (Dwight Merriam et al. eds., 1985).

96 See, e.g., Edward L. Glaeser & Joseph Gyourko, The Impact of Zoning on Housing Affordability, Working Paper 8835, National Bureau of Economic Research (2002); available at http://www.nber.org/papers/w8835 (last visited June 25, 2002).

97 See Merriam, supra note 95, at 95.

98 See Dietderich, supra note 20, at 103.

99 Bob Egelko, Court Backs Low-Income Housing Units; Developers' Challenge to Napa Law Rejected, S.F. Chron., June 8, 2001, at A4 (quoting Harold Johnson, Pacific Legal Foundation attorney). See also James E. Holloway & Donald C. Guy, A Limitation on Development Impact Exactions to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities, 9 Dick. J. Envtl. L. & Pol'y 1, 17-18 (2000) (stating that takings claims often arise when developers believe local ordinances impose "unreasonable economic burdens that obligate them to pay for public benefits enjoyed by the community").

100 See Dietderich, supra note 20, at 28.

101 See Ellickson, supra note 19, at 1180.

102 See e-mail from Kate Funk, Keyser-Marston Associates, to Barbara Kautz (May 31, 2002, 11:48 PDT) (on file at the

University of San Francisco Law Review office).

103 See Thomas Kleven, Inclusionary Ordinances and the Nexus Issue, in Inclusionary Zoning Moves Downtown 109, 124 (Dwight Merriam et al. eds., 1985).

104 See Ellickson, supra note 19, at 1180. See also e-mail from Nico Calavita to Barbara Kautz (June 4, 2002, 04:42 PDT) (on file at the University of San Francisco Law Review office) ("There are no empirical studies.").

105 Respondent's Brief in Opposition at 1, Home Builders Ass'n v. City of Napa, 122 S. Ct. 1356 (2002) (No. 01-893).

106 Petitioner's Reply to the Opposition to Petition for Writ of Certiorari at 4, Home Builders Ass'n v. City of Napa, 122 S. Ct. 1356 (2002) (No. 01-893).

107 See Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 65 (Ct. App. 2001).

108 272 U.S. 365 (1926).

109 Id. at 395.

110 Id. (citing Cusack Co. v. City of Chicago, 242 U. S. 526, 529, 530 (1917) and Jacobson v. Massachusetts, 197 U.S. 11, 30-31 (1905)).

111 See id. at 387. From 1928 to 1962, the Supreme Court reviewed no zoning cases. See Stoebuck & Whitman, supra note 26, § 9.11 at 579.

112 447 U.S. 255 (1980).

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113 See U.S. Const. amend. V (prohibiting the taking of private property for "public use, without just compensation."). See generally Agins, 447 U.S. 255.

114 See Agins, 447 U.S. at 257.

115 Id. at 260.

116 See id. at 261-62.

117 See Ronald H. Rosenberg & Nancy Stroud, When Lochner Met Dolan: The Attempted Transformation of American Land-Use Law by Constitutional Interpretation, 33 Urb. Law. 663, 670 (2001); Edward H. Ziegler, Development Exactions and Permit Decisions: The Supreme Court's Nollan, Dolan, and Del Monte Dunes Decisions, 34 Urb. Law. 155, 157-58 (2002).

118 See Rosenberg & Stroud, supra note 117, at 674-77; Ziegler, supra note 117, at 157-59.

119 483 U.S. 825 (1987).

120 See id. at 834 n.3.

121 See Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994). Note that the Associated Home Builders in City of Napa challenged Napa's inclusionary ordinance under only the "substantially advance" prong of Agins, never alleging that the ordinance deprived builders of all economically viable use of their property or that the ordinance constituted an economic taking under the test established in Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). See Petitioner's Reply to the Opposition to Petition for Writ of Certiorari at 7 n.6, Home Builders Ass'n v. City of Napa, 122 S. Ct. 1356 (2002) (No. 01-893) ("Because the Takings Clause claim is based on allegations that the Ordinance fails to substantially advance a legitimate governmental interest,... Petitioner is not alleging a denial of economically viable use....") (internal citations omitted).

122 See Holloway & Guy, supra note 99, at 18. But see Rosenberg & Stroud, supra note 117, at 677 (stating that some courts will use the "substantially advance" test as a vehicle for "highly intrusive review"); Ziegler, supra note 117, at 158 n.23 (listing regulations overturned on the basis of "substantially advance" analysis).

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[123] See Nollan, 483 U.S. 825;Dolan, 512 U.S. 374.

[124] Holloway & Guy, supra note 98, at 8-9.

[125] See 483 U.S. 828-29.

[126] See id. at 836-37.

[127] See id. at 837.

[128] See 512 U.S. at 394-96.

[129] See id. at 387-88.

[130] Id. at 391.

[131] See id.

[132] See id. at 391 n.8.

[133] See supra notes 48-53 and accompanying text.

[134] See Judd & Rosen, supra note 9, at 5 (The "legal arguments for such a challenge have existed for a number of years.").

[135] "The donation of land or creation of an easement for public use." Black's Law Dictionary, 7th ed. (2000).

[136] See, e.g., Lee Anne Fennell, Hard Bargains and Real Steals: Land Use Exactions Revisited, 86 Iowa L. Rev. 1, 4, 13 (2000) (noting that the varying standards create a "logical anomaly. Land use bargains [between individual developers and municipalities] are constrained by proportionality requirements, while land use decisions... are not." "Nexus and proportionality standards might be logically applied to land use regulation generally.").

[137] 526 U.S. 687 (1999).

[138] Id. at 702-03 (emphasis added) (internal citations omitted). The majority opinion was signed by five justices. In a partial concurrence, Justice Souter, joined by the remaining justices, stated, "I agree in rejecting extension of 'rough proportionality' as a standard for reviewing land-use regulations...." Id. at 733 (Souter, J., concurring and dissenting).

[139] Virtually all of the cases and articles reviewed by the author for this Comment define "exactions" only by reference to specific activities-- dedication of land, payment of fees, construction of public improvements-- rather than in a generic sense that permits applicability beyond these specific examples. Two exceptions are a Washington appellate court decision, Benchmark Land. Co. v. City of Battle Ground, 14 P.3d 172, 175 (Wash. Ct. App. 2000) (applying Nollan/Dolan because a mandatory street improvement "required the developer to address a problem that existed outside the development property....[a]nd the development did not cause this problem"); and Stoebuck & Whitman, supra note 26, § 9.33 at 688 (distinguishing an exaction from a regulation as a requirement for the actual transfer of land or a fee from the developer to the government). In their petition for writ of certiorari to the United States Supreme Court, the HBA implicitly defined an exaction as "the forced payment of land, money, or labor." Petition for Writ of Certiorari at 10, Home Builders Ass'n v. City of Napa, 122 S. Ct. 1356 (2002) (No. 01-893).

[140] Rosenberg & Stroud, supra note 117, at 678. See generally Ziegler, supra note 117, at 161-65 (discussing issues regarding application of the Nollan/Dolan test).

[141] See Nancy E. Stroud, A Review of Del Monte Dunes v. City of Monterey and Its Implications, 15 J. Land Use & Envtl. L 195, 203-04(1999); Ziegler, supra note 117, at 162 n.39-40.

[142] See Ziegler, supra note 117, at 163-64.

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143 Id. at 164-65 n.51.

144 See Stroud, supra note 139, at 205-06 (discussing decisions following Del Monte Dunes). Relying on Del Monte Dunes, the New York Court of Appeals and the Colorado Supreme Court have limited the use of the Dolan "rough proportionality" test. See Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 697 (Colo. 2001) (upholding generally applicable sewer fees and holding that Nollan/Dolan apply "only where the government demand[s] real property as a condition of development"); Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 721 N.E.2d 971, 975-76 (N.Y. 1999) (holding that, pursuant to Del Monte Dunes, Nollan/Dolan is applicable only to exactions and upholding rezoning of a golf course from residential to recreation).

145 San Remo Hotel v. City and County of San Francisco, 41 P.3d 87, 103 (Cal. 2002) (quoting Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 1001 (Cal. 1999)) (emphasis added).

146 San Remo Hotel, 41 P.3d at 105.

147 Id. at 103 (quoting Santa Monica Beach, 968 P.2d at 1001).

148 Stoebuck & Whitman, supra note 26, § 9.32 at 680 (citing Pioneer Trust & Savings Bank v. Village of Mt. Prospect, 176 N.E. 2d 799, 802 (1961)).

149 See Daniel J. Curtin, Jr. & Cecily T. Talbert, Curtin's California Land Use and Planning Law, at 269 (22nd ed. 2002).

150 Stoebuck & Whitman, supra note 26, § 9.32 at 680 (citing Longridge Builders, Inc., v. Planning Board, 245 A.2d 336, 337 (N.J. 1968)).

151 41 P.3d 87 (Cal. 2002).

152 A residential hotel room is a room occupied by one person for at least thirty-two consecutive days. See id. at 92.

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[153] See id.

[154] See id. at 95.

[155] Id.

[156] See id. at 111.

[157] Id. at 105-06. Note that Justice Scalia equated the "reasonable relationship" test to the "rough proportionality" test that the Court formulated in Dolan. See Dolan v. City of Tigard, 512 U.S. 374, 390-91 (1994). However, commentators often consider the "reasonable relationship" test to be a more deferential standard. See, e.g., Ziegler, supra note 117, at 164-65.

[158] See San Remo Hotel, 41 P.3d at 106; Ziegler, supra note 117, at 164-65.

[159] 198 S.E.2d 600 (Va. 1973).

[160] See id.

[161] See id. at 601.

[162] Id. at 602.

[163] See id.

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164 See id.

165 Mandelker, supra note 2, § 7.26 at 325.

166 See Va. Code Ann. § 15.2-2304 (Michie Supp. 2001).

167 See Fairfax County, Va., Zoning Ord. §2-800 (1998), available at http://www.fairfaxcounty.gov/dpz/PDF_files/Ordinance/art02.pdf; Fairfax County, Va., Key Provisions of the Fairfax County Affordable Dwelling Unit (ADU) Ordinance (Mar. 31, 1998), available at http://www.co.fairfax.va.us/gov/rha/adu/Keyprovisions.pdf (last visited June 26, 2002).

168 456 A.2d 390 (N.J. 1983).

169 Id. at 449.

170 Id. at 448.

171 See id. at 449.

172 See id. at 448.

173 Id. at 449-50.

174 Id. at 449.

175 583 A.2d 277 (N.J. 1990).

176 Id. at 288.

177 Id.

178 Id.

179 See id.

180 See id. at 283-84; Southern Burlington Township NAACP v. Township of Mt. Laurel, 456 A.2d 390, 448-50 (N.J. 1983).

181 See discussion infra Part III.B.1.

182 108 Cal. Rptr. 2d 60 (Ct. App. 2001).

183 Recent Case, Constitutional Law--Fifth Amendment Takings Clause-- California Court of Appeal Finds Nollan's and Dolan's Heightened Scrutiny Inapplicable to Inclusionary Zoning Ordinance --Home Builders Ass'n of Northern California v. City of Napa, 108 Cal Rptr. 2d 60 (Cal. Ct. App. 2001), 115 Harv. L. Rev. 2058 (2002) [hereinafter Recent Case].

184 See City of Napa, 108 Cal. Rptr. 2d at 61.

185 See Kendall & Lord, supra note 5, at 540-42, 545.

186 See id. at 541. On March 23, 2002, PLF's web site showed forty-eight land use takings cases. Another thirty-eight were related to environmental laws, endangered species, impact fees, and other land use matters. The NAHB, the Building Industry Association, or local home builders associations were parties in eight of these cases. (Pacific Legal Foundation, at http://www.pacificlegal.org/libertywatch/) (last visited Mar. 23, 2002).

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[187] Kendall & Lord, supra note 5, at 545. Amicus briefs in support of HBA were filed on behalf of the California Housing Council and the Apartment Association of Greater Los Angeles. See City of Napa, 108 Cal. Rptr. at 61.

[188] See City of Napa, 108 Cal. Rptr. 2d at 63 n.4.

[189] See id. at 61. Intervenors included Napa Valley Community Housing, Non Profit Housing Association of Northern California, and Housing California. Amicus briefs were filed on behalf of the Napa Chamber of Commerce, Napa Valley Farm Bureau, Napa Valley Grape Growers' Association, seventy-two California cities, and the California State Attorney General. See id.

[190] See Napa, Cal., Mun. Code § 15.94.050(A) (1999). Note that the definition of "affordable" as used in the ordinance is complex but generally means that monthly payments are limited to ensure that units are affordable to persons earning less than eighty percent of the median income. See id.

[191] See id. § 15.94.050(B).

[192] See id. § 15.94.050(F).

[193] Id. § 15.94.080(A).

[194] City of Napa, 108 Cal. Rptr. 2d at 63 (quoting Tahoe-Sierra Pres. Council v. State Water Res. Control Bd., 259 Cal. Rptr. 132, 146 (Ct. App. 1989)).

[195] See City of Napa, 108 Cal. Rptr. 2d at 64.

[196] See Telephone Interview with Michael Rawson, Co-Director, The Public Interest Law Project and California Affordable Housing Law Project, Oakland, Cal. (Nov. 12, 2001).

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197 City of Napa, 108 Cal. Rptr.2d at 64.

198 See id. at 66.

199 See id. at 64-65.

200 438 U.S. 104 (1978).

201 See Brief for Intervenors-Respondents at 26, City of Napa (Cal. Ct. App. 1st Dist.) (No. A090437) (citing Penn Central, 438 U.S. at 108).

202 See Brief for Intervenors-Respondents at 27.

203 City of Napa, 108 Cal. Rptr. 2d at 64.

204 Id. at 65.

205 See id. at 66 (citing Penn Central, 438 U.S. at 108). The historic preservation ordinance at issue in Penn Central was itself designed to correct past New York City failures to protect historic buildings. See id.

206 See City of Napa, 108 Cal. Rptr. 2d at 64.

207 See Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994).

208 Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993 (Cal. 1999).

[209] City of Napa, 108 Cal. Rptr. 2d at 65 (quoting Ehrlich v. City of Culver City, 911 P.2d 429, 438 (Cal. 1996)).

[210] Id. at 66.

[211] Id. at 65 (quoting Santa Monica Beach, 968 P.2d at 1002).

[212] Id. at 65-66 (quoting Santa Monica Beach, 968 P.2d at 1002).

[213] Daniel J. Curtin, Jr., Residential Inclusion, San Francisco Daily J. at 5 (July 20, 2001). See also summary of case in Development: In-Lieu Fee Substitutes for Affordable Housing, Real Estate L. Report, November 2001, at 7.

[214] See Serna, supra note 73.

[215] Id.

[216] See discussion supra p. 24. This may not be the case in regard to required dedications of land. See infra note 222.

[217] See San Remo Hotel v. City and County of San Francisco, 41 P.3d 87, 104 (Cal. 2002).

[218] See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[219] See supra notes 48-53 and accompanying text.

[220] 515 U.S. 1116 (1995).

[221] Id. at 1118 (Thomas, J., dissenting from denial of certiorari). The ordinance in question required existing parking lots

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to install at least one tree for every eight parking spaces and to devote ten percent of their surface area to landscaping--a typical land use regulation. The Supreme Court of Georgia reviewed the ordinance pursuant to Agins and refused to apply Nollan/Dolan because it was not an individualized determination. See id. at 1116-17.

222 However, in San Remo Hotel, the California Supreme Court specifically distinguished payment of fees from the "exaction of an interest in real property" as occurred in Nollan and Dolan, implying that Nollan/Dolan may apply to all dedications of real property, even if legislatively imposed. See 41 P.3d at 106.

223 Recent Case, supra note 183, at 2063.This review suggests that a four-part test initially be applied to determine if an ordinance constitutes a taking: whether there is 1) a per se physical taking (involving physical occupation); 2) a per se economic taking (no economically viable use); 3) a taking under the Penn Central multifactor test, see Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); or 4) a failure to "substantially advance[ ] legitimate state interests" under Agins, 447 U.S. at 260. Only if the ordinance constitutes a taking under one of these tests would it be subject to heightened scrutiny under Nollan/Dolan, either in a facial challenge or an as-applied challenge. See Recent Case, supra note 183, at 2063-65.

This analysis confuses the two prongs of a takings analysis. The heightened scrutiny Nollan/Dolan test is used to determine whether the government's action is a "substantial advancing of a legitimate state interest," see Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987), not whether there is an economic taking. See also Edward J. Sullivan, Return of the Platonic Guardians: Nollan and Dolan and the First Prong of Agins, 34 Urb. Law. 39, 41 (2002) ("Nollan and Dolan [are] founded exclusively on the first prong of the Agins test...."). Whether the test is used depends entirely on the nature of the government's action, rather than on its economic impact. Note that in Nollan, the Court agreed that the Coastal Commission could have required the Nollans to dedicate the beach easement had the required dedication actually advanced the state's asserted interest. The dedication did not create an economic taking; rather, it did not "substantially advance" the state's interest. See Nollan, 483 U.S. at 836-37. The Court has imposed the test only when reviewing required dedications of property, see supra pages 21-24, and has stated in dicta that it applies only to "exactions." See City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 702 (1999). Thus, the issue is whether inclusionary requirements are exactions subject to the Nollan/Dolan test, not whether they are "takings." In addition, the Penn Central test is almost never appropriate when reviewing an ordinance on its face; rather, it is an "essentially ad hoc, factual inquir[y]" generally utilized in an as-applied challenge. Penn Central, 438 U.S. at 124.

224 See Ziegler, supra note 117, at 164-65 n.51.

225 Cal. Gov't Code § 66000 (West Supp. 2002).

226 See Cal. Gov't Code § 66020(d)(1) (West Supp. 2002).

227 See Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 63 (Ct. App. 2001).

228 See Brief of Amicus Curiae in Support of Respondent City of Napa at 9, City of Napa (Cal. Ct. App. 1st Dist.) (No. A090437); Memorandum of Points and Authorities in Support of Defendant City of Napa's Demurrer at 17, Home Builders Ass'n v. City of Napa (Napa County Super. Ct.) (No. 26-07228).

229 See San Remo Hotel v. City and County of San Francisco, 41 P.3d 87, 105 (Cal. 2002).

230 See id. at 92.

231 Even some authors supportive of inclusionary zoning believe that they could be considered to be exactions. See, e.g., Merrill & Lincoln, supra note 20, at 274 (stating that inclusionary ordinances may be considered exactions because they require the developer to provide a "public good" and may allow him to pay fees to avoid specific restrictions). See also discussion supra note 25. In California, because of the requirements of California's Mitigation Fee Act, see supra notes 225-27 and accompanying text, any challenge based on a contention that the ordinance is an impact fee must be brought in an as-applied challenge after the fees have been paid under protest.

232 San Remo Hotel, 41 P.3d at 104.

233 See Napa, Cal., Mun. Code § 15.94.050(F).

234 Id. § 15.94.050(B).

235 See Recent Case, supra note 183, at 2061 n.33 (describing the typical cost of nexus studies as $20,000-$35,000). See also infra Part V.C. for a description of possible nexus studies.

236 See Napa, Cal., Mun. Code § 15.94.080(A) (1999).

[237] See Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987); e-mail from Thomas B. Brown, City Attorney, Napa, to Barbara Kautz (Aug. 23, 2002, 21:03 PDT).

[238] See Serna, supra note 73.

[239] See Recent Case, supra note 183, at 2061-62.

[240] See Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 64 (Ct. App. 2001).

[241] See discussion infra Part V.D.3.

[242] See Telephone Interview with Thomas B. Brown, City Attorney, Napa, Cal. (Mar. 29, 2002).

[243] Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

[244] See id. at 108.

[245] Id. at 124.

[246] See id. at 138.

[247] Wendie L. Kellingham, New Takes on Old Takes: A Takings Law Update, 2001 ALI-ABA Land Use Inst. 511, 515 (2001).

[248] See Penn Central, 438 U.S. at 131.

[249] See Impact Evaluation, supra note 91, at 5.

[250] See Petitioner's Reply to the Opposition to Petition for Writ of Certiorari at 7 n.6, Home Builders Ass'n v. City of Napa, 122 S. Ct. 1356 (2002) (No. 01-893).

[251] See Petition for Writ of Certiorari at 28, Home Builders Ass'n v. City of Napa, 122 S. Ct. 1356 (2002) (No. 01-893).

[252] See U.S. Const. amend. XIV, § 1.

[253] See Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 67 (Ct. App. 2001).

[254] See Memorandum of Points and Authorities in Support of Defendant City of Napa's Demurrer at 19, Home Builders Ass'n v. City of Napa (Napa County Super. Ct.) (No. 26-7228).

[255] See City of Napa, 108 Cal. Rptr. 2d at 67.

[256] See id.

[257] See Mallakh, supra note 31, at 1872-76.

[258] See id.

[259] See Town of Telluride v. Lot Thirty-Four Venture L.L.C., 3 P. 3d 30, 35 (Colo. 2000).

[260] See id. at 32.

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261 Id.

262 Id.

263 See id at 32. In a dissent, Chief Justice Mullarkey argued vigorously that the Telluride ordinance was a land use control, pointing out that it was impact-related and designed to meet other Colorado planning goals and did not apply to existing rental units, as would a typical rent control ordinance. See id. at 42-44 (Mullarkey, C.J., dissenting).

264 Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983).

265 See id. at 446 n.30.

266 Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 998 (Cal. 1999).

267 See id. at 999.

268 See Cal. Gov't Code § 65915(c).

269 This figure is based on a median income of $74,500 for a three-person family. Sixty percent of median income equals $44,700/year, or $3,725/month. Thirty percent of monthly income equals $1,117/month.

270 485 U.S. 1 (1988).

271 See id. at 4.

[272] See id. at 15. Justice Scalia, however, would have found the ordinance to be facially unconstitutional based on this section alone. See id. (Scalia, J., dissenting).

[273] See Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 67 (Ct. App. 2002).

[274] No. 00-1167 (U.S. Supreme Ct., filed Apr. 23, 2002).

[275] See id., slip. op. at 27-28 ("An interest in real property is defined by the metes and bounds that describe its geographic dimensions.... Hence, a permanent deprivation of the owner's use of the entire area is a taking of the parcel as a whole....") (emphasis added).

[276] See id., slip op. at 23.

[277] See Calavita & Grimes, supra note 53, at 160.

[278] 503 U.S. 519 (1992).

[279] See id. at 530.

[280] Id. The Court did not decide whether this provision resulted in a taking because it had granted certiorari only to determine whether the ordinance created a physical taking. See id. See also Merrill & Lincoln, supra note 20, at 280 n.295.

[281] 124 F.3d 1150 (9th Cir. 1997).

[282] See id. at 1165-66.

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283 224 F.3d 1030 (9th Cir. 2000).

284 Id. at 1033.

285 See id. at 1037.

286 See Town of Telluride v. Lot Thirty-Four Venture LLC, 3 P.3d 30, 35 (Colo. 2000); supra notes 259-63 and accompanying text.

287 See Cal. Civ. Code §§ 1954.50 (West Supp. 2002).

288 See generally Mallakh, supra note 31 (discussing in detail whether Costa-Hawkins applies to inclusionary zoning ordinances).

289 See Cal. Civ. Code § 1954.52(a) (West Supp. 2002) ("Notwithstanding any other provision of law, an owner of residential real property may establish the initial... rental rates for a dwelling or unit....").

290 See Cal. Civ. Code § 1954.52(a)(3)(C)(ii) (West Supp. 2002) ("[A]n owner of real property ... may establish the initial and all subsequent rental rates for all new tenancies....").

291 See Mallakh, supra note 31, at 1850-51.

292 A participant in the legislative debates on Costa-Hawkins states that Costa-Hawkins proponents specifically asserted that the bill would not cover inclusionary units. However, he acknowledges that no such agreement is reflected in the legislative history. See Telephone Interview with Michael Rawson, Co-Director, The Public Interest Law Project and California Affordable Housing Law Project, Oakland, Cal. (Nov. 12, 2001). See also Mallakh, supra note 31, at 1870-72. Mallakh also discusses the numerous statements of the bill's authors that Costa-Hawkins would affect only the five California cities that did not permit vacancy decontrol (Berkeley, Santa Monica, West Hollywood, Cotati, and East Palo Alto), see id. at 1870 n.149, and notes that nowhere in the legislative history was the act described as having a "prohibitive effect" on inclusionary programs. See id. at 1871 n.154.

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293 Cal. Civ. Code § 1954.52(b) (2001).

294 See Cal. Gov't Code §§ 65915-65918 (West Supp. 2002). The Density Bonus law requires cities and counties to grant at least two incentives (or other incentives of "equivalent" financial value) for any housing development that includes a specified percentage of affordable housing:

Twenty percent affordable to lower income households; or

Ten percent affordable to very low income households; or

Fifty percent occupied by senior citizens.

See id. If a city does not choose to give financial assistance to the developer, it must grant him a twenty-five percent density bonus over that normally allowed by a city's zoning ordinance or comprehensive plan, see Cal. Gov't Code § 65915(f), plus one other incentive, generally a regulatory concession such as lower parking requirements, faster processing, lower fees, etc. See Cal. Gov't Code § 65915(h).

295 See Cal. Gov't Code § 65915(h).

296 See Cal. Civ. Code § 1954.52(b) (West Supp. 2002); Mallakh, supra note 31, at 1865-68.

297 See Mallakh, supra note 31, at 1869-76; supra Part IV.A.

298 See Cal. Gov't Code § 65583(c)(1)(A) (West Supp. 2002).

299 See discussion supra Part II.C.2.

300 See Mallakh, supra note 31, at 1851. After Santa Monica amended its ordinance, the lawsuit became moot. See id.

301 See Santa Monica, Cal., Mun. Code § 9.56.040 (1998).

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302 Colo. Rev. Stat. § 38-12-301 (2001).

303 See Boulder, Colo., Rev. Code, § 9-6.5-3 (2000); City of Boulder, Colo., City Council Agenda Item 11 (Jan. 2, 2001), available at http:// www.ci.boulder.co.us/clerk/previous/2001/010102/11.html (last visited Apr. 19, 2002).

304 See Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 63 (Ct. App. 2001).

305 See id. at 64.

306 See discussion supra Part II.B.

307 Judd & Rosen, supra note 9, at 7.

308 See Montgomery County, Md., Code, ch. 25A (2002); Montgomery County, supra note 41.

309 See San Mateo, Cal., City of San Mateo Housing Element H2.3-H2.5 (2002) [hereinafter San Mateo Housing Element].

310 See Santa Monica, Cal., Mun. Code ch. 9.56 (1998).

311 See Ellickson, supra note 19, at 1180.

312 See Dietderich, supra note 20, at 28.

313 Montgomery County, supra note 41.

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314 See id.

315 See supra note 54 and accompanying text.

316 See discussion supra Part I.B.3.

317 See City of San Mateo, Cal., Vision 2010: San Mateo General Plan, app. R § 3(D)(5)(b) (1990) [hereinafter San Mateo General Plan].

318 See San Mateo Housing Element, supra note 309, at H2.4.

319 See San Mateo General Plan, supra note 317, Policy LU 6A.1 at II-30.

320 See Santa Monica, Cal., Mun. Code § 9.56.040 (1998).

321 See Hamilton, Rabinovitz & Alschuler, Inc, The Nexus between New Market Rate Multi-Family Developments in the City of Santa Monica and the Need for Affordable Housing (July 7, 1998) (on file at the University of San Francisco Law Review office) [hereinafter HR&A Report].

322 See City of Santa Monica, Cal., Item 9-A, Second Supplemental Staff Report (June 9, 1998), available at http://www.santa-monica.org/cityclerk/council/agendas/1998/s98060909-A/html (last visited Mar. 24, 2002).

323 See HR&A Report, supra note 321, at 6. See also Keyser Marston Associates, Inc., Palo Alto BMR Program Residential Nexus: Issues and Recommendations A-6 (Apr. 1995) (concluding that at least 7.05 workers with moderate-income wages or below would be supported by the retail expenditures of every 100 houses and calculating an impact fee based on this ratio) (on file at the University of San Francisco Law Review office) [hereinafter KMA Report].

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324 See Santa Monica, Cal., Mun. Code § 9.56.010(f). The Santa Monica ordinance contains an excellent set of findings that can be used as a model by drafters of future inclusionary ordinances. Id. at § 9.56.010. See also Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277, 285 (N.J. 1990) ("Land must be viewed as an essential but exhaustible resource; any land that is developed for any purpose reduces the supply of land capable of being used to build affordable housing."); Merrill & Lincoln, supra note 20, at 285-87 (describing an economic methodology showing a link between the construction of market-rate housing and reduced opportunities for affordable housing); KMA Report, supra note 323, at 6 ("[T]he construction of market-rate housing means a lost opportunity to build below-market-rate housing."). See generally Mundie & Assocs. et al., An Inclusionary Housing Strategy for Mendocino County (Nov. 1995) (on file at the University of San Francisco Law Review office) (quantifying affordable housing needs based in part on limited land available for affordable units).

325 See Cal. Gov't Code § 65584(a) (West Supp. 2002).

326 See Calavita et. al., supra note 1, at 112.

327 See U.S. Dept. of Hous. & Urb. Dev., Consolidated Plan, at http:// www.hud.gov/progdesc/conplan.cfm (Jan. 23, 2002) (last accessed July 22, 2002).

328 Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

329 Id.

330 Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

331 See Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 64 (Ct. App. 2001).

332 See Mandelker, supra note 2, § 6.41 at 250.

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333 See, e.g., Napa, Cal., Mun. Code §15.94.080(A) (1999) (permitting a complete waiver if the developer can demonstrate no nexus between the inclusionary ordinance and the impacts of his project); Sacramento, Cal., Mun. Code § 17.190.130 (2001) (allowing a developer to request a determination that the inclusionary ordinance is a taking); Boulder, Colo. Rev. Code § 9-6.5-11 (2000) (permitting a developer to apply for an adjustment on the basis that the requirements constitute a taking).

334 See supra notes 293-94 and accompanying text.

335 See supra Part IV.C.

336 See supra Part IV. B.

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Comment
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CRACKING THE FOUNDATION: HIGHLIGHTING AND CRITICIZING THE SHORTCOMINGS OF MANDATORY INCLUSIONARY ZONING PRACTICES

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*1040 I. Introduction

After a five-year housing boom achieved record market highs in 2005 and 2006,[1] the United States housing market collapsed. By the end of 2008, prices had fallen at a record pace of eighteen percent within the last twelve months.[2] Experts and analysts fear that this face-first, downhill skid is only the beginning of an onslaught of accelerating price drops.[3] As a result, foreclosures will continue, and almost every other aspect of the United States economy will continue to be pulled further into recession.[4]

***1041** Predictably, as the economy on the whole slides, jobs are lost, cash-flow slows, financial burdens cannot be absolved, mortgages cannot be paid, and houses cannot be sold or purchased. The housing predicament is further exacerbated not only by the high percentage of household income absorbed by mortgage costs,[5] but also by the need for affordable housing, which has far outstripped the supply.[6] The exorbitant demand, which fueled the dramatic increase in price during the first five years of the twenty-first century, has boomeranged back to a negative demand due to high unemployment and high housing costs, causing a sudden standstill in demand and an overwhelming increase in supply.[7] In response to tumbling housing sales, builders are forced to reduce new housing production, which ***1042** negatively affects the availability of affordable housing.[8] With surges in housing prices between 1999 and 2005,[9] the sudden collapse of the housing market, the recent credit crunch, and the chronic inability of housing production to meet affordable housing needs,[10] this recent housing predicament truly is a crisis that has affected the overall economy and will continue to negatively affect the financial dispositions of the lower- and middle-income brackets.[11]

In response, several competing ideas and plans have been proposed to correct the financial crisis and help homeowners pay their mortgages. Free market advocates and politicians promote an approach that will ultimately put the responsibility on the homebuyers themselves.[12] Others recognize the ***1043** limitations of the free market and call for an effective government response to the housing problem.[13]

***1044** Looking to the government for housing assistance is not something new. Since the early 1940s, there has been a constant push for government intervention in housing prices and zoning regulations to aid medium- to lower-income families and other citizens in owning a home.[14] Programs enacted for this purpose are under the umbrella policy of "affordable housing."[15] Basically, affordable housing denotes "housing [that] is available at a reduced cost for households with incomes at or below specific levels."[16] On the federal level, the government has assisted lower-income home buyers by enacting the HOME Program,[17] SHOP,[18] and HOZ.[19]

On a state and local level, municipalities, with the encouragement of affordable housing proponents, have been advocating inclusionary zoning. Inclusionary zoning practices require that a pre-determined percentage of the housing units in new real estate developments be reserved and sold at a price that is affordable to low- and moderate-income households.[20] The number ***1045** of cities with inclusionary zoning mandates has grown rapidly, and between 1999 and 2003, "the number of California communities with inclusionary zoning more than tripled, from 29 to 107 communities."[21]

There are currently two types of inclusionary zoning: voluntary and mandatory. Voluntary inclusionary zoning allows a prospective developer to choose whether to participate in a program that can potentially increase the inventory of affordable housing in a community.[22] There has been heavy criticism of voluntary programs because, by being voluntary in nature, they do not produce the kinds of results that housing advocates demand.[23] Thus, there has been a fervent push for mandatory inclusionary zoning. Such ***1046** mandatory programs do not give the prospective developer the choice of participation, but, rather, require that builders either include affordable housing units in their development or comply with one of the alternative requirements.[24]

Unsurprisingly, when a program requires a private party to comply with the regulations and demands of a public entity, debate erupts. Although criticized early in their development,[25] inclusionary zoning programs have been upheld by courts as a valid technique to further advance the legitimate state interest of affordable housing.[26] The U.S. Supreme Court has yet to rule on mandatory inclusionary zoning ordinances. However, in the last major case concerning inclusionary zoning, Home Builders Association v. City of Napa, the California Supreme Court held that a very municipality-friendly mandatory program was a valid affordable housing technique.[27]

Since Home Builders Association, substantial research and study has raised questions about both the constitutionality and the effectiveness of mandatory inclusionary zoning ordinances.[28] This Comment embraces the new data and finds that, in direct opposition to the court's decision in Home ***1047** Builders Association,[29] mandatory inclusionary ordinances are exactions[30] that require heightened scrutiny, and many, if not all, programs fail under this standard.[31] Even if courts do not apply an exaction analysis, mandatory inclusionary zoning programs fail under both the Lucas and the Penn Central takings standard.[32] As a result, the programs that are utilized today amount to unconstitutional takings and are contradictory to the purpose of inclusionary zoning.[33] In response, this Comment offers a possible solution to the shortcomings of the mandatory inclusionary zoning programs currently in force.[34] Although not as aggressive as current mandatory programs in creating housing that is affordable for the lowest income bracket, the proposed solution side-steps constitutionality complaints, entices developers, and achieves the ultimate goals of inclusionary zoning.

This Comment will discuss affordable housing basics, inclusionary zoning fundamentals, mandatory program deficiencies, and a proposed solution. Part II lays down the historical foundation of affordable housing, as well as the emergence of inclusionary zoning.[35] Part III explains inclusionary zoning basics and analyzes the legal challenges against this type of affordable housing technique.[36] Part IV analyzes mandatory inclusionary zoning ordinances and concludes that they are in fact exactions that require a heightened scrutiny, and the programs in operation today fall short both constitutionally and of their intended purpose.[37] Part V presents a possible program that avoids all the pitfalls associated with the current mandatory inclusionary programs.[38] Part VI concludes the Comment.

II. History of Affordable Housing Action in the United States

A. The Federal Government Gets Involved

The economic and social changes during the Industrial Revolution brought about policies to institute affordable housing programs as a means ***1048** to house those at the lowest rung of the economic ladder.[39] Just after World War I, localized private sectors in the United States, primarily in New England, set up the first American affordable housing programs by establishing co-ops.[40] Affordable housing programs remained private for about the first ten years of their existence.[41] Then, in the early 1920s, the Second Progressive Movement began to influence social policy,[42] and there was a surge of societal pressure for affordable housing for the working poor.[43] Public sentiment along with the influence of the union movement convinced an already very sympathetic Governor Al Smith to advocate for the New York State Limited Dividend Housing Companies Act of 1927, which "supported the development of all types of affordable housing," and is credited as the first

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relatively large-scale government program that instituted an affordable housing plan for low-income families.[44]

Throughout the 1930s and early 1940s, the Great Depression and World War II stunted the growth of affordable housing and kept government programs small and regional.[45] However, sparked by President Franklin D. ***1049** Roosevelt's "Economic Bill of Rights" invocation at the 1944 State of the Union Address,[46] the federal government got involved and passed the Housing Act of 1949.[47] For nearly two decades, the public housing venture under the Act fell short of production targets, each subsequent housing program introduced failed to gain momentum, and "executive responsibility for housing was fragmented."[48] This trend of failure did an about-face with the establishment of the U.S. Department of Housing and Urban Development (HUD) in 1965,[49] and three years later, the notion of federal leadership in housing triumphed with the passing of a second act, the Housing Act of 1968.[50]

Despite all of the praise and self-congratulation in Washington, D.C. upon the passage of the Housing Act of 1968, this measure sputtered from the very beginning.[51] During the early years of the Nixon administration, "attacks on the production-dominated strategy were mounting from both inside and outside the federal government" despite the federal government's success in meeting its subsidized housing goals.[52] In response, President Nixon "forced a reexamination of federally administered production ***1050** programs and a search for better alternatives," and suddenly imposed a moratorium on all new subsidy commitments.[53]

In the wake of the 1973 moratorium, three policy instruments arose. The first is the use of voucher-type programs "as the preferred subsidy vehicle instead of large-scale subsidized housing production programs."[54] The second, and most significant to this Comment, is the "formal transfer of most housing program control from the federal government to state and local governments."[55] The third is "the use of the tax system to induce desired housing outcomes" through programs such as the Low Income Housing Tax Credit (LIHTC) program.[56]

Focusing on the second instrument, transfer of responsibility to the local governments, in effect, gave the states and municipalities the freedom to enact any policy or program they determined would: (1) be the most effective in solving the issue of affordable housing and (2) be most beneficial to the social agenda of the state and local government. One such program was inclusionary zoning.

B. Inclusionary Zoning--A Localized Solution to a National Problem

On a local and state level, government has attempted to solve the issue of affordable housing by instituting inclusionary zoning mandates on ***1051** developers. The first attempt to set up an inclusionary zoning program took place in Fairfax, Virginia, in 1971.[57] However, the ordinance was struck down because the Virginia Supreme Court held that the legislature that passed it did not have the authority to do so.[58] Shortly thereafter, in 1974, Montgomery County, Maryland successfully put in place the first adopted inclusionary zoning program.[59] This ordinance required that "15 percent of new developments with more than 50 housing units be sold at a price affordable to low income households."[60] With this, inclusionary housing was introduced to the United States.

Inclusionary zoning ordinances have been sought as the means to solve the affordable housing problem in a number of states.[61] For instance, New Jersey used the judicial system in Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I) to establish an inclusionary zoning device in an effort to satisfy the need for low-income housing.[62] In the 1980s, housing prices soared by double-digit increases across the country, creating a severe housing affordability crisis.[63] California was hit hardest by the increase due to massive domestic migration and the inability to meet housing demands,[64] and by 1992, "the average price of a resale home in the state was 190 percent of the national average."[65] As a result, the California legislature mandated that each city and county government put in place an affordable housing plan.[66] California and New Jersey have the most extensive programs. However, other states have also been pushing for the use of the technique to solve affordable housing problems.[67]

*1052 III. Inclusionary Zoning Basics

A. What Is Inclusionary Zoning?

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Inclusionary zoning strives to create affordable housing units within new real estate developments "by requiring residential developers to set aside a specified percentage of housing units in a proposed development [to be priced] affordable to low- and moderate-income households."[68] Because affordable units created under an inclusionary zoning plan are developed at the same time as, and usually within, newly developed housing projects, the housing market alone is the purveyor and engine that drives the creation of the affordable units.[69] These programs have not only been introduced to fight against the statistics articulated in the introduction of this Comment,[70] but rather they have been implemented to provide the community with affordable units and limit the seclusion and consolidation of affordable housing neighborhoods.[71] Although such programs are widespread across the country, each municipality's program is unique and tailored to the municipality's interests.[72] Each community regulates its inclusionary zoning program based on determined variables such as:

> ***1053** [1.] Whether the program is voluntary or mandatory . . . [;]
>
> [2.] What income levels qualify as "affordable" [;]
>
> [3.] What percentage of units are set aside as affordable[;]
>
> [4.] Whether developers receive any additional subsidies[;]
>
> [5.] How long the units remain affordable[;]
>
> [6.] The size of the developments that qualify[; and]
>
> [7.] Whether developers can comply with the program by building units off site or by paying a fee.[73]

Many municipalities have utilized inclusionary zoning as a tool for smart growth.[74] A major incentive for cities to enact such a program is to distribute "affordable housing--and the people that go with it--throughout the community."[75] Furthermore, housing advocates praise inclusionary zoning because "it provides affordable housing without requiring municipal funding."[76] As a result, the responsibility to provide affordable housing is placed squarely on the developers and, in many cases, other purchasers.[77]

B. The Legal Challenges to Inclusionary Zoning

Since they have been introduced in the 1970s, inclusionary zoning ordinances have been subjected to constitutional challenges: Fairfax County v. DeGroff Enterprises,[78] Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II),[79] Holmdel Builders Association v. Township of Holmdel,[80] and Home Builders Association.[81]

***1054** In the first attack on an inclusionary zoning ordinance, Fairfax County, the program was held to be invalid.[82] The importance of this decision goes beyond its holding for two specific reasons. First, under this act, developers were not given compensation in the form of density bonuses or any other incentives.[83] This established an incentive requirement in inclusionary zoning.[84] Second, the court focused its decision on the zoning authority given to Fairfax County under state law.[85] This is significant in that it based its reasoning on Virginia law and not federal law, leaving the question of constitutionality up to federal courts.

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Mount Laurel comprises two cases, one in 1975 and the other in 1983. In the first case,[86] the New Jersey Supreme Court invalidated an ***1055** exclusionary zoning practice[87] and mandated the use of an inclusionary zoning ordinance.[88] The second Mount Laurel decision was accompanied by five other cases that were heard together because they raised many similar issues, and all were decided in a single opinion known as the Mount Laurel II decision.[89] This set of cases came to the New Jersey Supreme Court because the passive remedies of the Mount Laurel I decision were ineffective and created more litigation than they solved.[90] Thus, the court in the second case sharpened the remedies expressed in Mount Laurel I.[91] To combat the inability to get developers to create affordable housing and ameliorate poverty, the court laid ground for municipalities to adopt ***1056** inclusionary zoning ordinances.[92] Specifically, the court majority stated that there are two basic types of affirmative measures "that a municipality can use to make the opportunity for lower income housing realistic: (1) encouraging or requiring the use of available state or federal housing subsidies and (2) providing incentives for or requiring private developers to set aside a portion of their developments for lower income housing."[93] This case paved the way for hundreds of municipalities to implement set-aside programs to create affordable housing.

Picking up where the Mount Laurel cases left off, Holmdel Builders Association v. Township of Holmdel ruled on the legal validity of alternatives to set-asides, and considered whether such ordinances exceeded a local government's police powers.[94] Again, this case was comprised of a series of cases involving several municipalities attempting to comply "with their obligation to provide a realistic opportunity for the construction of affordable housing under [the New Jersey Supreme Court's] ruling in Mt. Laurel II and the provisions of the [Fair Housing Act]."[95] The court held that:

> ***1057** [I]nclusionary zoning through the imposition of development fees is permissible because such fees are conducive to the creation of a realistic opportunity for the development of affordable housing; development fees are the functional equivalent of mandatory set-asides; and it is fair and reasonable to impose such fee requirements on private developers when they possess, enjoy, and consume land, which constitutes the primary resource for housing.[96]

Thus, the ordinances and techniques implemented by these municipalities were not an overreaching of the zoning laws or an abuse of the municipalities' police powers.[97]

Home Builders Association is the most significant case for the purposes of this Comment in that it deals most directly with inclusionary zoning in the context of an exaction.[98] Furthermore, this is the most recent case dealing with mandatory inclusionary zoning and involves techniques widely used today. The ordinance in Home Builders Association required "that ten percent of all newly constructed units must be 'affordable' as that term is defined" and offered no incentives to the developer.[99] However, the program did allow for two alternatives: (1) an "alternative equivalent proposal" from the developer and (2) "in-lieu fees."[100] Furthermore, the municipality planning committee has the power to waive any and all requirements at its discretion.[101] The court upheld the mandatory ***1058** inclusionary program enacted by the City of Napa as a constitutional land use ordinance.[102]

These four cases have provided a basic rubric for a legal defense of inclusionary zoning ordinances. First, an inclusionary zoning ordinance that violates state compensatory laws and goes beyond the local municipality's zoning authority cannot be enacted.[103] Second, affordable housing set-asides and development fees are valid inclusionary zoning techniques.[104] Third, mandatory inclusionary zoning programs are valid without developer benefits, but alternatives to introducing affordable units in market-rate development must be in place.[105] With these three keystones to a valid inclusionary zoning program, several municipalities have adopted all types of programs specifically tailored towards their needs, wants, and policy agendas.

C. Types of Inclusionary Zoning Programs

Inclusionary zoning programs have four basic formats: (1) mandatory without incentives; (2) mandatory with incentives; (3) voluntary under prescribed conditions; or (4) voluntary through ad hoc negotiated agreements.[106] The current trend is to enact mandatory programs that demand residential developers with projects of certain sizes to "provide a share of affordable units in return for density bonuses or other compensatory incentives."[107] However, some municipalities have mandatory programs with no compensatory incentives, and still others have voluntary programs with generous incentives.[108] A sampling of counties, cities, and townships with inclusionary zoning programs shows that although the voluntary programs are very

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popular across the board, there has been a dramatic push for mandatory programs.[109] As a result, this onrush of mandatory inclusionary zoning problems has invited scrutinous analysis and many challenges from critics.

*1059 IV. Challenges to Mandatory Inclusionary Zoning Ordinances

Within the last few decades, housing advocates, housing experts, and politicians have rigorously endorsed the implementation of mandatory inclusionary zoning. For instance, to combat the housing problems of New York City, the PRATT Center for Community Development[110] laid out its proposal in a 2004 report advocating, first and foremost, that the city should "[a]pply mandatory inclusionary zoning to all future neighborhood-wide zoning changes."[111] In addition, the DC Campaign for Inclusionary Zoning, a subsidiary of Campaign for Mandatory Inclusionary Zoning,[112] submitted a plan to the zoning commission of Washington, D.C. that required developers "to build inclusionary units with the larger market-rate development."[113] This mandatory inclusionary zoning proposal persuaded the zoning commission to adopt the plan into its official zoning rules and requirements.[114]

Proponents of mandatory inclusionary zoning hang their hats on numerous desired benefits and have affixed mandatory programs as their spearhead in the fight against apparent housing ills.[115] From a sociological ***1060** standpoint, mandatory inclusionary programs are engineered to incorporate both lower- and upper-class members of society into a single area and eliminate the class strata in local neighborhoods, thereby decentralizing poverty.[116] Furthermore, by decentralizing poverty and integrating communities, mandatory inclusionary zoning can potentially "alleviate social problems such as crime and unemployment."[117] Proponents further tout that mandatory inclusionary zoning programs place the financial burden on the shoulders of private developers and require no large public financial investment.[118] Last, and most important, mandatory programs have created more low-income housing units than similar voluntary plans.[119]

Beyond heralding the desired benefits of mandatory inclusionary zoning programs, scholars and housing advocates have focused on rapid-growth communities as prime locations to wedge in mandatory programs.[120] The advantage of planting these policies in growing communities is that it enables affordable housing plans to harness the momentum of growing markets, thereby creating more affordable housing units.[121] The basic ***1061** structure of inclusionary zoning depends on growth to encourage the construction of new units including affordable housing units.[122] However, as discussed later in this Comment, a slowdown in production due to a sluggish economy and the implementation of mandatory inclusionary zoning programs will compound any housing slump and effectively reduce affordable and market-rate housing production.[123]

Regardless of the increasing support for mandatory inclusionary ordinances to house those in the low- and middle-income brackets, this technique and many of the programs founded on this technique are inefficient and unconstitutional. A government regulation can be challenged as an uncompensated taking of private property "by alleging a 'physical' taking, a Lucas-type total regulatory taking, a Penn Central taking, or a land-use exaction violating the standards set forth in Nollan and Dolan."[124] This Comment finds that the latter three standards are appropriate for mandatory inclusionary zoning ordinances and that this affordable housing technique appears to falter under all three. Although there is much debate about such a classification, a mandatory inclusionary zoning ordinance is an exaction and is subject to intermediate scrutiny under the Nollan and Dolan standards.[125] This classification is ignored by housing advocates and politicians, and many enacted mandatory inclusionary programs are overly broad and thus invalid.[126] Furthermore, these programs do not sufficiently compensate developers, thus resulting in an unconstitutional taking under Lucas and Penn Central.[127] Last, the allotted alternatives to actually building affordable units are ineffective in creating the housing that is promised and increase the price on all the housing in the community.[128] As ***1062** implemented today, mandatory inclusionary policy falls short of its many promises.

A. First Challenge: Mandatory Inclusionary Zoning Ordinances Are Exactions

It is imperative to properly classify mandatory inclusionary zoning programs to determine which level of scrutiny should be applied when analyzing their constitutionality. Classification may depend on how the program is structured. For instance, if the program allows for in-lieu fees, what the fees are allocated for can impact the classification of the program. But, regardless of offsets and other claimed incentives, the basic structure of a mandatory inclusionary zoning ordinance requires that a developer provide for a certain percentage of affordable housing within a new development.[129] Under this definition, there are four classifications within which analysts and scholars place mandatory inclusionary zoning ordinances: (1) an

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impact fee; (2) a form of rent control; (3) a tax; and (4) an exaction.

Some proponents of inclusionary zoning contend that the technique should be considered and analyzed as a municipal impact fee. The argument is as follows: Inclusionary zoning ordinances and impact fees both attempt to reimburse the city or community for the resources "used up" by the newly constructed development.[130] Furthermore, the ordinances, like impact fees, are legislative and "based upon a plan created with regard to the impact of development," thus, deserving broad deference.[131] However, this categorization is misplaced. Impact fees are charges "applied to offset the additional public-service costs of new development."[132] The funds raised by ***1063** the fees are usually dedicated to the provision of additional services, such as "water and sewer systems, roads, schools, libraries, and parks and recreation facilities, made necessary by the presence of new residents in the area . . . [and] are essentially user fees levied in anticipation of use, expanding the capacity of existing services to handle additional demand."[133] This means that impact fees are used to help compensate for the increased demand of infrastructure services and public facilities that are already in existence.[134] Market-rate development does not impact anything the city provides that would require an "affordable housing impact fee" to mitigate. The only resource new market-rate development deprives affordable housing of is land, and land is not a service that can be mitigated by an impact fee. Generally, these fees, once collected, are allocated to service the new development.[135] Fees cannot generate "new land"; thus, although inclusionary zoning ordinances may incorporate impact fees[136] and affect land much like impact fees, they are not one and the same.[137]

***1064** A more appropriate classification is that inclusionary zoning ordinances are a form of price control on par with rent control.[138] In some jurisdictions, inclusionary zoning ordinances place a price ceiling on the affordable units in a new development tract.[139] It has been argued that inclusionary zoning ordinances are unilateral regulations requiring developers to charge a predetermined amount, and therefore are rent controlling devices.[140] Moreover, the municipality has the power to reduce or waive the ordinance, thus providing further evidence that the technique acts like rent control.[141]

However, rent control and inclusionary zoning differ in four material ways. First, "[r]ent control requires existing units to be rented at below-market rates whereas inclusionary zoning mandates the construction of new [affordable] housing units, usually in return for an incentive."[142] Second, the execution and administration of inclusionary zoning programs and rent control ordinances are different.[143] Inclusionary zoning programs are generally controlled by guidelines created by HUD.[144] Third, affordable housing inclusionary zoning programs are broader in scope than rent control

***1065** policies.[145] Fourth, in order to be eligible for affordable housing, each candidate must prove that he or she fits within the "income guidelines established by HUD for inclusionary zoning programs," whereas "anyone can rent a rent-controlled unit."[146]

An even more appropriate classification is that mandatory inclusionary zoning ordinances are a tax on development. It is argued that because the municipality does not pay for the expenses of the inclusionary zoning ordinance, the mandate is, in effect, a tax on the developers.[147] Because the developers must price the affordable housing units at well below market price, they must forfeit the profits they would have made if the units were sold at market-rate.[148] Municipalities and states "do not pay for the cost of producing the price-controlled units, so inclusionary zoning works like a tax on builders."[149] Although inclusionary zoning programs work like a tax, the fact that ordinances do not require monetary supplements or in-lieu fees unless necessary means that "tax" is not a completely appropriate characterization.[150]

The fourth, and most suitable, characterization of mandatory inclusionary zoning ordinances is an "exaction." Development exactions are defined as "dedications of land to the public, installation of public improvements, and [monetary payments] for public purposes that are imposed by governmental entities upon developers of land as conditions of development permission."[151] Mandatory inclusionary zoning ordinances are ***1066** "requirements in a zoning ordinance for setting aside a proportion of housing units in a residential development for lower-income households."[152] In the event that it is not feasible to create affordable units in the new developments, these programs allow developers "to pay a fee in lieu of providing units; provide units at another location; or provide land elsewhere for the construction of affordable units."[153] Furthermore, politicians, courts, advocates, and academics concede that affordable housing is a legitimate state interest.[154] Juxtaposing the definition of "exaction" and the definition and characteristics of mandatory inclusionary zoning programs reveals that one defines the other. Mandatory inclusionary zoning ordinances are government enforced and are requirements for developers, as are exactions.[155] Mandatory inclusionary zoning ordinances are for public purposes or state interests and are fees, money, land dedications, or public improvements, as are exactions.[156] In fact, every characteristic of mandatory inclusionary zoning

ordinances fits neatly in the definition of exactions as provided by the treatise.[157] Therefore, as an exaction, the courts must apply an intermediate level of scrutiny.[158]

***1067** 1. With an Exaction Comes Nollan and Dolan Heightened Scrutiny

The legal analysis of an exaction relies heavily on two cases: Nollan v. California Coastal Commission[159] and Dolan v. City of Tigard.[160] As mentioned earlier, an exaction occurs when the government imposes specific conditions on a particular piece of private property that result in a change to the use of that property by the owner.[161] This particular form of taking requires that there be an essential nexus and rough proportionality between the exaction demanded by the government and the harm done to the community by the new development.[162] The criteria necessary for an exaction to avoid a takings charge are enumerated by the U.S. Supreme Court in the Nollan[163] and Dolan[164] cases.

In the Nollan case, approval of a construction permit for a beach house was subject to a dedication, by the owner, of a public access easement across the beach-front property.[165] The California Coastal Commission defended the condition on the grounds that the existence of the easement would eliminate any "psychological barriers" to using the state beach.[166] Mr. Nollan, the owner of the beach-front property, claimed the easement equated to a taking of private property for public use without just compensation in direct violation of the Fifth and Fourteenth Amendments.[167]

The Court held in favor of the property owners.[168] For a government action to be valid, there must be a connection between the means and ends of the provision.[169] Placing a condition on the approval and issuance of a construction permit is a valid land use regulation if denying the permit ***1068** would substantially further a governmental purpose.[170] In this case, the justifications proposed by the state for the condition were disfavored by the Court, which found that the condition did not serve a public purpose related to the permit requirement.[171] There was no nexus between the condition on the proposed construction to provide a lateral easement over the privately owned portion of the beach and the state interest in providing access to the public portion of the beach.[172] Thus, the exaction constituted a taking of private property without just compensation.[173]

The Nollan case introduced a new rule concerning a taking. There must be an essential nexus between a legitimate state interest and a permit condition.[174] This results in exactions being subject to a "heightened scrutiny" standard of review,[175] as reaffirmed in Dolan.

In Dolan, a property owner applied to the city for a building permit to increase the size of her store and pave the store's parking lot.[176] The planning commission granted Dolan's permit application subject to "her compliance with [a] dedication of land (1) for a public greenway along Fanno Creek to minimize flooding that would be exacerbated by the increases in impervious surfaces associated with her development and (2) for a pedestrian/bicycle pathway intended to relieve traffic congestion in the city's Central Business District."[177] Dolan alleged that the required conditions "were not related to the proposed development, and, therefore . . . constituted an uncompensated taking of her property" in strict violation of her Fifth Amendment rights.[178]

***1069** The Court held in favor of Dolan. In its analysis, the Court established a two part test. First, there must be an essential nexus between a legitimate state interest and the permit condition.[179] If a nexus is found to exist, then the court must "determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development."[180] The municipality must look at the project in question specifically and make a unique assessment of the condition to determine if it is related to the project in both nature and impact,[181] and the condition must be roughly proportional to the impact of the proposed development.[182] The municipality in Dolan did not satisfy the second prong of the two prong test, and the conditions were held to be unconstitutional.[183]

Based on the criterion under both Nollan and Dolan, an exaction is subject to a two pronged test. For a condition to be held constitutional under heightened scrutiny, there must be an essential nexus between a legitimate state interest and a permit condition, and its effect on the proposed development must be roughly proportional to the development's impact on the community.[184] If these two prongs are not satisfied the court will strike down the condition as unconstitutional.[185]

2. As an Exaction, an Inclusionary Zoning Program Must Pass the Heightened Scrutiny of Nollan and Dolan

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The textbook definition of exaction is articulated above; however, it is important to thoroughly understand exactions beyond textbook definitions in order to apply a proper Nollan/Dolan analysis. Exactions work on the premise of "adverse impact" to the city or county. Externalities that are introduced by new developments can overly burden existing infrastructure, ***1070** existing social services, and other municipal resources. A simple illustration is a new subdivision's impact on schools in the community. If a town allows the development of a 100 home subdivision, the increase in homes in the area will increase the demand on the local school district to provide education for the residents in the new subdivision. Therefore, the city would require that the developer build a new school in or near the subdivision to diminish the adverse impact the subdivision would have on the local school district. This is an exaction: the dedication of land to the public (in this case a school) imposed by the city as condition for development permission in order to lessen the negative impact the development has on the community.[186]

Moreover, exactions work in tandem with the city or county's municipal power to deny development.[187] If a builder cannot comply with an exaction the municipality has the right to deny development.[188] This ability is critical to the power of an exaction and is therefore integral to the analysis of the exaction. What this means is that for a proper nexus to exist the denial of building permits must be in line with the overall goals or purpose of the exaction. For example, if the developer cannot build the new school then the city cannot allow the developer to adversely affect the schools already in operation and must deny building permits. It is clear in this example that the purpose of the exaction is to limit excessive burden on the local schools. This exaction properly operates along the line of its ultimate goal. If a subdivision is built, the developer must build a school to alleviate the adverse impact on the community. Furthermore, denying the building permits will also achieve this goal by not allowing development and, therefore, limiting the introduction of new residents to the community.

Because mandatory inclusionary zoning programs are exactions, one must identify the adverse impact to be alleviated by the program and couple this with a Nollan and Dolan review. The impact of a Nollan and Dolan analysis on mandatory inclusionary zoning ordinances is best examined by applying their tests to the elements of the mandatory inclusionary zoning programs.[189] First, it must be clear that the municipality, in denying the ***1071** developers the opportunity to use their property at their discretion, is furthering the purpose for which the ordinance, program, or regulation was enacted to accomplish.[190] Determining the appropriate purpose of the program and finding a nexus is essential to the success of the ordinance and can prove to be rather troublesome. There seem to be two possible purposes for mandatory inclusionary zoning requirements: (1) creating more affordable housing and (2) setting aside land for affordable housing.[191]

Examining the first possible purpose, it is clear that requiring developers to build affordable housing will in fact create more affordable housing. However, it is not clear how denying a developer a building permit and the use of the developer's property would increase the supply of affordable housing.[192] If the goal is to create more affordable housing, it is unquestionably counterproductive to deny a builder a permit.[193] Therefore, the nexus test fails because it is not clear how denying a developer a permit accomplishes the ultimate goal of creating more affordable housing.[194]

***1072** As enumerated earlier, the second possible purpose for a mandatory inclusionary zoning program is to secure land set-asides for future affordable housing projects.[195] However, dedicating property to offset the development's impact on nonrenewable land resources invokes a heightened scrutiny standard that is satisfied only if "the legislative purpose were stated to be the preservation of residentially zoned land for housing for moderate and lower income developments."[196] If the ordinance lacks this language, then the nexus requirement has not been met.[197] Under the nexus test in Nollan:

> [I]t is likely that most affordable housing exactions (whether requiring a developer to build affordable units alongside his market units, or to pay for someone else to build them, or to dedicate buildable lots to the government) [] would not achieve the same purpose as the outright prohibition of a residential development to the degree that the nexus test requires.[198]

Thus, as previous postulated, most mandatory inclusionary zoning ordinances fail constitutionally.

As required by Dolan, the second test is whether the required dedication is roughly proportional both in nature and extent to the impact of the proposed development.[199] Thus, the requirements and restrictions on the developer must be proportionate to the impact of the new development on the community.[200] This requires municipalities to evaluate the overall impact the new development will have on: (1) the municipality's land resources; (2) the affordable housing to market-rate housing ratio; and (3) the economic impact on the community, and determine if the elements of its mandatory inclusionary zoning ordinance

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burden the developer in proportion ***1073** to the project's impact.[201] Obviously, this individualized analysis requires an impact study by the municipality and a narrowly tailored purpose[202] written into the program with which to compare "developer impact" and the objective of the ordinance.[203]

The rationale for mandatory inclusionary zoning ordinances relies on the theory that the creation of market-rate units will supply a growing population with much needed housing, and the influx of middle to upper income individuals will eventually attract lower-income individuals, who will, in turn, require affordable housing.[204] Thus, the creation of new developments "negatively impacts the pre-existing need for affordable homes," and requires the new developments to include affordable units to undo or counter the negative impact of the new development.[205] The major issue in this scenario, under the Dolan test, is determining the actual impact on affordable housing caused by the developments and the corresponding relationship the ordinance has to that impact.[206]

The Dolan test requires courts to weigh the burden on developers and builders against the ordinance's benefit to the city or county.[207] Footing the bill for affordable housing can be extremely burdensome,[208] and to pass the Dolan test the municipality would have to investigate and determine if the actual impact of the mandatory inclusionary ordinance is sufficiently proportional to the developer's heavy burden of subsidizing the affordable units.[209] The parameters of this relationship are crucial because the Dolan ***1074** test does not allow for speculation or guesswork.[210] Therefore, the city or county must demonstrate "that affordable homes would, in fact, be built on that land" occupied by the developer's project to show that "the impact on the need for affordable housing is [not] purely speculative."[211] This requirement is extremely hard to prove and to fit within the bounds of the Dolan standard. Although it is reasonable to conclude that building market-rate units may result in less land for affordable units,[212] proving that "the property supply impact that a proposed residential development may have on the need for affordable housing seems at best speculative and at worst impossible to do."[213] Overall, the burden of proof under Dolan is quite formidable and, as demonstrated here, appears to be too heavy for municipalities to justify their mandatory inclusionary zoning ordinances.

It is evident from the above argument that satisfying the Nollan nexus requirement is questionable because the purpose, or purposes, for the ordinance may not be achieved by denying the builder the opportunity to use his or her property at will.[214] Furthermore, Dolan's burden of proof standard can prove to be impossible to achieve for the governments that institute mandatory inclusionary zoning ordinances.[215] Thus, it appears that these programs will not qualify under Nollan/Dolan scrutiny, resulting in a taking, and if due compensation was not given to the developers, an unconstitutional taking.[216] Although the characteristics of these ordinances are more similar to exactions than any other category argued above, the most heralded case ***1075** by inclusionary zoning advocates and proponents of mandatory programs disagrees with this classification and the application of the heightened scrutiny.[217]

3. Criticism of Home Builders Association

The strongest case for mandatory inclusionary zoning advocates is Home Builders Association.[218] This case involved an inclusionary ordinance that required real estate developers to set aside ten percent of all newly constructed residential units as affordable housing.[219] The ordinance offered three possible alternatives to strict compliance: (1) "developers of single-family units may, at their option, satisfy the so called inclusionary requirement through an 'alternative equivalent proposal' such as a dedication of land, [in-lieu payments or fees], or the construction of affordable units on another site"; (2) "[d]evelopers of multifamily units may also satisfy the [ten] percent requirement through an 'alternative equivalent proposal' if the city council, in its sole discretion, determines that the proposed alternative results in affordable housing opportunities equal to or greater than those created by the basic inclusionary requirement"; and (3) "a residential developer may choose to satisfy the inclusionary requirement by paying an in-lieu fee, [which] [d]evelopers of single-family units may choose this option by right, while developers of multi-family units are permitted this option if the city council, again in its sole discretion, approves."[220] In an attempt to assist developments, this program apportions a variety of benefits "including expedited processing, fee deferrals, loans or grants, and density bonuses that allow more intensive development."[221] Last, the ordinance stipulates that developers can appeal for a "reduction, adjustment, or complete waiver of obligations under the ordinance 'based upon the absence of any reasonable relationship or nexus between the impact of the development and . . . the inclusionary requirement.'"[222]

***1076** The Home Builder's Association of Northern California (HBA) sued the City of Napa on the grounds that the enforcement of the ordinance resulted in an impermissible taking under both state and federal law.[223] The California Supreme

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Court upheld the ordinance as valid because the ordinance "provides significant benefits to those who comply with its terms, [d]evelopments that include affordable housing are eligible for expedited processing, fee deferrals, loans or grants, and density bonuses . . . [and] [m]ore critically, the ordinance permits a developer to appeal for a reduction, adjustment, or complete waiver of the ordinance's requirements."[224] The court denied the HBA's Nollan/Dolan analysis on the grounds that such a test is reserved for land use bargains between an owner and a regulatory body,[225] and this ordinance should be analyzed not as an "individualized assessment imposed as a condition of development," but as a generally applicable zoning regulation.[226]

As stated above, this opinion set inclusionary zoning ordinances outside the jurisdiction of the Nollan and Dolan tests. However, analyzing the court opinion exposes some questionable statements and assertions. First, the court denied the use of the Nollan/Dolan analysis stating that such a test is reserved for bargains between an owner and a municipality.[227] The court made this declaration despite the structure of the ordinance in question, which allowed developers to petition and negotiate with the municipality and propose an alternative plan.[228] In fact, approval of this plan is at the sole discretion of the municipality.[229] Inherently, programs that allow developers to propose their own plans will require municipalities to look at a developer's proposal on an individualized basis and eventually make a deal with the developer before issuing a building permit. If a developer proposes a land grant as an alternative to the City of Napa's ten percent set-aside, the City may respond with a fee proposal instead. Such exchanges are essentially bargaining negotiations.[230] Therefore, any program that allows ***1077** private proposals as alternatives to the established criteria,[231] in and of itself, invites an interaction between public and private entities that equates to bargaining and requires an individualized assessment, thus triggering a Nollan/Dolan analysis.[232] The City of Napa's program is no different. Although the fundamental effect of the ordinance is applied to all development in the City of Napa,[233] the inclusion of alternatives in the ordinance narrows the application of the ordinance when a private entity proposes an alternative.[234]

The Nollan and Dolan test requires an intermediate standard of scrutiny, and, as the Home Builders Association argues, the City of Napa's ordinance is "invalid under Nollan and Dolan because there is no 'essential nexus' or 'rough proportionality' between the exaction required by the ordinance, and the impacts caused by [the] development of property."[235] Therefore, the structure and procedural process written into the City of Napa's ordinance fatally evoke the Nollan and Dolan test, which determines that the program does not satisfy the required heightened scrutiny and is, therefore, unconstitutional.

B. Second Challenge: Beyond Nollan and Dolan Scrutiny, Mandatory Inclusionary Zoning Ordinances Fall Short Both Constitutionally and of Their Intended Purpose

The social and economic theories behind mandatory inclusionary ordinances are not in and of themselves unconstitutional; however, the programs in use today might amount to an illegal taking and have proven to be counterproductive to their intended purpose. There are three basic mandatory program formats: (1) no benefits to developers; (2) benefits to developers; and (3) alternatives to set-asides. All programs consist of one of these formats, while some consist of a combination of these, such as alternatives but no benefits.[236] As explained below, certain mandatory ***1078** inclusionary zoning characteristics can create the exact environments that the inclusionary zoning policy seeks to abolish.[237] Furthermore, there is a strong argument that programs that lack proper compensation amount to an unconstitutional taking.[238] However, before delving into the takings argument, it is essential to understand some basic takings principles.

1. What is a "Taking" and When Is it Unconstitutional?

Fundamentally, since the mid 1920s,[239] state and local governments have been able to engage in land use planning that affects private citizens and private land so long as it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land."[240] These principles are rooted in the Fifth Amendment of the United States Constitution, which states that "[n]o person shall . . . be deprived of . . . property, without due process of law . . . nor shall private property be taken for public use, without just compensation."[241] If government policies or government programs either actually or effectively deprive a private citizen, organization, or entity of the use of private property without just compensation, then the program or policy results in an unconstitutional taking.[242] To understand the basics of a "takings argument," it is best to break down the elements of the Fifth Amendment.

***1079** a. What Counts as "Public Use" ?

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The public use requirement in the Fifth Amendment demands that the taking bear some rational relationship to the public interest or the public good.[243] The term "public use" is, unfortunately, extremely malleable, resulting in numerous judicial interpretations. The United States Supreme Court has held that public use includes, among other things, clearing blighted areas[244] and non-blighted areas,[245] reducing the potential harms of a real estate oligopoly,[246] and setting up infrastructure for land irrigation.[247] The ambiguity and competitive interpretations of the clause are even more divergent and conflicting in the state courts.[248] For example, almost each state has a different definition and criteria for the term "blighted" and invokes eminent domain under competing circumstances.[249] Local benches ***1080** tend to take a broad view, and "public use is treated as coterminous with public advantage or public purpose, which allows the acquisition of private property to further the public good or general welfare, or to secure a public benefit."[250] The disorderly medley of local interpretations remains because the Court defers to municipalities and local authorities in defining "public good" to combat slum neighborhoods, blighted areas, and economic loss.[251]

In 2005, the Court underscored its lenient interpretation of public use in Kelo v. City of New London.[252] Public use was deemed to include any "public purpose."[253] In essence, legislation with any conceivable rationality is considered a public purpose and thus a bonafide public use.[254] The Kelo decision enraged a significant portion of the public by holding that "non-use takings are not constitutionally prohibited on their face," and granting legislative bodies the power to utilize eminent domain to achieve any outcome they desire and to obstruct any use they deem undesirable.[255]

All inclusionary zoning programs can generally satisfy the public purpose clause of the Fifth Amendment. As stated in Home Builders Association, it is a legitimate state interest to have affordable housing,[256] and courts, academics, and advocates claim that requiring developers and market-rate homebuyers to fund affordable housing units helps increase the affordable housing supply.[257]

***1081** b. What Government Actions Require Equitable Compensation?

There are four scenarios in which government action or policy creates a compensable taking: (1) regulatory takings; (2) regulations that deprive the owner of all value in the property; (3) physical invasion; and (4) exactions.[258] The first three forms of compensable taking have been sculpted by the Court through a series of decisions. Regulatory takings occur when government regulations of the property leave no economically viable use and the principal value of the land is lost.[259] A regulation that deprives an owner of all economically beneficial use of his property occurs when a government action renders the property useless and of no value.[260] A physical invasion occurs when the government physically invades private property or allows others to physically invade the private property.[261] Exactions are, as explained above, "dedications of land to the public, installations of public improvements, and [payments] of money for public purposes that [are] imposed by governmental entities upon developers of land as conditions of development permission."[262]

***1082** This brings us to the inevitable question: Are mandatory inclusionary programs a taking, and if so, are the developers compensated for the taking? If the mandatory inclusionary program enforced by the municipality has an "incentive" or "benefit" for the land developer, is it enough? The following analysis is complementary to the exaction analysis above and attempts to answer another question: If a mandatory inclusionary is not held to be an exaction, as declared in Home Builders Association, can it still be an unconstitutional taking? Before these questions can be answered, the proper "takings analysis" must be determined.

2. Which "Takings" Standard Applies to Mandatory Inclusionary Zoning Ordinances?

The Court has described two categories of regulatory takings: per se takings and regulatory economic impact takings.[263] These two categories are better classified as a two-tiered approach to a takings analysis because the regulation in question can be analyzed first under per se, and if a taking is not found, the regulation can be analyzed under regulatory economic impact.

The Court established two categories of regulatory action that are per se takings for Fifth Amendment purposes. First, if a regulatory condition, no matter how small, requires a private owner to endure permanent physical invasion of his or her property, the government must provide just compensation.[264] Second, a regulation that completely deprives an owner of "all economically beneficial us[e]" of his or her property triggers the demand of just compensation.[265] When a regulation does neither constitute a physical invasion nor completely deprive the landowner of all its economically beneficial use, the courts then analyze the regulatory takings challenges under the standards set forth in Penn Central Transportation Co. v. New York

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City.[266] The regulatory economic impact standard under Penn ***1083** Central factors in "[t]he economic impact on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[267] Furthermore, the Penn Central analysis examines the "character of the governmental action" which may be determinative of a taking.[268]

Both categories (per se and regulatory economic impact) and all three standards under Loretto, Lucas, and Penn Central focus upon the "severity of the burden that government imposes upon private property rights."[269] In the Loretto context, any permanent physical invasion, no matter how small, is the determining factor that undermines "the landowner's right to exclude, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[270] In the Lucas framework, the complete deprivation of economic value is the determining factor and has been decided to be, "from the landowner's point of view, the equivalent of a physical appropriation."[271] In the Penn Central context, the "magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests" are the determining factors.[272]

Which of these three standards can be applied to mandatory inclusionary zoning ordinances? Depending on the structure of program, the ordinance can fall under the analysis of the Lucas standard and the Penn Central standard. Why not Loretto? The Court in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency distinguishes physical takings and regulatory takings.[273] Inclusionary zoning ordinances, which are ***1084** clearly regulations imposed by the government, are set apart from physical takings under Tahoe-Sierra, thus eliminating the Loretto standard for inclusionary zoning ordinances and leaving the other two as the standards that must be applied.[274] But to what is the standard applied? The lots subject to the ordinances? The property as a whole? The following section investigates this inquiry.

3. The "Parcel as a Whole" Dilemma and the "Denominator" Issue

There are two ways to analyze a development. The first method requires that the development be analyzed as one whole, continuous project. Under this analysis, as long as the developer gets some return on his investment of the overall project there is not a taking.[275] Although no compensation would be required under the Lucas standard, the Penn Central standard may require compensation if the regulation essentially constitutes eminent domain.[276] On the other hand, the second method requires that the development be analyzed not as an uninterrupted stretch of land full of improvements but as a large grouping of lots within defined property lines. Because each lot and unit is distinct, each must be uniquely improved to cover its costs and turn a profit. Under this analysis, if the developer does not get a return on a lot because of a local ordinance, then this is a taking. The second method falls under the denominator issue and allows for the application of the Lucas standard on a particular lot; however, the precedent established under Penn Central and Tahoe-Sierra demands that a takings analysis be applied to a "parcel as a whole."[277]

***1085** The Court in Penn Central established the "parcel as a whole" rule, which requires courts to analyze the questioned property as one continuous property in a takings analysis.[278] Fourteen years later, the Court undermined the Penn Central standard in Lucas by questioning the big picture approach to a takings challenge,[279] and then again in Palazzolo v. Rhode Island.[280] But, the "parcel as a whole" rule was resuscitated most recently in Tahoe-Sierra when the court refused to sever the property in question under a takings analysis, thereby reviving the significance of the standards in Penn Central.[281]

In Penn Central, the property at issue was a city landmark that was protected under a city ordinance restricting development of the site in an effort to maintain the landmark's original character.[282] The property as a whole was considered a landmark and the Court stated that one cannot "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[283] For Penn Central, the parcel in question was the Grand Central Terminal in New York City.[284] The petitioners tried to separate the airspace from the terminal ***1086** itself.[285] The city ordinance designated that terminal to be a landmark, and the petitioners could not disaggregate the terminal in an attempt to find a takings argument.[286] The landmark, including the airspace, was one single parcel. The language in Penn Central begs the question: What is a "parcel" ?

The Department of Commerce under then Secretary Herbert Hoover defined "parcel of land" in A Standard City Planning Enabling Act (SCPEA): "for the purpose of sale or of building development: [e]very division of a piece of land into two or more lots, parcels, or parts is, of course, a subdivision."[287] Thus, a parcel is a smaller piece of a larger part of land, namely a subdivision. This definition is decisive in determining what takings standard to apply.

A mandatory inclusionary zoning ordinance, although applied to an entire development, targets specific product. The affordable component does not apply to every lot uniformly, but rather to specific lots--specific parcels. For example, the Boulder, Colorado mandatory program requires that twenty percent of units created in a subdivision must be affordable.[288] Therefore, in a tract of fifty single family homes or a complex of fifty condominiums, there must be at least ten affordable units, and those units will be sold at a lesser rate. The affordable requirement is not spread throughout the entire subdivision, but dedicated to specified units. Mandatory inclusionary zoning programs break subdivisions into two categories: affordable units and market-rate units. Therefore, the Penn Central "parcel as a whole" standard does not apply to the development on the whole, but to each lot, for each lot is a "single parcel" per the SCPEA.[289]

This definition leads to three analytical scenarios: (1) the Lucas standard applied to each and every lot; (2) the Penn Central economic standard being applied to each and every lot; and (3) the Penn Central economic impact standard applied to the subdivision as a whole. The third scenario is inconsequential because the Court held that, as long as a developer receives a reasonable return on an investment, a taking will not be found.[290]***1087** Developers would be hard-pressed to show that selling only twenty percent of their inventory at below market-rate would not result in a reasonable return on the entire development.[291] Conversely, the other two scenarios are apt in analyzing mandatory inclusionary zoning programs. In applying the Lucas standard, one must look at each lot/unit and if total economic depletion is found, then there is a compensable taking.[292] If no taking is found under Lucas, then the adverse-economic-impact standard of Penn Central can apply: Does the regulation unduly "interfere[] with distinct investment-backed expectations" ?[293] With both standards available to evaluate mandatory inclusionary zoning ordinances, this Comment finds that the programs in use today potentially fail under either standard. The first program analyzed is the "no benefit" program.

4. "No Benefit" Programs Are an Unconstitutional Taking

Most proponents of inclusionary zoning programs support developer-benefits in the form of incentives and offsets.[294] However, there is an influential minority of inclusionary zoning proponents who advocate that no incentives or benefits are necessary, much less required. Some communities that have mandatory inclusionary zoning programs do not offer incentives to offset and subsidize the costs of creating below market-rate housing.[295] In ***1088** such programs, developers bear the costs of providing affordable housing to low- and middle-income homebuyers.[296] Does this scenario amount to an unconstitutional taking?

Based on the takings criteria laid out in Lucas, a taking constitutes a regulation that completely deprives an owner of all economically beneficial use of his property.[297] Thus, an ordinance is a taking if it deprives an owner of all economically beneficial use of his property, and such a taking is found unconstitutional without adequate compensation.[298] Furthermore, under Penn Central, a regulation that interferes with property may be of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]."[299] Both of these standards are appropriate to analyze no benefit programs.

How does building an affordable housing unit in a market-rate development affect the developer's bottom-line on those allocated lots? Developers perform due diligence and cost estimations with the expectation of about a twenty percent return on their investment.[300] The market regulates what developers can charge homebuyers for their product.[301] Developers must build at a certain specification to obtain their desired return, and they must price their product at the highest amount possible in order to achieve that profit margin.[302] When units are sold under price control regulations, the developers cannot realize their pre-determined profits. Affordable housing units are obviously sold well below market price, but what is more significant is that they are sold below building cost.[303] Economic studies have shown that "[t]he amount of revenue a developer can gain by selling or renting a unit required to be affordable by a mandatory [inclusionary zoning] policy is generally lower than the costs of developing that unit . . . ."[304] Some programs, especially in California, ***1089** require builders to build affordable units with the exact same specifications as market price units, thereby making the requirement of selling at an affordable rate in these jurisdictions more impactful, or, in some situations, a complete economic loss.[305]

As stated earlier, under the Lucas test, a taking occurs when a "[r]egulation . . . den[ies] the property owner all 'economically viable use of his land.'"[306] In a single-family residence scenario, a city ordinance requiring a lot to be sold at a loss as a prerequisite for a building permit is a regulation that deprives an owner of all economically beneficial use of the property.[307] In a multifamily residence scenario, a city ordinance requiring a unit to be sold at a loss as a prerequisite for a building permit is a regulation that deprives an owner of all economically beneficial use of the property.[308] Therefore, these ordinances are

takings per Lucas.

Some mandatory inclusionary zoning proponents might argue that in a multifamily scenario, developers are in fact selling "air space,"[309] and therefore the Penn Central standard bars a depravation-of-economic-value taking analysis on the airspace.[310] However, unlike the train station in Penn ***1090** Central, a multifamily unit is not being separated from the units below in an inclusionary zoning action. The defendants in Penn Central tried to separate the airspace above the station in order to prove that the area in question, the airspace, has lost all economic value.[311] This is not the case here. As each unit is well within the definition of parcel under the SCPEA, the Lucas takings analysis and the Penn Central economic-impact analysis applies to the unit alone, regardless of whether it is located on the ground or airspace.[312]

Because the ordinance results in a taking, the developer must be adequately compensated. In a no benefit program, the municipality does not satisfy the constitutional requirement of reimbursing a landowner for taking his or her property. Proponents claim that the market-rate inventory subsidizes the loss of profit and cost of the affordable housing units.[313] Furthermore, inclusionary zoning advocates state that houses in large tracts end up subsidizing the losses on other houses due to market fluctuations.[314] Both of these statements are true; however, these arguments are not addressing the constitutional issues. One property subsidizing the losses of another property does not remedy the loss of property use and value resulting from governmental action.[315] If the affordable unit was permitted to be sold at market value, the developer would have received full market-value-profit for the unit.[316] If a "no incentives" policy does not pass constitutional muster, are programs that do have incentives constitutionally permissible?

5. "Density Bonus" and "Developer Benefits" Programs Cannot Guarantee Just Compensation

As previously explained, ordinances that require set-asides of affordable units amount to a taking.[317] Therefore, to offset losses, cities and counties must compensate developers for their compliance in some form or ***1091** another.[318] Municipalities offer several types of incentives in the form of "expedited processing, fee deferrals, loans or grants, and density bonuses that allow more intensive development . . . ."[319] Density bonuses are the most widely advocated incentive for developers.[320]

Proponents of mandatory programs highlight the potential benefits of density bonus inclusions in affordable housing policy and suggest that this is the only offset necessary for developers.[321] Surprisingly, Robert C. Ellickson, one of the most outspoken critics of inclusionary zoning, hints at possible acceptance of programs with density bonuses.[322] Although Ellickson's concession is hailed by inclusionary zoning enthusiasts, his embrace of density bonuses occurred in the early 1980s, well before modern comments and studies undermined this inclusionary zoning cornerstone.[323]

Once praised as the stalwart foothold against mandatory inclusionary zoning opposition, density bonus programs are now facing heavy resistance.[324] In many situations, additional density is either not possible or not cost feasible to offset the loss of profits of affordable units. The shortcomings of density bonuses are most prevalent in multifamily ***1092** developments.[325] Adding an additional floor to a building not only increases the construction time of the development, but also tacks on a tremendous amount of overall cost.[326] For single-family residences, density bonuses require more land on which to place the additional units.[327] In many situations, developers have exhausted the land to its utmost "economically feasible density, which makes a density bonus worthless."[328] Furthermore, as time passes, density bonuses become less effective because they are not ***1093** adjusted for increased construction and land costs.[329] For instance, subsequent ordinances and increased land values over time increase the per-unit cost of development, and a density bonus might not be adequate to offset the rising costs.[330] Moreover, land sellers are aware of density bonuses and undercut the supposed benefits of density bonuses by adding in the increase livable-unit/acre ratio to land purchase prices.[331] Thus, "the density bonus that was meant to help offset high land costs and provide incentives to incorporate lower-rent units" loses its value.[332]

It is important to understand that density bonuses allotted in inclusionary zoning programs are purposed for just compensation, whether effective or not.[333] They are offered to allow a builder to regain lost profits on a development caused by the requirement of affordable housing. They are not used to "shift development away from one location (the 'sending area') toward another location (the 'receiving area')" like a standard transferable development right.[334]

***1094** Apart from economic issues of density bonuses, there are several social critiques. Higher density planning is constantly under fire from neighboring residences, and density bonus incentives contribute to this unpopular market and the public outcry.[335] Developments that are required to include affordable housing and consequently accept the higher density are

routinely fought by Not in My Backyard ("NIMBY") neighbors who challenge them during the approval phase.[336] As a result, these developments are severely delayed,[337] effectively costing the complying developer more money.[338]

***1095** Municipalities do, however, offer more than just density bonuses to offset the costs of set-asides.[339] Although density bonuses are much more prevalent, a few jurisdictions offer certain fee waivers, expedited permit processing, and tax abatements.[340] The most compelling are the tax and fee waiver incentives which are, more or less, government subsidies. Effectively, a local subsidy that is procured to offset the losses of inclusionary zoning results in the local city or county paying for the affordable units. One purported benefit of mandatory inclusionary zoning is that this technique does not cost the local government a dime,[341] but if the government is going to pay for the affordable units, why would it support a technique that limits the supply of housing?[342] Furthermore, if government subsidies were in the least bit effective in covering the builder's losses on the affordable units, developers would surely flock to participate in such a win-win program.[343] This, however, is not the case.[344] Therefore, ***1097** mandatory programs are not only uninviting to developers, the fee waivers, tax exemptions, and expedient permit processing benefits undermine the advocates' claim that tax dollars are not allocated to the building of the affordable units.

The attempt to compensate losses by offering these bonuses and incentives, although well intentioned, has missed the mark because the possible benefits "have proven difficult to achieve or insufficient to make up the costs."[345] Some municipalities have recognized the faults of density bonuses and incentives, and offer alternatives to strict compliance with the mandatory inclusionary zoning requirements. However, substantial analysis of the most popular and widely used "alternatives" to providing in-development affordable housing reveals that these too fail to make the grade.

C. Programs with "Alternatives" Operate in Strict Contradiction to the Goals of Inclusionary Zoning

There are several municipalities that employ mandatory inclusionary programs that allow developers to substitute set-asides with an alternative. For example, the City of Napa allowed for an "alternative equivalent proposal" such as a dedication of land, in-lieu payments or fees, or the construction of affordable units on another site.[346] These three alternatives appear in dozens of other municipality programs and seem to be among the most popular.[347] This technique (of allowing alternative equivalent proposals) is used as a way to buttress a mandatory exclusionary program by allowing the municipality to approach developers with other ways to contribute to its affordable housing program in the event that set-asides are not possible.[348] Also, municipalities use alternatives as a way to show protesting parties and courts that the program is flexible and accommodating.[349] In return, developers receive benefits, which, as argued ***1098** earlier, are not a guarantee of full compensation. Although these alternative programs are popular with inclusionary zoning proponents, they operate in a contradictory manner to the socioeconomic goals of inclusionary zoning.[350] For the purposes of this comment, the most popular alternatives--in-lieu fees, land dedications, and offsite construction--will be analyzed.[351]

1. In-lieu Fees: The Counterproductive Alternative

In-lieu fees are a common alternative that allow a developer to decline to include below-market units with market value units by paying fees to the municipality.[352] These fees are then placed in a city-held general housing ***1099** trust fund to be used for affordable housing initiatives.[353] The assets kept in the trust funds are used for a variety of purposes such as increasing the affordable housing supply in areas that are in need,[354] acquiring land for affordable housing units, and constructing housing units for ownership or rental, including transitional housing.[355] Although the funds are sometimes used for "inclusionary-like" purposes,[356] housing trust funds are allocated at the discretion of city officials for whatever affordable housing purpose they deem necessary.[357] Unfortunately, in many cases the allocated funds are used for purposes that are in direct contradiction to the purpose of ***1100** inclusionary zoning.[358] Other municipalities give housing trust funds to community action agencies and community housing organizations as well as transitional housing programs for special needs individuals.[359] These programs, and social programs like them, are commendable and illustrate the concern these municipalities have for low-income and special needs individuals; however, the use of inclusionary zoning in-lieu funds strips the affordable housing technique of its purpose.

First, programs that use in-lieu fees perpetuate the ghettoization of affordable housing communities in direct conflict with the inclusionary zoning purpose.[360] Housing projects that consist of a high percentage of affordable units tend not to be economically diverse, essentially centralizing and concentrating poverty.[361] Second, housing trust fund revenues are used solely to build affordable housing developments and transitional housing units.[362] Building developments consisting solely of

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affordable housing actively separates below-market tenants and homeowners from median and high income developments and neighborhoods.[363] Transitional housing programs are, by definition, temporary half-way housing programs not tailored specifically to low- and middle-income families who need mere housing assistance, but tailored to a cornucopia of disadvantaged and special needs persons with an array of social needs.[364] Third, and most unfortunate, ***1101** general housing trust funds have the capacity to funnel inclusionary housing funds away from those in need.[365] Thus, affordable housing funds are not necessarily used for those in need of affordable housing.[366] By comingling inclusionary zoning funds with general housing funds, the in-lieu fees betray their purpose and effectively reduce the amount of affordable housing in the community, and thus are of little value to the inclusionary zoning objectives. Fourth, municipalities that use in-lieu fees solely for the purpose of buying land to build affordable housing units effectively undermine inclusionary zoning goals by setting aside and segregating affordable housing from market-rate developments in the same manner that land dedications and off-site construction do.[367] This alternative clearly does not fulfill the mission of inclusionary zoning, a symptomatic failure also found in land dedications and off-site construction.

2. Land Dedications and Off-Site Construction: Not in My Backyard!

Land dedications and off-site construction can be analyzed together because they operate in unison and contradict the goals of inclusionary zoning in the same way. Both alternatives are popular with the hundreds of California municipalities that have enacted inclusionary zoning ordinances.[368]

***1102** Land grants and dedications allow developers to purchase land and then contribute the land to the municipality's affordable housing plan rather than incorporate below-market units into their developments.[369] In practice, land dedications have produced affordable housing; however, this technique disrupts the purpose of inclusionary zoning.[370] By isolating the affordable housing from the market-rate units, land dedications "undermine the economic and social integration that many inclusionary policies aim to create" by lumping together the lower-class and isolating them from the other classes.[371] No longer are inclusionary dollars used for an inclusionary purpose, and this alternative to integration consolidates and centralizes poverty in strict contradiction with a primary goal of inclusionary zoning.

Off-site construction allows builders to construct an affordable housing complex in another location, away from their market-rate development, rather than including below-market units.[372] Unlike land dedications, the responsibility of producing affordable units remains with the developer, and the local authorities are not involved in the actual production of housing.[373] However, similar to the land dedications, off-site development isolates affordable housing and restricts residential integration.[374]

***1103** Land dedications and off-site construction options run contrary to the fundamental elements of inclusionary zoning.[375] A program is hardly inclusionary if it allows for socioeconomic segregation funded by the very dollars and resources allocated for an inclusionary purpose. Furthermore, the success of these alternatives is dependent on the approval of surrounding neighborhoods, which may harbor discriminatory opinions against high density affordable housing.[376] Obstructing campaigns from surrounding communities will inevitably delay and may even prohibit construction of the units, rendering the alternatives useless.[377]

It is evident from the above analysis that mandatory inclusionary zoning ordinances are not only exactions evoking heightened scrutiny, but are also unconstitutional takings on other grounds and operate in contradiction to their purpose.[378] The major problem with these programs, as they operate today, is that they do not encourage developers to participate.[379] If a program was designed in such a way as to encourage developers to participate, not only would it escape the constitutional and compensatory ***1104** issues, but it would have builders flocking to the jurisdiction, eager to take advantage.[380] Therefore, the key to a successful and constitutional inclusionary zoning program is to attract the developer with a developer-focused program.[381]

V. Economic Persuasion and Attraction, the Crucial Ingredients for a Successful Inclusionary Zoning Program

Recent research has indicated that mandatory inclusionary zoning programs have failed to meet their most fundamental goal, namely, creating adequate affordable housing in market-rate housing tracts.[382] Even if the goal of inclusionary zoning was merely to contribute to the number of affordable housing units in a given community and to prohibit the consolidation of poverty, many of the programs enforced by local cities and counties have proven ineffective.[383] Indeed, most of the enacted

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programs ***1105** that create affordable housing have the tendency to do more harm than good, mainly by contributing to the environment of segregation that inclusionary zoning tries so desperately to eradicate.[384] Thus, it is apparent that mandatory inclusionary zoning policy has not lived up to its promise.[385]

Most of the ordinances throughout the United States that demand mandatory inclusionary zoning set-asides are damaging housing markets.[386] They are also contributing to the ghettoization of communities through separatist alternatives to set-asides, sometimes amounting to an unconstitutional taking.[387] To create effective, progressive affordable housing programs, the right blend of policies and incentives and "an active partnership between the private and public sectors" is the ultimate key for success.[388] Such a winning strategy can only be found in a voluntary program that entices private cooperation, convinces developers to invest in the program, and makes economic sense for all parties involved.

What is very disheartening, from a pragmatic point of view, is the disregard many academics, students, and activists have for the wellbeing of those who are responsible for the actual construction of affordable and ***1106** market-rate housing.[389] Builders are not faceless corporate suits.[390] Some are small family operations that hire and employ individuals who themselves may qualify for the particular affordable housing units that they are building.[391] Therefore, it is imperative to bring developers to the table through persuasion, rather than force.[392] This can only be achieved by a program that is economically suitable for developers.[393] An effective ***1107** program would be voluntary and allow developers to make a profit on affordable houses that is comparable to what they would make on market-rate houses without density bonuses, other incentives, or alternatives.[394]

The most promising means by which to achieve this is a two part plan. The first part would require cities and counties to relinquish all permitting, impact, mitigation, plan check, and surcharge fees for the affordable units.[395]***1108** In some jurisdictions, fees alone contribute to a significant percentage of building costs.[396] By greatly minimizing these fees or removing them altogether, the bottom-line building costs can be heavily reduced.[397] The second part of the plan is to allow builders to sell affordable units for market-value production cost,[398] thus the profit made is in direct proportion to the elimination of fees.[399]

Opponents will decry that local governments will be losing out on the revenues generated from building fees.[400] However, many mandatory inclusionary zoning programs currently allow for government subsidies to assist buyers of affordable housing, which suggests that local government is, in fact, paying for the below-market-rate houses.[401] Moreover, recent studies ***1109** show that the losses of revenue from property taxes and taxes on the sale of affordable housing can be substantial over time.[402] Thus, a minimum loss upfront is a small price to pay for an effective inclusionary program that will encourage developers to comply.

Additionally, a program that eliminates city and county fees and allows builders to sell their affordable inventory at a market-rate cost has several other benefits. First and foremost, this plan is constitutional.[403] By allowing the developer to realize a return on the property, the program will not be found to deprive the property owner of his property's economic value, thus sidestepping a possible Lingle violation.[404] Second, by not having to offer offsets, such as density bonuses, there are no limits to the number of affordable housing units that can be built in a tract.[405] Freedom from the restrictions associated with a feasible density mix allows for a wider range of inclusionary unit percentages within a development, opening the doors to more affordable units.[406] Third, because the sales price is based solely on building costs, the affordable units will not be subject to demand-price-increases.[407] This plan will require the municipality to heavily regulate who ***1110** is qualified to purchase the affordable units, so as to benefit those for whom the program is designed.[408] Fourth, because offsets are a must,[409] a fee-free program does not involve the negative issues of density bonuses,[410] which in turn means less public outcry for developments that involve high density affordable housing.[411] Fifth, because the program is voluntary and enticing to builders, municipalities will not have to offer alternatives when it is impossible to include the affordable units in the new development.[412] This plan entices a developer to build affordable units among market-rate units, thereby truly achieving the goal of inclusionary zoning.

Using the most recent census records, the following analysis illustrates the possible pricing under this plan. According to the U.S. Census Bureau, the 2008 median income for a family of four in the state of California[413] was $70,712.[414] The 2008 median home price in California was $427,271.[415] If developers made approximately twenty percent on the home,[416] the median ***1111** market-value cost is $341,816.80, including taxes, fees, marketing costs and exactions. Subtracting the fees (approximately $68,363.36) from the market-value cost yields a bare building cost of $273,453.44.[417] Therefore, if the

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developer wanted to make a twenty percent profit on the bare building cost, the affordable housing cost would be $341,816.80,[418] nearly $86,000 less than the market-rate price and a twenty percent drop in the selling price. Of course, these calculations are based on ratio data and may vary from city to city; however, this example illustrates the potential pricing possibilities under this plan.

The one serious drawback of this plan is that the selling price of the affordable units is very rigid. For developers to see a profit, they would have to sell the affordable units at a certain percentage above their building cost, preferably at the building cost of the market-rate units. Any lower, and the city or county would commit an unconstitutional taking. What does this mean? Basically, it means that the lowest of the low-income bracket may possibly be out of reach of buying these affordable units.[419] As mentioned above, the 2008 median income for a family of four in the state of California was $70,712, which means that "very low" -income individuals made approximately $35,000, and "low" -income individuals made approximately $46,000.[420] Individuals at these levels would have an immensely difficult time affording a home in California, which had a 2008 median home price of ***1112** $427,271.[421] However, even radical inclusionary zoning programs would be strained tremendously to include homebuyers at the "very low" -income level.[422]

VI. Conclusion

The goal of inclusionary zoning is twofold: create more affordable housing units and integrate such units with market-value units. This can be achieved by adopting a plan that is voluntary and entices builders to participate. Builders and developers run on a demanding "return on investment" system. Thus, economic incentive is the key to encouraging developer participation. By making affordable housing programs profitable, cities and counties will not be burdened by the weaknesses of density bonuses, in-lieu fees, land dedications, and off-site construction. This can be achieved by cutting the fees and taxes on the affordable units and selling them for market-value cost. Although such a plan unfortunately does not dip into the lowest economic brackets, it is one step closer to achieving the goals of inclusionary zoning.

Footnotes

1 Brian Louis, U.S. Housing Market May Bottom in 2009, Zandi Says, Bloomberg.com, Feb. 9, 2009, available at http://www.bloomberg.com/apps/news? pid=20601087&sid=aJTtcFir47.E&refer=home ("Demand for new and existing homes began to fall in 2005, marking the end of a five-year U.S. housing boom fueled in part by easy credit for subprime borrowers. Existing home prices tumbled from an average high of $230,200 in July 2006 to $175,400 in December, according to data from the Chicago-based National Association of Realtors.").

2 Ruth Mantell, Home Prices Off Record 18% in Past Year, Case-Shiller Says, MarketWatch, Dec. 30, 2008, http://www.marketwatch.com/news/story/home-prices-off-record-18/story.aspx?guid=%7BBF591131-9F33-46B5-A A21-E9769244FE5A% 7D. In December 2008, Case-Shiller home price index published that prices in all of its market cities fell substantially compared to 2007, 14 of the 20 metro areas researched showed record rates of annual declines, and for the "original 10-city index, prices fell a record 19.1% in the previous 12 months." Id. Measuring the average change in home prices in several major metropolitan areas, the S&P/Case-Shiller Metro Area Home Price Indices are market records and analyses that are measurements of benchmark housing prices in the United States. Standard & Poor's, S&P/Case-Shiller Metro Area Home Price Indices, May 2006, http://www2.standardandpoors.com/spf/pdf/index/SPCS_ MetroArea_HomePrices_Methodology.pdf. The indices "measure changes in housing market prices given a constant level of quality." Id.

3 See Standard & Poor's, supra note 2.

4 Id.; see also Jonathan Burton, Ten Investment Ideas for 2009, MarketWatch, Dec. 29, 2008, http://www.marketwatch.com/news/story/Ten-investment-ideas-make-you/story.aspx?guid=%7BD3DE1B99-663C-43E2-9F97-1B6BD4A232FC%7D ("Now we face the worst economic times since the Great Depression. The coming year will bring more job losses, bankruptcies, foreclosures, cutbacks. Consumers and companies will spend less, dig out of debt, save what they can. The incoming administration of President-elect Barack Obama will try to do its part--keeping interest rates low, funding job-creating projects and printing money to stimulate the contracting economy."); John Bellamy Foster, The Financialization of Capital and the Crisis, Monthly Rev., Apr. 2008, at 1, 2, available at http://www.monthlyreview.org/080401foster.php ("Since the collapse of the subprime mortgage market in July 2007, financial distress and panic have spread uncontrollably not only across countries but also across financial markets themselves, infecting one sector after another: adjustable rate mortgages, commercial paper (unsecured short-term corporate debt), bond insurers, commercial mortgage lending, corporate bonds, auto loans, credit cards, and student loans.").

5 Michelle DaRosa, Comment, When Are Affordable Housing Exactions an Unconstitutional Taking?, 43 Willamette L. Rev. 453, 453 (2007) ("[O]ne out of every seven households in the United States pays more than half of its gross income for housing, while the Department of Housing and Urban Development suggests that a family should spend no more than 30% of their gross monthly income on housing.").

6 Douglas R. Porter, The Promise and Practice of Inclusionary Zoning, in Growth Management and Affordable Housing: Do they Conflict? 212, 213 (Anthony Downs ed., 2004). Data collected from 1981 to 2000 shows that in twenty-eight metropolitan regions, there is a dramatic discrepancy between job growth (with about twelve million over that time period) and housing growth (with only seven million units being completed over the same time period). Id . The same study analyzed this shortcoming and determined that production of housing units is off-pace on an average of 88,000 units per year. Id. "[C]onstruction of new housing has not kept pace with job growth and household formation, and the pace of multifamily construction suitable for lower-income households is far below that of single-family homes." Id. at 213-14. This crisis has bled into the rental housing market as well. Since 1997, "rental costs have risen faster than the consumer price index," devaluing the income of renters, who are more than likely to be on the bottom of the financial totem pole. Id. at 213. Furthermore, the "Department of Housing and Urban Development estimates that housing affordable by very low income renters dropped by 7 percent--about 1.14 million units--in just two years (1997-1999)." Id.

7 In 2008, Southern California home sales dropped dramatically in the wake of the housing bubble burst. See Peter Hong, Southern California Home Sales Drop to 20-Year Low, L.A. Times, Feb. 14, 2008, http://articles.latimes.com/2008/feb/14/business/fi-homes14. Double digit slides of upwards of fifty-three percent illustrate the tightening of the housing market that has aggravated the nation's financial woes. Id.; see also Nina Wu, Housing Market Dives, Honolulu Star-Bulletin, Jan. 6, 2009, at 8, available at http://www.starbulletin.com/news/20090106_December_home_sales_drop_19.html.

8 See Luke Mullins, The Top 5 Housing-Market Hopes for 2009, U.S. News & World Report, Dec. 18, 2008, http://www.usnews.com/articles/business/real-estate/2008/12/18/the-top-5-housing-market-hopes-for-2009.html. Because

of a sharp decline in the demand for new homes, "home builders have been forced to sharply pull back on new construction." Id. Government surveys and reports discovered that at the end of 2008, "housing starts dropped to their lowest level since 1959, when officials started keeping the statistics. [T]hat's bad news for the economy-- because it means fewer jobs for builders and others ...." Id. As explained below, affordable housing grows congruously with market-rate housing, and a halt in creating market-rate homes is a halt on creating affordable homes. See also Jeremy Kutner, Affordable Housing Hits Wall in Time of Rising Need, Christian Sci. Monitor, Feb. 6, 2009, at 4, available at http:// www.csmonitor.com/2009/0206/p04s01-usec.html ("With the whole housing market in a deep freeze, it's perhaps not surprising that fewer low-income units--which require huge subsidies to get built even in flush times--are being constructed.").

9 Margery Austin Turner & G. Thomas Kingsley, Federal Programs for Addressing Low-Income Housing Needs 2 (2008), available at http:// www.urban.org/UploadedPDF/411798_low-income_housing.pdf. "From 1999 through 2005, U.S. housing markets experienced an unprecedented boom. Changes in policies and market mechanisms, including a vast increase in subprime lending, substantially expanded the number of homeowners, while the number of renters remained flat." Id.

10 Benjamin Powell & Edward Stringham, Housing Supply and Affordability: Do Affordable Housing Mandates Work? 1 (2004), available at http://reason.org/files/020624933d4c04a615569374fdbeef41.pdf.

11 Stephanie Armour, Existing Home Sales Skid in June: Housing Market Distress Also Lowers Median Price, USA Today, July 25, 2008, at 1B, available at http://www.usatoday.com/printedition/money/20080725/1b_homesales25.art.htm (noting that "deepening worries about the economy--amid rising mortgage rates, layoffs and inflation--are plaguing real estate and forestalling any recovery."); see also Stephanie Armour, Home Sales, Prices Drop as Traditionally Strong Spring Season Starts, USA Today, Apr. 23, 2008, at 9A (noting that unemployment, sales closing at bottom, and a tightening of home loans is drastically hurting the housing market and many families.). Large corporations are not immune to the housing and economic crisis as illustrated by General Motor's loss of billions as net-income indicators show drops of up to ninety percent. John O'Dell, GM Hurt by Weak HousingMarket, L.A. Times, May 4, 2007, at C1. Inexperienced workers and young job-seekers are also feeling the impact. Erik Eckholm, Working Poor and Young Hit Hard in Downturn, N.Y. Times, Nov. 8, 2008, http://www.nytimes.com/2008/11/09/us/09young.html ("A kind of domino effect is beginning to squeeze out the least skilled or experienced workers--those already on the bottom of the ladder--who are settling for part-time employment and fewer hours if they can find work at all. Hardest hit of all are younger job-seekers, especially black males in their late teens or early 20s without more than a high school education.").

12 Some free-marketers believe a "do nothing" strategy is the key to long term success. See Luke Mullins, Peter Schiff: Let the Housing Market Crash, U.S. News & World Report, Jan. 23, 2009, http:// www.usnews.com/blogs/the-home-front/2009/1/23/peter-schiff-let-the-housing-market-crash.html. Peter Schiff finds that government intervention cannot be the solution: "[T]he government's response to the housing crisis has only made matters worse and ... the best way to help the market would be to let home prices fall further." Id. In April 2008, Congressman John Shadegg proposed the Homeowner Empowerment Act of 2008 as a solution:

[The act] would temporarily allow Americans to tap into retirement plans, without paying penalties or taxes, to make their mortgage payments or the personal mortgage payments of any other individual ... [thus] [e]nabling borrowers,

family or friends with retirement accounts to make mortgage payments would stave off additional defaults.

John Shadegg, A Free Market Approach To Housing Crisis, Relistr, Apr. 29, 2008, http://relistr.com/real-estate/a-free-market-approach-to-housing-crisis.html.

13 Academics, bloggers, and pundits who highly prize the protective oversight of government intervention claim that the housing crisis was caused by a failure of the free market. See, e.g., Jeff Rosenberg, Correcting for Market Failures, MNpublius.com, June 29, 2009, http://mnpublius.com/2009/06/. Many politicians believe that government action is the way out of the housing problems facing struggling homeowners, homebuyers, and renters:

Senator Obama said he would take the following steps to solve the current foreclosure and credit liquidity problems.

1. Create a new Federal Housing Administration Housing Security Program. The Senator supports the efforts of Senate Banking Committee Chairman Chris Dodd (D-CT) to create a new program that will incentivize lenders to buy or refinance existing mortgages and convert them into stable 30-year fixed mortgages with a federal guarantee provided for the resulting loans. Senator Obama called this a "backstop" not a "bailout."

2. Ask lenders to write down loan amounts for more conventional borrowers. Lenders should take action to restructure loans as early as possible when borrowers are at risk of financial trouble or when housing prices plummet. To alleviate lender concerns over tax and legal issues, the Senator's plan also calls for legislation that will clarify the ability of servicers to act on behalf of the loans investors/owners.

3. Closing the bankruptcy loophole for mortgage companies. Under current Chapter 13 rules, judges cannot modify the terms of home mortgages, even if the loan was unfair or predatory. Making this change could prevent as many as 600,000 foreclosures.

4. Create a new mortgage interest tax credit which will assist homeowners who do not itemize their taxes. This would involve a 10 percent universal mortgage credit which will, effectively, cut 10 percent off of the interest rate paid by 10 million, mostly low income, home owners.

5. Provide an additional $10 billion of Mortgage Revenue Bond (MRB) authority. These are used to refinance subprime loans and provide mortgages for first-time homebuyers but are currently over-subscribed in most states.

6. Combat mortgage fraud and predatory subprime lending by defining mortgage fraud on the federal level, increasing funding for federal and state law enforcement programs and creating new criminal penalties for fraud.

7. Require more accurate and understandable loan disclosure documents.

Glenn Setzer, Senator Obama Lays out Housing Policy--Third in a Series, Mortgage News Daily, Apr. 4, 2008, http://www.mortgagenewsdaily.com/442008_ Obama_Housing_Plan.asp (summarizing the President's plan found at BarackObama.com, Barack Obama's Plan to Restore Confidence in the Markets, Tackle the Housing Crisis and Help Protect Families from the Economic Slowdown, http://obama.3cdn.net/f9836ef496f75a9be0_39gimvt5b.pdf (last visited Nov. 14, 2009)).

14 A major push for government intervention was the homecoming of millions of American men after World War II and the prospects of having the streets laden with homeless veterans. See Gerald W. Sazama, Lessons from the History of Affordable Housing Cooperatives in the United States: A Case Study in American Affordable Housing Policy, 59 Am. J. Econ. & Soc. 573, 580 (2000). Thus, by war's end "a disposition policy was developed amending the 1940 Housing Act, ensuring that those public housing projects not converted to low-income housing, would first be sold to veterans, then to residents, and, lastly, to private realtors." Id. This was achieved despite squabbling on Capitol Hill

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and taught housing advocates that federal aid can be tough to come by, regardless of ample support from the voting public. Id.

15 See City of Santa Clarita, Affordable Housing & Services, http://www.santa-clarita.com/cityhall/cd/housing/index.asp (last visited Nov. 14, 2009).

16 Id.

17 U.S. Dep't of Hous. & Urban Dev., Affordable Housing Programs, http://www.hud.gov/offices/cpd/affordablehousing/programs/index.cfm (last visited Nov. 14, 2009) ("The HOME program helps to expand the supply of decent, affordable housing for low and very low- income families by providing grants to States and local governments called participating jurisdictions or 'PJs'. PJs use their HOME grants to fund housing programs which meet local needs and priorities. PJs have a great deal of flexibility in designing their local HOME programs within the guidelines established by the HOME program statute and Final Rule. PJs may use HOME funds to help renters, new homebuyers or existing homeowners.").

18 Id. ("SHOP provides funds for non-profit organizations to purchase home sites and develop or improve the infrastructure needed to set the stage for sweat equity and volunteer-based homeownership programs for low-income families. SHOP is authorized by the Housing Opportunity Program Extension Act of 1996 as ammended [sic], Section 11, and is subject to other Federal crosscutting requirements. National and regional nonprofit organizations or consortia with experience in using volunteer labor to build housing may apply. This is a competitively based program funded through the NOFA.").

19 Id. ("The Homeownership Zone program allows communities to reclaim vacant and blighted properties, increase homeownership, and promote economic revitalization by creating entire neighborhoods of new, single-family homes, called Homeownership Zones. Communities that apply for HOZ funds are encouraged to use New Urbanist design principles by providing for a pedestrian-friendly environment, a mix of incomes and compatible uses, defined neighborhood boundaries and access to jobs and mass transit.").

20 Smart Growth/Smart Energy Toolkit, Inclusionary Zoning, http://www.mass.gov/envir/smart_growth_toolkit/pages/mod-iz.html (last visited Nov. 14, 2009).

21 See Powell & Stringham, supra note 10, at 1. "California was an early leader in the adoption of inclusionary zoning, and its use there has grown rapidly in the state .... [Today], 20 percent of California communities ... have inclusionary zoning." Id. The primary reason for the panicked adoption of these programs is that since the early 1980s, there has

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been a rapid increase California housing prices. See Nico Calavita, Origins and Evolution of Inclusionary Housing in California, in Inclusionary Zoning: The California Experience 3 (2004), available at http://www.oaklandnet.com/BlueRibbonCommission/PDFs/BlueRibbon25-NHC_IZ_Rpt.pdf. Some of the factors that contributed to the sharp increases are:

[1.] Heavy in-migration during the 1970s and 1980s, and the inability of the housing industry to keep up with demand....

[2.] NIMBYism. Successful opposition on the part of residents to new residential development--especially higher density--both at the periphery and in urbanized communities, limits housing construction.

[3.] Declines in investment in public infrastructure at the state and local levels reduces the availability of developable land. One result is unusually high development impact fees. While the full amount is not necessarily passed on to consumers--fees tend to reduce land prices--high fees usually result in higher housing costs. The main cause of the infrastructure deficit at the local level is Proposition 13, passed in 1978, that limited property tax revenues.

[4.] Proposition 13 has another significant deleterious effect on the housing market. Fiscally impoverished cities engage in "fiscal zoning" that encourages commercial land uses that generate sales taxes while discouraging housing perceived as a fiscal drain because of the need for services that it generates.

[5.] Many existing metropolitan regions such as Los Angeles and San Diego were developed on coastal plains and mesas. The remaining land is highly constrained from an environmental standpoint, especially in terms of slopes and biology.

Id. at 3-4 (citations omitted).

22 See Andrew G. Dietderich, An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed, 24 Fordham Urb. L. J. 23, 45 (1996); see also Tom Means et al., Below-Market Housing Mandates as Takings: Measuring Their Impact 7 (2007), available at http://www.independent.org/pdf/policy_ reports/2007-11-09-housing.pdf. "Developers could then weigh the benefits and costs of participating, and if the benefits exceeded the costs, the developers could voluntarily comply." Id.

23 See infra note 393. Affordable housing advocates deride voluntary inclusionary zoning programs for not being able to produce "housing affordable for low- and very-low-income households" and "must rely heavily on federal, state, and local subsidies in most cases." Nicholas Brunick et al., Voluntary or Mandatory Inclusionary Housing? Production, Predictability, and Enforcement 3-4 (2004).

24 See Dietderich, supra note 22, at 45. Mandatory inclusionary zoning ordinances are much more aggressive than voluntary programs because they take "away a developer's choice ... [and] require[] the developer to dedicate to low-income use part of any new development above a certain size, but [may] offer[] a density bonus to compensate the developer for possible losses." Id.

25 See generally Robert C. Ellickson, The Irony of "Inclusionary" Zoning, 54 S. Cal. L. Rev. 1167 (1981). Ellickson, the Walter E. Meyer Professor of Property and Urban Law at Yale Law School, concludes that inclusionary zoning

programs endorsed by local and state governments will actually aggravate the affordable housing crisis it has been designed to resolve. Id. at 1215. He reasons his argument on the deduction that:

Inclusionary zoning involves in-kind housing subsidies, a method increasingly viewed as one of the most inefficient forms of income redistribution. Inclusionary zoning can also constitute a double tax on new housing construction--first, through the burden of its exactions; and second, through the "undesirable" social environment it may force on new housing projects.... [T]his double tax is likely to push up housing prices across the board, often to the net injury of the moderate-income households inclusionary zoning was supposed to help.

Id. at 1215-16.

26 Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60 (Ct. App. 2001); Holmdel Builders Ass'n v. Twp. of Holmdel, 583 A.2d 277 (N.J. 1990); S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel II), 456 A.2d 390 (N.J. 1983).

27 See Home Builders Ass'n, 108 Cal. Rptr. 2d 60 (holding that the ordinance in question is not a violation of the takings clauses, did not evoke a Nollan/Dolan heightened scrutiny, and met the requirement of advancing a legitimate state interest); see also DaRosa, supra note 5, at 473-74. "The Supreme Court has not ruled on an affordable housing ordinance takings challenge, either in a facial challenge or as applied ...." Id. at 473.

28 Because the Home Builders Ass'n decision was not entirely comprehensive and failed to included certain factors in its reasoning, many law review articles, legal journals, and policy reports have criticized the decision and concluded in strict opposition to the California Supreme Court. See generally DaRosa, supra note 5; see also Means et al., supra note 22. Furthermore, experts in economics and public policy have compiled the latest data and have criticized inclusionary zoning programs for their negative affects both on housing inventory and housing costs. See Powell & Stringham, supra note 10; see also Means et al., supra note 22.

29 See Home Builders Ass'n, 108 Cal. Rptr. 2d 60.

30 See infra notes 151-216 and accompanying text.

31 See infra notes 218-35 and accompanying text.

32 See infra notes 236-345 and accompanying text.

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33 See infra notes 346-81 and accompanying text.

34 See infra notes 382-422 and accompanying text.

35 See infra notes 39-67 and accompanying text.

36 See infra notes 68-109 and accompanying text.

37 See infra notes 110-422 and accompanying text.

38 See infra notes 382-422 and accompanying text.

39 See Sazama, supra note 14, at 573. Starting in the mid-nineteenth century in Europe, cooperatives were organized by groups of urban workers to help craftsmen and members of their trade find housing. Id. at 576. Such programs did not come across the Atlantic until 1918. Id. at 577-78.

40 Id. at 577-78. In support of these affordable housing efforts, trade unions with strong socialist influences stepped in and shouldered the plight of urban workers looking for housing. Id. at 578. Some of these early unions were involved in an early form of social security to assist their members with retirement, thus providing testing grounds for the national program that was adopted by the federal government a few decades later. Id. Many of these unions were well experienced in self-help projects for working families, and the early forms of affordable housing were consistent with the union's agenda. Id.

41 Id. at 578.

42 The Second Progressive Movement was sparked by a split in the Republican Party in the 1920s. Encyclopaedia Britannica, Progressive Party, Encyclopaedia Britannica Online, http://

www.britannica.com/EBchecked/topic/478379/Progressive-Party (last visited Nov. 14, 2009). Certain members of the party were frustrated by the conservative vein that controlled both the Republican and Democratic parties of the day. Id.

43 See Sazama, supra note 14, at 578.

44 Id.

45 See id. at 579. The most the government did for affordable housing was establish "public housing" under the Public Works Administration and the United States Housing Authority. See The Eleanor Roosevelt Papers, Public Works Administration, in Teaching Eleanor Roosevelt (Allida Black et al. eds., 2003), available at http://www.nps.gov/archive/elro/glossary/pwa.htm. In the first year of his presidency, Franklin D. Roosevelt signed into law the National Industrial Recovery Act. Id. Written into the act was the creation of an agency that would be responsible for spending "big bucks on big projects" in order to stimulate the economy out of the Great Depression. Id. (internal quotation marks omitted). Beyond funding projects like Bonneville Power and Navigation Dam, the Public Works Administration was budgeted to improve public welfare (i.e. housing). Id. The program proved to be a flop despite spending over six billion dollars on industrial projects. Id. Moreover, the highlighted big failure "was in quality, affordable housing, building only 25,000 units in four and a half years." Id.; see also Charles J. Orlebeke, The Evolution of Low-Income Housing Policy, 1949 to 1999, 11 Housing Pol'y Debate 489, 492 (2000), available at http://www.mi.vt.edu/data/files/hpd% 2011(2)/hpd%2011(2)_orlebeke.pdf.

46 President Franklin D. Roosevelt, State of the Union Address, Jan. 11, 1944, reprinted in The Public Papers and Addresses of Franklin D. Roosevelt 32 (Samuel I. Rosenman ed., 1944). Roosevelt spoke of a second Bill of Rights that enumerated new rights to all persons, among these "[t]he right of every family to a decent home ...." Id. at 41.

47 See Orlebeke, supra note 45, at 490.

For low-income housing advocates, the Housing Act of 1949 promised that the federal government, given the means and the authority, could solve the nation's housing problems through the exercise of committed political leadership at the top and the implementation muscle of a technically skilled, socially conscious bureaucracy working its will with an eager housing industry and compliant local governments.

Id.

48 Id.

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49 Id. As part of President Lyndon B. Johnson's Great Society policy, the Department of Housing and Urban Development Act of 1965 created HUD. U.S. Dep't of Hous. & Urban Dev., HUD History, http://www.hud.gov/library/bookshelf12/hudhistory.cfm (last visited Nov. 14, 2009). Since its inception, HUD's mission has been to "increase homeownership, support community development and increase access to affordable housing free from discrimination." U.S. Dep't of Hous. & Urban Dev., Mission, http://www.hud.gov/library/bookshelf12/hudmission.cfm (last visited Nov. 14, 2009). In order to fulfill this mission, the department has tried to "embrace high standards of ethics, management and accountability and forge new partnerships-- particularly with faith-based and community organizations--that leverage resources and improve HUD's ability to be effective on the community level." Id.

50 See Orlebeke, supra note 45, at 490. "Reaffirmation of the 1949 goal with quantified production targets and timetable, new housing subsidy programs generously funded, planning requirements aimed at dispersing low-income housing throughout metropolitan regions, and even a new fair housing act outlawing racial discrimination--all the tools were there." Id.

51 Id.

52 Id.

53 Id. It was during this moratorium that Section 8 housing was created, which was an adoption of the Experimental Housing Allowance Program (EHAP) and basically an updated version of the Section 23 housing program created in the early sixties. See R. Allen Hays, The Federal Government & Urban Housing: Ideology and Change in Public Policy 144-46 (1985); see also Louis Winnick, The Triumph of Housing Allowance Programs: How a Fundamental Policy Conflict Was Resolved, 1 Cityscape 95, 106-12 (1995), available at http://www.huduser.org/Periodicals/CITYSCPE/VOL1NUM3/winnick.pdf (highlighting the early efforts and successes of the EHAP). This form of housing was founded on the "housing allowance" concept of providing a voucher subsidy to "low-income families living in privately owned rental housing that meets certain standards." Edgar O. Olsen & William J. Reeder, Does HUD Pay Too Much for Section 8 Existing Housing?, 57 Land Econ. 243, 243 (1981).

54 See Orlebeke, supra note 45, at 491. Considered the "most useful, cost-effective form of subsidy," voucher programs and demand-side subsidies were considered in the 1990s to make the most sense by some housing experts. Id. However, many opponents of voucher housing insist that Section 8 housing not only destroys existing neighborhoods and communities, but perpetuates the hardships of poverty. See Howard Husock, Let's End Housing Vouchers, City Journal, Autumn 2000, at 84-91, available at http://www.city-journal.org/html/10_4_lets_end_housing.html.

55 See Orlebeke, supra note 45, at 491. The passing of the Housing Act of 1990 created the HOME program which distributed grants to states and cities for housing needs and purposes. Id. Under the program, local governments would receive federal money to create affordable housing for both low-income earners and renters, and the executive

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decisions on how and where the money would be used was left to the local governments. Id.

56 Id. at 491-92. Like HOME, tax programs like the LIHTC program, enacted in 1986, "move toward greater program control by states and cities, which determine the allocation of the credits to specific projects." Id. at 492. Furthermore, on a political level, "the LIHTC is also helped by being a tax expenditure rather than a spending item; as such, its cost tends to be hidden below the horizon of general public awareness." Id.

57 See infra notes 82-85 and accompanying text.

58 Edward A. Tombari, The Builder's Perspective on Inclusionary Zoning 3 (2005), available at http://www.zoningmatters.org/files/pdfs/BuilderPerspectiveonIZ.pdf.

59 Gerrit-Jan Knaap et al., Housing Market Impacts of Inclusionary Zoning 3 (2008), available at http://www.smartgrowth.umd.edu/research/pdf/KnaapBentoLowe-InclusionaryHousing.pdf.

60 Id. For their compliance, developers would be allowed a density bonus of twenty percent higher than that which was allowed by the zoning bureau. Id.

61 Barbara Ehrlich Kautz, Comment, In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing, 36 U.S.F. L. Rev. 971, 972-73 (2002).

62 336 A.2d 713 (N.J. 1975) (mandating that municipalities use inclusionary zoning techniques in new developments to satisfy that region's need for low-income housing).

63 See Kautz, supra note 61, at 978.

64 Id. During this time, municipalities in California instituted impact fees and growth controls, effectively slowing down the new development of housing during the 1980s. Id.

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65 Id. "[O]nly twelve percent of families in San Francisco, Los Angeles, and Orange Counties could afford the average price home." Id.

66 See id.; Cal. Gov't Code §§ 65580, 65583(c) (West Supp. 2009).

67 See Kautz, supra note 61, at 977. Montgomery, Maryland's "Moderately Priced Dwelling Unit Program" applies to all proposed residential developments of 20 units or more, and requires the set-aside of between 12.5% and 15% of the units as affordable, with up to a 22% density bonus. Dep't of Hous. & Cmty. Affairs, In Brief: The MPDU Process for Developers and Builders, http:// www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_P/mpdu/MPDU_Process_Developers.asp (last visited Nov. 14, 2009). Massachusetts's Comprehensive Permit Law (40B), proposed to bridge the poor and the wealthy, is an inclusionary zoning plan that allows the developer to propose an affordable housing plan to the local housing commission, and would be considered a "voluntary inclusionary zoning" program. See Jonathan Witten, Adult Supervision Required: The Commonwealth of Massachusetts's Reckless Adventures with Affordable Housing and the Anti-Snob Zoning Act, 35 B.C. Envtl. Aff. L. Rev. 217 (2008).

68 Mary Anderson, Opening the Door to Inclusionary Housing 3 (2003), available at http://www.bpichicago.org/documents/OpeningtheDoor.pdf. To illustrate inclusionary zoning more clearly, imagine functional developer Home Builders Company (HBC) has purchased fifty acres of land in Town-A and wishes to build one hundred single family homes on this site. Town-A has an inclusionary zoning program that requires every master-planned community that has more than one hundred single family homes to dedicate fifteen percent of the units to affordable housing prices. The program requires that the affordable units be sold at a price that can be purchased by families that have a total income of $50,000 a year. Thus, HBC must sell fifteen units at a price that is affordable to families with that established income. This illustration highlights which party holds the responsibility under inclusionary zoning programs.

69 See Anderson, supra note 68, at 3.

70 See supra notes 6-11 and accompanying text.

71 See Anderson, supra note 68, at 4. "Inclusionary Housing Programs enable low- and moderate-income families to live in homes indistinguishable from--and adjacent to--market-rate housing, and to live in communities with better access to employment and educational opportunities." Id.

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[72] Id. at 5.

[73] Habitat for Humanity-New York City, Information on Inclusionary Zoning, http://www.habitatnyc.org/pdf/Toolkit/InclusionaryZoning.pdf (last visited Nov. 14, 2009).

[74] .See Porter, supra note 6, at 214. The Commonwealth of Massachusetts's smart growth website states that inclusionary zoning is "a very effective tool for communities wishing to increase the affordable housing supply" and dedicates an entire page to inclusionary zoning on its smart growth website. Smart Growth/Smart Energy Toolkit, supra note 20.

[75] See Porter, supra note 6, at 215.

[76] See Smart Growth/Smart Energy Toolkit, supra note 20. The Commonwealth of Massachusetts's smart growth website states that the fact that inclusionary zoning does not require public funds is the primary attraction. Id.

[77] See Porter, supra note 6, at 218-20. Porter recognizes developers' argument that they are forced to take on the responsibility for inclusionary zoning programs. Id. at 219. Furthermore, Porter points out the arguments made by the same developers that building fees and municipal requirements hike up costs and inclusionary zoning tacks on more costs which artificially hike up the cost of their product. Id.

[78] 198 S.E.2d 600 (Va. 1973).

[79] 456 A.2d 390 (N.J. 1983).

[80] 583 A.2d 277 (N.J. 1990).

[81] 108 Cal. Rptr. 2d 60 (Ct. App. 2001).

82 Fairfax County, 198 S.E.2d 600. In 1973, Fairfax County issued an amendment to its zoning ordinance requiring developers "of fifty or more dwelling units ... to build at least 15% of these dwelling units as low and moderate income housing within the definitions promulgated by the Fairfax County Housing and Redevelopment Authority (FCHRA) and the United States Department of Housing and Urban Development (HUD)." Id. at 601. The court determined that providing affordable housing is a legitimate state purpose; however, the court did not approve of the act citing two reasons. Id. at 602. First:

> [I]n establishing maximum rental and sale prices for 15% of the units in the development, [the act] exceeds the authority granted by the enabling act to the local governing body, [by the state], because it is socio-economic zoning and attempts to control the compensation for the use of land and the improvements thereon.

Id. Second:

> [T]he amendment requires the developer or owner to rent or sell 15% of the dwelling units in the development to persons of low or moderate income at rental or sale prices not fixed by a free market ... [s]uch a scheme violates the guarantee set forth in Section 11 of Article 1 of the Constitution of Virginia, 1971, that no property will be taken or damaged for public purposes without just compensation.

Id.

83 Fairfax County, 198 S.E.2d at 602.

84 This decree was later voided under Home Builders Association. See 108 Cal. Rptr. 2d at 63-64.

85 Fairfax County, 198 S.E.2d at 602.

86 S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel I), 336 A.2d 713 (N.J. 1975). The first Mount Laurel case arose when the Southern Burlington County NAACP "attack[ed] the system of land use regulation by defendant Township of Mount Laurel on the ground that low and moderate income families are thereby unlawfully excluded from the municipality."Id. at 716. The township enacted an ordinance that, along with other regulations, restricted "minimum lot area, lot frontage and building size requirements" and limited building to only single family homes, effectively eliminating affordable housing for low- to moderate-income families. Id. at 728-29. The New Jersey Supreme Court ultimately held that exclusionary zoning ordinances are unconstitutional if they make it physically and economically impossible to provide low- and moderate-income housing in the community. Id. at 731-34. The majority held that:

> [T]he police power is the power of the state to act for the general welfare of the people of the state; the police power may be delegated to local governments, but only if municipalities also stay within the general welfare requirement; a land use ordinance that serves the parochial welfare of a single community to the detriment of the general welfare is therefore unconstitutional as beyond the power of government.

John M Payne, Reconstructing the Constitutional Theory of Mount Laurel II, 3 Wash. U. J.L. & Pol'y 555, 558 (2000).

87 Exclusionary zoning is the implementation of zoning practices that segregate one sector of society from the others. Zoning practices that result in this separation have been scorned and ridiculed as both racist and prejudiced. See Edward H. Ziegler, Urban Sprawl, Growth Management and Sustainable Development in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape, 11 Va. J. Soc. Pol'y & L. 26, 53 n.116 (2003) ("Snob zoning and exclusionary development codes, designed to appease affluent and 'outdoorsy' individuals, are strongly associated with high rates of home ownership, high home values, high income levels, and white population size."). Quoted in Ziegler's article, Anthony Downs, a senior fellow in the Economics Studies program at the Brookings Institution, highlights the sentiments associated with exclusionary practices:

[N]onpoor people have what are to them cogent social, economic, and personal security reasons to remain physically and socially separated from poorer people. These motives are reinforced by the social and ethnic differentiation of suburbs from central cities, wide-spread racial discrimination and intolerance, and constant media reporting of adverse conditions in central cities. In contrast, many of the poor believe that they would benefit from being more geographically integrated with better-off groups. That would give them better access to jobs and schools and an escape from concentrated-poverty environments. But the nonpoor control the institutional processes that determine how income groups are geographically distributed.

Id. at 53-54 n.116 (quoting Anthony Downs, New Visions for Metropolitan America 204 (1994)).

88 Mount Laurel I, 336 A.2d at 731-34.

89 S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel II), 456 A.2d 390 (N.J. 1983). The accompanying cases were Urban League of Essex County v. Mahwah, 504 A.2d 66 (N.J. Super. Ct. Law Div. 1984); Round Valley, Inc. v. Township of Clinton, 413 A.2d 356 (N.J. Super. Ct. App. Div. 1980); Glenview Development Co. v. Franklin Township, 397 A.2d 384 (N.J. Super. Ct. Law Div. 1978); Caputo v. Township of Chester, Docket No. L-42857-74 (N.J. Super. Ct. Law Div. Oct 4, 1978) (unreported); and Urban League of Greater New Brunswick v. Borough of Carteret, 359 A.2d 526 (N.J. Super. Ct. Ch. Div. 1976).

90 See Payne, supra note 86; see also Holmdel Builders Ass'n v. Twp. of Holmdel, 583 A.2d 277, 279 (N.J. 1990) ("In the years following [the decision], many municipalities failed to comply with the clear mandate of Mt. Laurel I. The failure to provide the necessary opportunity for affordable housing led to a new legal challenge. [The court] clarified and reaffirmed the constitutional mandate set forth in Mt. Laurel I, imposing an affirmative obligation on every municipality to provide its fair share of affordable housing.").

91 Mount Laurel II, 456 A.2d 390.

92 Mount Laurel II, 456 A.2d at 443; see also Holmdel Builders Ass'n, 583 A.2d at 279-80 ("We enumerated several possible approaches by which municipalities could comply with the constitutional obligation, including lower-income density bonuses and mandatory set-asides. We stressed that 'municipalities and trial courts are encouraged to create other devices and methods for meeting fair share obligations."' (quoting Mount Laurel II, 456 A.2d at 443)).

93 Mount Laurel II, 456 A.2d at 443. In the opinion, the majority firmly restated the doctrine of the Mount Laurel I decision:

The constitutional power to zone, delegated to the municipalities subject to legislation, is but one portion of the police power and, as such, must be exercised for the general welfare. When the exercise of that power by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare--in this case the housing needs--of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality. Municipal land use regulations that conflict with the general welfare thus defined abuse the police power and are unconstitutional. In particular, those regulations that do not provide the requisite opportunity for a fair share of the region's need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection.

Id. at 415 (citing Mount Laurel I, 336 A.2d at 713).

94 See Holmdel Builders Ass'n, 583 A.2d 277.

95 Id. at 280. "The Townships of Chester, South Brunswick, Holmdel, Middletown, and Cherry Hill all adopted ordinances to provide for low- and moderate-income housing. The ordinances, in varying forms, impose fees on developers as a condition for development approval." Id. The townships enacted the following:

[T]he Townships of Chester and South Brunswick have enacted ordinances that impose a mandatory development fee on all new non-inclusionary developments as a condition for development approval. Their ordinances do not give developers a density bonus in exchange for the development fee. Middletown Township's ordinance imposes a mandatory development fee on all new commercial development as a condition for development approval. Non-inclusionary residential developers may choose between constructing the affordable housing or paying an in-lieu fee. Density bonuses do not accompany any of the options. Holmdel Township enacted an ordinance that gives developers a density bonus if they contribute to an affordable-housing trust fund. Cherry Hill Township's ordinance imposes a mandatory development fee on all new commercial developments and non-inclusionary residential developments of a sufficient size.

Id. at 282-83. In response to the ordinances, several builders' associations challenged the ordinances as:

exceeding the authority of the zoning and police powers and the Fair Housing Act; an invalid tax in violation of the uniform property taxation requirement of the New Jersey Constitution; a taking without just compensation in violation of both the United States and New Jersey Constitutions; and a denial of due process and equal protection in violation of both the United States and New Jersey Constitutions.

Id. at 280.

[96] Id. at 288 (citing Mount Laurel II, 456 A.2d at 390).

[97] Id. ("Such measures do not offend the zoning laws or the police powers.").

[98] For the significance of the exaction see infra notes 189-216. An in-depth discussion and analysis of Home Builders Association and its facts is found later in this note. See infra notes 218-235.

[99] Home Builders Ass'n, 108 Cal. Rptr. 2d at 62.

[100] Id. at 62-63.

[101] Id.

[102] Id. at 67.

[103] See Fairfax County, 198 S.E.2d at 602; see also notes 82-85 and accompanying text.

[104] See Mount Laurel II, 456 A.2d at 390; see also Holmdel Builders Ass'n, 583 A.2d at 288.

[105] See Home Builders Ass'n, 108 Cal. Rptr. 2d at 60.

[106] See Porter, supra note 6, at 221-25.

[107] Id.

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108 See id. at 221, 226. Boulder, Colorado and Carlsbad, California are two communities that impose inclusionary programs with no incentives. Id. Irvine, California and Somerville, Massachusetts are two communities that have the voluntary incentive programs. Id.

109 See id. at 222-25.

110 See Pratt Center for Community Development, http:// www.prattcenter.net/about (last visited Nov. 14, 2009). "The [Pratt] Center was founded at the birth of the community development movement, as the first university-based advocacy planning and design center in the U.S." Id.

111 PolicyLink & Pratt Institute Center for Community and Environmental Development, Increasing Housing Opportunity in New York City: The Case for Inclusionary 27 (2004), available at http:// prattcenter.net/sites/default/files/publications/Inclusionary%20Zoning%C20Full% 20Report.pdf.

112 The Campaign for Mandatory Inclusionary Zoning is a "broad coalition of traditional affordable housing allies along with progressive labor, religious and community-based groups." Cheryl Cort, Policy Director, Coalition for Smarter Growth, Washington D.C.'s Campaign for Mandatory Inclusionary Zoning, Presentation at the 2007 National Inclusionary Housing Conference (Oct. 30, 2007), available at http:// www.smartergrowth.net/anx/index.cfm/3,179,576/2007-10-30cc.pdf.

113 DC Campaign for Inclusionary Zoning, Our Proposal, http:// www.policylink.org/DCIZ/proposal.html (last visited Jan. 20, 2009).

114 See Zoning Comm'n for the District of Columbia, Notice of Final Rulemaking, Z.C. Order No. 04-33, May 18, 2006, available at http:// dcoz.dc.gov/alternate/trans/trans_view.asp?view=%2Forders%C2F04%C2D33%2Epdf.

115 Housing advocates have used mandatory programs as their spearhead in their fight against apparent affordable housing ills. This is demonstrated by former New Mexican Governor David Resnik's speech at the National Inclusionary Zoning Conference. His list of nine recommendations started off with:

Lesson #1: Enact a mandatory, not voluntary, [inclusionary zoning] law. Voluntary programs don't produce much inclusionary housing. They simply give spineless public officials political cover that "they've done something" while it's "business as usual" for builders--but for only another five or ten years.

....

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Lesson #3: However, advocate firmly (if more quietly) that [inclusionary zoning] must serve the full range of workforce housing needs. [Inclusionary zoning] must not only help young police officers, firefighters, and teachers (for whom it is easy to rally public support) but your community's hospital orderlies and nursing home aides, convenience store clerks, and school janitors.

David Resnik, Former Governor of New Mexico, Keynote Address at the National Inclusionary Housing Conference (Oct. 5, 2005), available at http:// www.gamaliel.org/DavidRusk/keynote%2010-5-05.pdf.

116 Brian R. Lerman, Note, Mandatory Inclusionary Zoning--The Answer to the Affordable Housing Problem, 33 B.C. Envtl. Aff. L. Rev. 383, 390 (2006). David Resnik's speech highlights progressive housing policy's underlying principles:

Jim Crow by income is steadily replacing Jim Crow by race. As racial segregation slowly diminishes, economic segregation increases--with heavy racial and ethnic implications. [Inclusionary zoning] is the most direct tool to attack economic segregation. Mixed-income neighborhoods are the best housing policy. Mixed-income neighborhoods are the best school policy. Mixed-income neighborhoods are the best anti-crime policy. Mixed-income communities are the best anti-fiscal disparities policy.

Resnik, supra note 115.

117 Lerman, supra note 116, at 390. Politicians and advocates contend that "[i]nclusionary housing promotes economic and racial integration which can lead to a host of positive social and economic outcomes such as improved schools, decreased crime, and reduced poverty, all of which have not only significant social benefits, but also significant fiscal benefits to city government." Nicholas Brunick, The Impact of Inclusionary Zoning on Development 3 (2004), available at http://www.bpichicago.org/documents/impact_iz_ development.pdf.

118 Lerman, supra note 116, at 392.

119 Id. at 390; see also Bernard Tetreault, Arguments Against Inclusionary Zoning You Can Anticipate Hearing, New Century Housing, Oct. 2000, at 19, available at http://www.nhc.org/pdf/pub_nc_10_00.pdf ("The problem is that most of them, because of their voluntary nature, produce very few units.").

120 See generally Ngai Pindell, Developing Las Vegas: Creating Inclusionary Affordable Housing Requirements in Development Agreements, 42 Wake Forest L. Rev. 419 (2007).

121 Housing experts assert that not only do inclusionary zoning programs benefit from strong housing markets, they require a vigorous market to operate. Steven Wright, Pros vs. Cons: Smart Growth Experts Debate Inclusionary Zoning Strategies in an Effort to Win Affordable diverse Neighborhoods, On Common Ground, Winter 2007, at 33,

available at http://www.realtor.org/smart_ growth.nsf/docfiles/winter07proscons.pdf/$FILE/winter07proscons.pdf. "Lewis cautioned that inclusionary zoning requires a strong housing market to make it work, noting 'if the market isn't strong, developers will look at inclusionary as the thing that's killing the project."' Id.

122 See DC Office of Planning, Inclusionary Zoning: A Primer 10-11 (2002), available at http://www.planning.dc.gov/planning/lib/planning/news_ room/2002/october/zoning_primer.pdf. "Both mandatory and voluntary Inclusionary Zoning requirements rely on strong housing markets to deliver units." Id. at 10.

123 See Kutner, supra note 8.

124 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005).

125 See infra notes 151-216 and accompanying text.

126 See infra notes 200-13 and accompanying text.

127 See infra notes 239-345 and accompanying text.

128 See infra notes 346-76 and accompanying text.

129 See Anderson, supra note 68, at 4 ("Inclusionary Housing Programs promote the production of affordable housing by requiring residential developers to set aside a certain percentage of the housing units in a proposed development to be priced affordable to low- and moderate-income households.").

130 Proponents of the "impact fee" classification argue the following:

[M]arket-rate development cuts into the amount of land available for potential future use as the site for affordable housing. Inclusionary zoning thus represents a local government mechanism comparable to development fees (e.g., school impact fee or water and sewer fee), to mitigate the effects of a new development proportionate to its impact on

the public infrastructure.

J. Hunter Schofield & Anita R. Brown-Graham, Locally Initiated Inclusionary Zoning Programs: A Guide for Local Governments in North Carolina and Beyond 4 (2004) available at http:// www.sog.unc.edu/pubs/electronicversions/pdfs/inczonch1.pdf; see also Lerman, supra note 116, at 383, 414; Daniel J. Curtin, Jr. & Cecily T. Talbert, Curtin's California Land Use and Planning Law 320 (24th ed. 2004).

131 See Lerman, supra note 116, at 414. Broad deference allows for a very low standard of scrutiny, requiring only a demonstration that the ordinance was put in place to create needed affordable housing. Id. The court need only to find that the enacting board/committee "acted within the scope of its authority." Id.

132 Lawrence W. Libby & Carmen Carrion, Ohio University Extension Fact Sheet: Development Impact Fees 1, available at http://ohioline.osu.edu/cd-fact/pdf/1558.pdf (last visited Nov. 14, 2009).

133 Id.

134 The Wisconsin Realtor's Association defines impact fees:

"[I]mpact fees" are financial contributions (i.e., money, land, etc.) imposed by communities on developers or builders to pay for capital improvements within the community which are necessary to service/accommodate the new development.

Impact fees, however, must be reasonable. To ensure fairness, impact fees can only be assessed (1) for capital improvements that are a direct consequence of the new development and (2) in an amount not exceed[ing] the proportionate share required to serve the new development. In other words, a developer cannot be required to pay a disproportionate share of improvements that also benefit other persons (i.e., a bridge on the other side of town).

Wisconsin Realtors Association, Impact Fees, http:// www.wra.org/government/land_use/impact_fees/default.htm (last visited Nov. 14, 2009). This fee is best understood with an example. If a builder is adding one hundred more houses to a city, the city must build additional sewer facilities and possibly widen intercepting piping to hold the waste product of one hundred more houses. The city must respond to the additional impact on the infrastructure already in place, and thus charges an impact fee.

135 Id.

136 See infra note 151.

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[137] Although it is evident that inclusionary zoning is not an impact fee, it does, however, have the effect that an impact fee does by taxing the developers.

To the extent that subsidies do not cover the costs of below-market units, inclusionary zoning, much like development impact fees, will act like a tax on market-rate development. Although the builders may appear to bear the burden of paying for the below-market units, they might end up passing part or all of this effective tax onto buyers or sellers of undeveloped land. Who actually bears the burden of any tax is determined by actual market conditions, specifically the relative elasticities of supply and demand. Examining the economics of an inclusionary tax will help to determine how the burden is likely to be split between the builders, market-rate home buyers, and owners of undeveloped land.

Benjamin Powell & Edward Stringham, "The Economics of Inclusionary Zoning Reclaimed": How Effective Are Price Controls?, 33 Fla. St. U. L. Rev. 471, 478 (2005) (footnotes omitted).

[138] Nadia I. El Mallakh, Does the Costa-Hawkings Act Prohibit Local Inclusionary Zoning Programs?, 89 Cal. L. Rev. 1847, 1873 (2001). The implementation of rent control is enacted by the city council, board of supervisors, or other municipal legislative bodies. Id. The legislative body sets the rental prices as of the day of enactment and in the future adjusts the rents "in a variety of ways, such as by a local rent control board or the consumer price index." Id.; Kari Anne Gallagher, Comment, Yee v. City of Escondido: Will Mobile Homes Provide an Open Road for the Nollan Analysis?, 67 Notre Dame L. Rev. 821, 821 n.1 (1992) (citing Richard E. Blumberg et al., The Emergence of Second Generation Rent Controls, 8 Clearinghouse Rev. 240 (1974)).

[139] The affordable housing plan in St. Johns, Florida requires that there be a "sales price cap of $92,490 for an existing house or $106,017 for new construction (including house and land)." Strategic Planning Group, Inc., St. Johns County Affordable Housing Report 145 (2002), available at http://www.co.st-johns.fl.us/BCC/growth_management/media/Housing/FinalReportMay23.pdf; see also UW Economics Intern, Inclusionary Zoning: More Problems, Less Solutions, and Making Markets More Inefficient All at One Time, Pax Americana Institute, Mar. 26, 2007, http://www.paxamerica.org/index.php?option=com_content&view=article&id=81 ("Inclusionary Zoning places a price ceiling on rents and sale prices of 'affordable housing' required to be constructed on new developments.").

[140] See Apartment Ass'n of S. Cent. Wis.. v. City of Madison, 2006 WI App 192, 296 Wis. 2d 173, 722 N.W.2d 614.

[141] Id.

[142] See Mallakh, supra note 138, at 1873. Unlike inclusionary zoning ordinances, "rent control does not aid in the construction of new affordable rental units." Id.

[143] Id. Unlike inclusionary zoning ordinances, "rent control rates are set by a local legislative body such as a local rent

control board or by an annually prescribed percentage in the local rent control act." Id.

[144] Laura M. Padilla, Reflections on Inclusionary Housing and a Renewed Look at its Viability, 23 Hofstra L. Rev. 539, 554 (1995) ("Qualification requirements for initial occupants of inclusionary units vary from program to program, but are always tied to income (which is generally modified based on family size according to HUD guidelines), and are usually adjusted for inflation on an annual basis").

[145] See Mallakh, supra note 138, at 1874. Inclusionary zoning can apply to rental units, condominiums, and single-family developments, whereas "rent control only applies to rental units...[and, in turn,] inclusionary zoning programs potentially create more diverse forms of affordable housing opportunities." Id.

[146] Id.

[147] See Powell & Stringham, supra note 10, at 17. "Inclusionary zoning effectively acts as a tax on the production of market-rate units because developers must sell a percentage of units at a loss to gain permits to sell market-rate units." Id.

[148] Benjamin Powell & Edward Stringham, Op-Ed., Inclusionary Zoning Makes Housing Less Affordable, S.F. Bus. Times, Nov. 19, 2004, http:// sanfrancisco.bizjournals.com/sanfrancisco/stories/2004/11/22/editorial3.html. Powell and Stringham conducted a study and found that "in the median city in the San Francisco Bay Area, builders must forgo $345,000 in revenue for each below-market unit [and in] one quarter of jurisdictions builders must forego more than $500,000 in revenue for each below market-rate unit." Id.

[149] Id.

[150] In-lieu fees are a part of some inclusionary zoning programs; however, the main purpose of an inclusionary zoning program is to create affordable housing units within the same developments as market-rate units, not simply contribute to a city housing trust fund. See infra notes 352-367 and accompanying text.

[151] See Lerman, supra note 116, at 396 n.108 (citing William B. Stoebuck & Dale A. Whitman, The Law of Property § 9.32 (3d ed. 2000)).

Cities and towns use developer exactions as a strategy to offset the burdens of new development on the community.

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Exactions contribute to regional equity by ensuring that a new development pays a fair share of the public costs that they generate. Exactions consist of a developer's payment of "impact fees." These fees are used to fund new schools and parks; construction or maintenance of public infrastructure directly connected to the new development; and off-site improvements and services. Exactions are levied on developers in exchange for the approvals to proceed with a project.

PolicyLink, Development Exactions, http://policylink.info/EDTK/Exactions (last visited Nov. 18, 2009).

152 Porter, supra note 6, at 212 n.1.

153 Karen Destorel Brown, Brookings Inst. Ctr. On Urban & Metro. Policy, Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area 2 (2001), available at http://www.brookings.edu/reports/2001/10metropolitanpolicy_brown.aspx.

154 See Stewart Ain, Making Housing Affordable, N.Y. Times, Jan. 26, 2003, at 8 ("There is a vital state interest to having local governments respond to the need for local affordable housing...." (quoting Assemblyman Thomas P. DiNapoli)); see also Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 64 (Ct. App. 2001) ("First, we have no doubt that creating affordable housing for low and moderate income families is a legitimate state interest."); Lerman, supra note 116, at 395 ("As mentioned above, the basic adoption of inclusionary zoning statutes causes the creation of affordable housing to be viewed as a legitimate state interest. Once the local ordinance is proven to be a legitimate state interest, the question becomes whether the developer can be forced to provide the required affordable units." (footnotes omitted)); Daniel J. Curtin, Jr. & Elizabeth M. Naughton, Inclusionary Housing Ordinance Is Not Facially Invalid and Does Not Result in a Taking, 34 Urb. Law. 913, 915 (2002).

155 See Lerman, supra note 116, at 396 n.108 (citing William B. Stoebuck & Dale A. Whitman, The Law of Property § 9.32 (3d ed. 2000)).

156 Id.

157 Id.

158 Jane C. Needleman, Note, Exactions: Exploring Exactly When Nollan and Dolan Should be Triggered, 28 Cardozo L. Rev. 1563, 1564 (2006) ("The potential for government leveraging and abuse is great in the development permit context, rendering the heightened scrutiny demanded by Nollan and Dolan necessary." (footnote omitted)).

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159 483 U.S. 825 (1987).

160 512 U.S. 374 (1994).

161 See Lerman, supra note 116, at 396 n.108 (citing William B. Stoebuck & Dale A. Whitman, The Law of Property § 9.32 (3d ed. 2000)).

162 See Nollan, 483 U.S. at 837 (holding that "the lack of nexus between the condition and the original purpose of the building restriction" is a fatal deficiency for the ordinance); Dolan, 512 U.S. at 391 (holding that a "term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment").

163 Nollan, 483 U.S. at 825.

164 Dolan, 512 U.S. at 374.

165 Nollan, 483 U.S. at 827.

166 Id. at 828-29.

167 Id. at 828.

168 Id. at 841-42.

169 Nollan, 483 U.S. at 837. The government's power to forbid particular land uses in order to advance some legitimate police power purpose includes the power to condition such use upon some concessions by the owner, even a concession of property rights, so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use. Id. at 831-37.

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170 Id. at 831-37.

171 Id.; see also id. at 841-42 (The Court, in its holding, emphasized that the government is "free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for [a] 'public purpose'; but if it wants an easement across the Nollan's property, it must pay for it." (citation omitted)).

172 Id.; see Needleman, supra note 158, at 1567 (noting that Justice Scalia concluded that "[a]llowing the public already present on the beach to walk across the Nollans' private property would not reduce any viewing obstacles from the street that would be created by the new house. The absence of a nexus between the condition imposed by the Costal [sic] Commission and its stated purpose made it likely that the municipality's purpose was to obtain an easement without having to pay for it.") (footnote omitted).

173 Id.

174 See Nollan, 483 U.S. at 837. The Nollan Court reaffirmed that permanent physical occupation constitutes a compensable taking. Id. at 831-32 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432, 434 (1982)).

175 Id. at 841. Some state courts have held that this standard does not extend to ordinances of general application (e.g., zoning ordinances) but only to adjudicatory actions of regulatory bodies (e.g., determinations of whether to grant a permit for development). See Needleman, supra note 158, at 1563-67.

176 Dolan, 512 U.S. at 379.

177 Id. at 374.

178 Id.

179 Id. at 385 ("In Nollan, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right--here the right to receive just compensation when property is taken for a public use--in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.").

[180] Id. at 388.

[181] Id. at 391.

[182] Id.

[183] Id. at 393-95. The Court stated that the city had not shown the "required reasonable relationship" between the flood plain easement and the property owner's proposed new building. Id. at 394-95.

[184] Id. at 409.

[185] Id.

[186] See supra note 151 and accompanying text.

[187] The decision of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), established the constitutionality of municipal discretion to grant or deny development permits, thus, "[i]f existing zoning regulations do not allow developers to build as of right, developers must seek municipal approval in order to proceed with construction." Michael T. Kersten, Exactions, Severability and Takings: When Courts Should Sever Unconstitutional Conditions from Development Permits, 27 B.C. Envtl. Aff. L. Rev. 279, 280 (2000).

[188] Id.

[189] As previously stated, the first step is to determine if the ordinance or condition being imposed on the developer has a "nexus with the state's legitimate purpose for prohibiting the development." See DaRosa, supra note 5, at 474 (footnote omitted). Furthermore, the second step requires that there be a rough proportionality between the exaction and the impact or burden to be created by the proposed development. Id. at 476-77.

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190 Id.

191 Id. at 475-76.

192 As previously explained:

> The point of affordable housing requirements is to increase the supply of housing that moderate and lower income families can afford.Denying a residential development permit out of hand may achieve other purposes: protection of the environment, preservation of a "view shed," preservation of a neighborhood's character or available infrastructure, for example. But prohibiting a residential development certainly does nothing to increase the supply of affordable housing. Thus framed, under the nexus test, there seems to be a constitutional disjuncture between the conceivable legitimate purposes for denying a developer building permits for a residential development and the purpose for affordable housing conditions a permit on the developer's entitlements.

Id. at 475 (footnote omitted).

193 Id. Market-rate production makes affordable housing production possible, and a depression of the former ultimately depresses the latter. This relationship relies primarily on affordable housing's dependence on subsidies from the taxes collected from market-value homes. See Kutner, supra note 8. In inclusionary zoning, the relationship is even more dependant as the definition of inclusionary zoning illustrates. See supra note 68 and accompanying text. Many affordable housing advocates illustrate the benefit of this reliance and propose steps to exploit the relationship.

> Community groups can take advantage of development pressures either to create housing directly or to gain financial resources for subsidizing affordability in other developments. Most typically, this involves requiring or providing incentives for market-rate development to include a percentage of below-market rate units in new developments. Alternatively, local land use policies can require fees from new development or even land donations to enable others to develop subsidized affordable housing.

PolicyLink, Affordable Housing Development 101, http:// www.policylink.info/EDTK/AH101/GoalsToTools.html (last visited Nov. 19, 2009).

194 See DaRosa, supra note 5, at 475.

195 Id.

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196 Id.

197 Id. A possible way to satisfy the Nexus test in Nollan is incorporate explicit language into the zoning ordinance that would prohibit the construction of any non-mixed-income developments. Id. at 476. Thus, "[a]ny residential development that did not include affordable housing units would be prohibited." Therefore, by actively "placing affordable housing conditions on entitlements [the ordinance] would have the required nexus with denying development altogether--no economically unmixed residential projects would be allowed." Id.

198 Id. at 475.

199 See Dolan v. City of Tigard, 512 U.S. 374, 388 (holding that a municipality must "determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development").

200 Id. at 389 (The Court indicated that the relationship would have to be shown by the municipality, not the plaintiff, and that "generalized statements as to the necessary connection between the required dedication and the proposed development" are insufficient. (citation omitted)); see also DaRosa, supra note 5, at 480. Therefore, a successful comparison hinges on the ability of the municipality to reliably quantify both the burden placed on the developer and the impact the new development will have on the community. Id.

201 See DaRosa, supra note 5, at 482. "Dolan, however, appears to require the government to make individualized determinations demonstrating that its requirements, as applied to an individual developer, are proportional in nature and extent to the harm created by a new residential development." Id.

202 See supra notes 190-198 and accompanying text.

203 See DaRosa, supra note 5, at 482 ("[G]eneralizations will not steer clear of a takings problem as the Dolan court indicated."); see also Dolan, 512 U.S. at 391.

204 See DaRosa, supra note 5, at 475.

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205 Id. at 478 (footnote omitted).

206 Id.

207 Id.

208 See infra notes 413-418 and accompanying text.

209 The question of when government action constitutes an overwhelming burden is illustrated by the following:

It looks like a taking when a government makes an entrepreneur subsidize affordable units when there is little or no hope of his making a profit on those units .... For example, in setting an affordable price, if the developer lost all hope of profit from the affordable units, a twenty percent exaction would result in roughly a twenty percent reduction of the gain the developer expected from "use" of his property, e.g. through developing it. The question is, is this too great of a burden? ... Viewed as a partial deprivation of profit, this is probably not going too far. But viewed through the lens of a land dedication, because ten percent was too much in Dolan, surely twenty or thirty percent would be too much ....

DaRosa, supra note 5, at 479.

210 Id. at 480.

211 Id. at 478. This analysis undermines the argument that characterizing a mandatory inclusionary zoning ordinance as an impact fee escapes constitutional criticism. See generally Lerman, supra note 116 (claiming that these ordinances are impact fees and, thus, are not held to Nollan/Dolan scrutiny).

212 See DaRosa, supra note 5, at 481 ("It is conceivable that residential developments do increase the need for affordable housing units, because unaffordable residential developments use up precious land resources for the benefit of the very few ....").

213 Id. Dolan dismisses speculation and unsupported projections as insufficient evidence of rough proportionality between the impact of the development and the amount exacted from the developer. Id. While the burden on the developer is rather simple to determine, given that the Court determines an appropriate return on investment, the

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impact is very difficult to determine. Id. It is very hard to predict how much affordable housing would be built on the proposed site but for the new development, and such predictions boil down to unacceptable speculation and unsupported projections. The Court has rejected this type of generalization as inadequate justification for exactions of private property without compensation. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that the standard does not require a "precise mathematical calculation," but "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the propose development").

214 See supra notes 190-98 and accompanying text.

215 See supra notes 200-13 and accompanying text.

216 See infra notes 258-345 and accompanying text.

217 See Lerman, supra note 116, at 406-07 ("The success of Napa's ordinance may have opened the door for this type of mandatory program to be used more frequently because of its proven constitutionality.").

218 Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 60 (Ct. App. 2001).

219 Id.

220 Id. at 62.

221 Id.

222 Id. at 63. "All fees generated through this option are deposited into a housing trust fund, and may only be used to increase and improve the supply of affordable housing in City." Id. at 62.

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[223] Id. at 63.

[224] Id. at 64.

[225] Id. at 65.

[226] Id. at 64.

[227] Id. at 196.

[228] Id. at 192.

[229] Id.

[230] Bargaining is a form of distributive negotiation. The Negotiation Experts, Bargaining, http://www.negotiations.com/definition/bargaining (last visited Nov. 19, 2009) ("Bargaining is a simple form of negotiation process that is both competitive and positional. Bargaining predominates in one-time negotiations and often revolves around a single issue--usually price. One party usually attempts to gain advantage over another to obtain the best possible agreement."). This definition comprehensively describes the tone of negotiations between builders and municipalities. Id. Both wants something from the other, and the city or county wants the most from the builders with the least amount of compromise and vice-versa. Id.

[231] In Douglas Porter's essay Promise and Practice of Inclusionary Zoning, the author lists sixteen random communities that have enacted inclusionary zoning programs, eleven of which allow for alternatives. Porter, supra note 6, at 222-25.

[232] Constitutional Law--Fifth Amendment Takings Clause--California Court of Appeal Finds Nollan's and Dolan's Heightened Scrutiny Inapplicable to Inclusionary Zoning Ordinance, 115 Harv. L. Rev. 2058, 2061 (2002).

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233 Home Builders Ass'n, 108 Cal. Rptr. 2d at 65-66.

234 See infra note 346 and accompanying text.

235 Home Builders Ass'n, 108 Cal. Rptr. 2d at 65.

236 See Porter, supra note 6, at 222-25. Boston, Massachusetts allows a tax abatement and "off-site [construction] if 15% affordable," whereas Chula Vista, California allows a density bonus but no alternatives. Id.

237 See infra notes 346-76 and accompanying text.

238 See infra notes 239-345 and accompanying text.

239 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), is considered the genesis of modern zoning practices. In that case, Euclid, a suburb of Cleveland, tried to inhibit Cleveland's industrial growth from swallowing the small village by zoning out certain types of infrastructure and using them in specific portions of the village. Id. at 379-85. The Court held that the zoning ordinance was not an unreasonable extension of the village's police power or arbitrary on its face, and thus it was not unconstitutional. Id. at 396-97.

240 Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005). In that case, Hawaii enacted a statute that capped the amount of rent oil companies could charge to its lessee/dealers, and the respondent "brought this suit seeking a declaration that the rent cap effected an unconstitutional taking of its property and an injunction against application of the cap to its stations." Id. at 528. The Court enumerated four scenarios that will constitute a taking: (1) a permanent physical occupation of the property (Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)); (2) "regulations that completely deprive an owner of all economically beneficial use of her property" (Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)); (3) a regulatory taking that causes severe economic impact without adequate justification per the standards set forth in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); and (4) an exaction or required dedication of property so onerous as to constitute a physical taking (Nollan and Dolan). Lingle, 544 U.S. at 538-48.

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241 U.S. Const. amend. V.

242 Id. The government has tremendous eminent domain abilities provided by its inherent police powers; thus, the "Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960).

243 See generally Berman v. Parker, 348 U.S. 26, 32 (1954). A non-exhaustive list of public purposes includes: "[p]ublic safety, public health, morality, peace and quiet, [and] law and order...." Id.

244 See id. at 35. In Berman, the Court equated public use with public purpose and reviewed the legislative judgment in terms of the undemanding rational basis test. Id.

245 See Kelo v. City of New London, 545 U.S. 469 (2005). The wave of anxiety began with the Court's decision in Kelo, holding that governments were entitled to take private homes when the city embarked upon economic development plans. Id. at 489. Private citizens sued the City of New London, Connecticut, because by decree, the municipality enacted its eminent domain powers and condemned an area of privately owned homes in order to propagate a comprehensive redevelopment plan. Id. at 473-74. The Court held that the community would benefit from the economic expansion and rejuvenation, and, therefore, the plans were a permissible public use under the Takings Clause of the Fifth Amendment. Id. at 486-89.

246 See Hawaiian Hous. Auth. v. Midkiff, 467 U.S. 229, 229 (1984). Landowners sought to have an act that "created a land condemnation scheme whereby title in real property is taken from lessors and transferred to lessees in order to reduce the concentration of land ownership" declared unconstitutional. Id. The court held "(1) The District Court was not required to abstain from exercising its jurisdiction, [and] (2) The Act does not violate 'public use' requirement of the Fifth Amendment for taking of private property." Id. at 230.

247 See Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896).

248 Lynda J. Oswald, Public Uses and Non-Uses: Sinister Schemes, Improper Motives, and Bad Faith in Eminent Domain Law, 35 B.C. Envtl. Aff. L. Rev. 45, 53 (2008).

249 Compare Yonkers Cmty. Dev. Agency v. Morris, 37 N.Y.2d 478 (1975) (holding that "blighted" areas include areas

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of improper land use and unwise planning) with San Franciscans Upholding the Downtown Plan v. City of San Francisco, 102 Cal. App. 4th 656, 698-99 (2002) (holding that for an area to be found blighted, "[i]t must be: (1) predominantly urbanized; (2) characterized by one or more statutorily defined conditions of physical blight; (3) characterized by one or more statutorily defined conditions of economic blight; and (4) affected by a cumulative effect of physical and economic blight so prevalent and so substantial that it causes a reduction of or a lack of proper utilization of the area to such an extent that it constitutes a serious physical and economic burden on the community which cannot be reasonably expected to be reversed or alleviated by private enterprise or government action, or both, without redevelopment" (citations omitted)). For extensive research on the definition of "blighted," see Jonathan M. Purver, Annotation, What Constitutes "Blighted Area" Within Urban Renewal and Redevelopment Statutes, 45 A.L.R. 3d 1096 (1972 & Supp. 2009).

250 Oswald, supra note 248, at 53; see also 2A Julius L. Sackman, Nichols on Eminent Domain § 7.01(1) (3d ed. 2009). The definition of public use can be stretched to mean anything in the pursuit of, or favorable to, the prosperity of the community, up to and including "[a]ny exercise of eminent domain which tends to enlarge resources, increase industrial energies, or promote the productive power of any considerable number of inhabitants" of a community. Sackman, supra, § 7.02(3).

251 See Oswald, supra note 248, at 53.

252 See Kelo v. City of New London, 545 U.S. 469, 479 (2005). The majority stated that "this 'Court long ago rejected any literal requirement that condemned property be put into use for the general public.'" Id. (citation omitted).

253 See id. at 478-81 (holding that the Court does not apply a narrow definition of public use).

254 See id. at 488 ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings--no less than the debates over the wisdom of other kinds of socioeconomic legislation--are not to be carried out in the federal courts." (citation omitted)).

255 See Oswald, supra note 248, at 55-56.

The significance of Kelo for non-use takings lies in its two-fold message that: (1) legislative determinations of public use and need are entitled to substantial judicial deference; and (2) the political process, as well as the judiciary and the Constitution, has an important role to play in reining in takings that are inappropriate or unwarranted.

Id. at 56; see also Kelo, 545 U.S. at 482-83, 489.

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256 See Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 66 (Ct. App. 2001).

257 See DaRosa, supra note 5, at 474. Although this assumption seems logical, new studies have shown the opposite. See infra note 307 and accompanying text.

258 See supra note 240.

259 See Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) (holding that whether a regulatory act constitutes a taking requiring compensation depends on the extent of diminution in the value of the property). Cf. Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (holding that a state may not regulate property into uselessness without paying compensation simply because the owner acquired the property after the regulation became effective).

260 See Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). The Court in Lucas held that a regulation that deprives an owner of all economically beneficial uses of land constitutes a taking unless the proscribed use interests were not part of the title to begin with. Id. Thus, a law or decree with the effect of depriving all economically beneficial use must do no more than duplicate the result that could have been achieved in the courts under the law of nuisance. Id.

261 See Loretto v. Teleprompter CATV, 458 U.S. 419, 434-35 (1982) (holding that "when the 'character of the governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner" (citation omitted)); see also Yee v. City of Escondido, 503 U.S. 519 (1992) (holding that a flight path established by the government that directed planes over Causby's chicken ranch which caused the chickens to lay faulty eggs was a physical invasion and a taking that required compensation); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (holding that the federal navigational servitude does not create "a blanket exception to the Takings Clause of the Fifth Amendment" and an attempt by the government "to create a public right of access to [an] improved pond goes so far beyond ordinary regulation or improvement for navigation involved in typical riparian condemnation cases as to amount to a taking requiring just compensation"); United States v. Causby, 328 U.S. 256 (1946) (holding that the common law doctrine of owned "from the depths to the heavens" is not longer valid in the modern word).

262 See Lerman, supra note 116, at 396 n.108 (quoting William B. Stoebuck & Dale A. Whitman, The Law of Property § 9.32 (3d ed. 2000)).

263 Per se takings are regulations that, on their face, constitute obvious deprivation of property and no further analysis is necessary. See John C. Keene, When Does a Regulation "Go Too Far?"--The Supreme Court's Analytical Framework

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For Drawing the Line Between an Exercise of the Police Power and an Exercise of the Power of Eminent Domain, 14 Penn St. Envtl. L. Rev. 397, 421 (2006); see generally Lucas, 505 U.S. 1003; see also Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002).

264 See Loretto, 458 U.S. 419 (holding that a law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). The Court has characterized "a permanent physical invasion as 'categorical' because there is no requirement for a court to strike a balance among a number of actors, in contrast to the approach mandated in the first component of the analytical framework discussed above." Keene, supra note 263, at 420.

265 Lucas, 505 U.S. at 1019. The Court held that the "government must pay just compensation for such 'total regulatory takings,' except to the extent that 'background principles of nuisance and property law' independently restrict the owner's intended use of the property. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005) (quoting Lucas, 505 U.S. at 1026-32).

266 438 U.S. 104 (1978).

267 Id. at 124.

268 Id.; see also Lingle, 544 U.S. at 539 ("[F]or instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good'--may be relevant in discerning whether a taking has occurred." (quoting Penn Central, 438 U.S. at 124)).

269 Lingle, 544 U.S. at 539.

270 Loretto, 458 U.S. at 433 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

271 Lucas, 505 U.S. at 1017.

272 Lingle, 544 U.S. at 540.

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273 535 U.S. 302, 321-25 (2002). After defining a physical taking and regulatory taking, the Court notes:

This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way--often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.

Id. at 323-24. Thus, the distinction erects a wall of separation of "physical" and "regulatory" takings, subjecting each to their own takings standard.

274 Id. at 302, 303, 322, 332 (distinguishing condemnations and physical takings from regulatory takings); see also supra note 273.

275 Under Lucas, the only way a depletion of value can be found to be a taking is if the government action "deprives land of all economically beneficial use ... [unless] the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." Lucas, 505 U.S. at 1027 (emphasis added). Thus, if the developer gets some return on his investment, then his property has not been completely depleted of value, and, thus, it is not a taking under Lucas.

276 Penn Central, 438 U.S. at 136 ("We now must consider whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922))).

277 In Lucas, the Court questioned the validity of the "parcel as a whole" standard when it analyzed its own "deprivation of all economically feasible use" rule. See Lucas, 505 U.S. at 1016 n.7. Under Penn Central, "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Penn Central, 438 U.S. at 130. In Tahoe-Sierra, the Court struck a blow against the petitioner's attempt to divide up the contested property in saying: "Petitioners' 'conceptual severance' argument is unavailing because it ignores Penn Central's admonition that in regulatory takings cases we must focus on the parcel as a whole." Tahoe-Sierra, 535 U.S. at 331 (quoting Penn Central, 438 U.S. at 130); see also Richard J. Lazarus, Celebrating Tahoe-Sierra, 33 Envtl. L. 1, 11 (2003).

278 Penn Central, 438 U.S. at 130.

279 See Lucas, 505 U.S. at 1016.

280 533 U.S. 606 (2001); see also Lazarus, supra note 277, at 10 ("In Palazzolo, the Court noted that it had expressed discomfort with the logic of this rule in Lucas and then seemed to cite favorably to some scholarship of Professor Epstein that called for the rule's wholesale abandonment.").

281 See Tahoe-Sierra, 535 U.S. at 331 ("Petitioners' 'conceptual severance' argument is unavailing because it ignores Penn Central's admonition that in regulatory takings cases we must focus on 'the parcel as a whole.' We have consistently rejected such an approach to the 'denominator' question." (citation omitted)).

282 See Penn Central, 438 U.S. at 109-12.

283 Id. at 130.

284 See id. at 104 ("Under the Landmarks Law, the Grand Central Terminal (Terminal), which is owned by the Penn Central Transportation Co. and its affiliates (Penn Central) was designated a 'landmark' and the block it occupies a 'landmark site.' Appellant Penn Central, though opposing the designation before the Commission, did not seek judicial review of the final designation decision. Thereafter appellant Penn Central entered into a lease with appellant UGP Properties, whereby UGP was to construct a multistory office building over the Terminal. After the Commission had rejected appellants' plans for the building as destructive of the Terminal's historic and aesthetic features, with no judicial review thereafter being sought, appellants brought suit in state court claiming that the application of the Landmarks Law had 'taken' their property without just compensation in violation of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment.").

285 See id. at 130.

286 See id. The Court's decision noted that "the New York City law does not interfere in any way with the present uses of the Terminal." Id. at 136. Therefore, the airspace restriction "not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions." Id. As long as the law did not interfere with the primary use of the parcel, as was found here, Penn Central would not "only ... profit from the Terminal but also ... obtain a 'reasonable return' on its investment." Id.

287 U.S. Dep't of Commerce Advisory Comm. on City Planning & Zoning, A Standard City Planning Enabling Act 6 n.6

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(1928), available at http:// myapa.planning.org/growingsmart/pdf/CPEnablingAct1928.pdf.

288 See Porter, supra note 6, at 222.

289 See supra note 287.

290 See Penn Central, 438 U.S. at 121 (holding against a finding of a taking because the appellants had failed to show that they could not earn a reasonable return on their investment in the Terminal itself).

291 Developers would have significantly more trouble arguing under Penn Central when the zoning ordinance requires less than twenty percent affordable. Of the sixteen programs listed in Douglas Porter's book, fourteen allow for set-asides of less than twenty percent. Porter, supra note 6, at 222-25.

292 See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring). Justice Kennedy noted that the "finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations," and the finding of total economic loss results in a compensable taking. Id. See also Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935).

293 Penn Central, 438 U.S. at 124.

294 See generally HousingPolicy.org, Incentives and Cost Offsets, http://www.housingpolicy.org/toolbox/strategy/policies/inclusionary_ zoning.html?tierid=121 (last visited Nov. 19, 2009); see also PolicyLink, Inclusionary Zoning, http://policylink.info/EDTK/IZ/How.html (last visited Nov. 19, 2009) ("Effective inclusionary zoning programs usually offer developers a range of cost offsets to achieve a double bottom line: affordable housing for residents and a reasonable, overall return for developers.").

295 See Kautz, supra note 61, at 980 ("About thirty-five percent of the ordinances provide no incentives whatsoever to a developer providing inclusionary housing."); Alex F. Schwartz, Housing Policy in the United States 196 (2006); Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 60 (Ct. App. 2001). The City of Napa did allow for alternatives to satisfy the inclusionary requirement, but no incentives or benefits to offset development costs of the affordable units. Id.

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[296] California Association of Realtors, Inclusionary Zoning Issues Briefing Paper, in The California Inclusionary Housing Reader 41, 43 (2003), available at http://www.cacities.org/resource_files/20276.California%20Inclusionary%C20Housing%Ëeader.pdf.

[297] See supra note 240.

[298] See supra note 240.

[299] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

[300] See Jennifer Langston, Developers Challenge Affordable Housing Study: City Underestimates Costs, They Say, Seattle Post-Intelligencer, Jan. 26, 2006, at B1, available at http://seattlepi.nwsource.com/local/257091_downtown26.html.

[301] See generally Paul Emrath, The Economics of Inclusionary Zoning, HousingEconomics.com, Feb. 2006, http://www.nahb.org/generic.aspx? sectionID=734&genericContentID=52787&channelID=311.

[302] Building specifications refer to the elaborateness of the building design and the quality of materials used in the construction of the house. For an extensive compilation of building materials, see generally RS Means Building Construction Cost Data 2009 (67th ed. 2008).

[303] See infra note 304 and accompanying text.

[304] Center for Housing Policy & Furman Center for Real Estate & Urban Policy at New York University, The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the San Francisco, Washington DC and Suburban Boston Areas 8 (2008), available at http:// furmancenter.org/files/IZPolicyBrief_LowRes.pdf.

[305] See Emrath, supra note 301.

[306] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1004 (1992); see supra note 239.

[307] This scenario is best illustrated by the inclusionary zoning plan in Marin, California. In this California community, developers "would have to sell or lease 50-60 percent at below-market rates, which must be made affordable to households earning 60-80 percent of the median income--resulting in a sale price of approximately $180,000-$240,000." News Release, Indep. Inst., New Study Shows "Inclusionary Zoning" Hinders Development and Makes Housing Less Affordable (Nov. 12, 2007), available at http:// www.independent.org/newsroom/news_detail.asp?newsID=94. At the time of this report, "the conservative median sale price of $838,750 (and homes in Marin typically sell for much more), [thus] revenue from a ten-unit project, with 50 percent price-controlled at 60 percent of the median household income, the revenue loss would total $3,293,740--roughly 40% of the value of the project." Id.

[308] Unlike a single family home, a multifamily unit in a multistory building "possess[es] airspace within the confounds of the building, with property owners enjoying a property right in the airspace." Atascadero, Cal., Interim Urgency Ordinance Establishing a Moratorium on the Approval of "Site Condominiums" (Sept. 26, 2006), available at http:// www.atascadero.org/media/council/e183a17092606-CondoMoratorium.doc. Thus, for multifamily developers, the airspace above their lot is a resource that can be negatively affected by an inclusionary zoning ordinance.

[309] Jeffrey A. Goldberg, Carefree Condominium Living and the "Illusion" of Home Ownership, condolawyers.com, http:// condolawyers.com/articles/carefree.htm (last visited Nov. 20, 2009) (noting that condominium (multifamily) buyers have actually purchased some airspace, and "[t]he 'real estate' that [they] 'own' is, technically, the air located between the floors, ceilings, and perimeter walls").

[310] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-33 (1978) (holding that the petitioner could not separate the airspace above the train terminal and apply a complete-depravation-of-economic-value standard to just the airspace).

[311] Id. at 130-31.

[312] See supra note 287 and accompanying text.

[313] See Emrath, supra note 301.

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[314] Id.

[315] See supra notes 295-307 and accompanying text.

[316] For example, if a commercial landowner has five lots, and one of the five is taken by the city for a public purpose and without compensation, the fact that the other four lots, when developed with shopping malls and office buildings, more than compensate for the fifth property's losses, does not eliminate the fact that the fifth lot was taken without restitution. This justification adheres to the first method's analysis which does not reflect the reality of how land is purchased, entitled, improved, and sold.

[317] See supra notes 295-307 and accompanying text.

[318] The holding in Agins requires the government to compensate when there is a taking. See supra note 240.

[319] Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 64 (Ct. App. 2001).

[320] Some of the incentives used by cities are increases in building heights, parking space reductions, expedited permitting, and tax abatements. See Porter, supra note 6, at 222-25.

When granted by municipalities to allow developers to build more units on a given site than local zoning laws would normally allow, density bonuses can be useful tools. In theory this lowers the cost per unit so the developer can make some portion of the units affordable for lower-income residents.

Doug Bibby, Dispelling the Myths of Density Bonuses, Nat'l Real Estate Investor, Apr. 1, 2008, at 108, available at http:// nreionline.com/commentary/nmhc/real_estate_dispelling_myths_density_0411/.

[321] See Lerman, supra note 116, at 389-90; see also Porter, supra note 6, at 222-23 (indicating that Fairfax County, Virginia, the birthplace of inclusionary zoning, has a density bonus as its only available incentive/off-set).

[322] See Ellickson, supra note 25, at 1180-81. In 1981, Ellickson was convinced that a density bonus could reduce the

financial burden of inclusionary zoning, the extent of which was dependent upon the following:

(1) the ratio of bonus units to inclusionary units; (2) the developer's savings in cost-of-land-improvements per lot resulting from the additional density; (3) the reductions in consumer valuations of project units resulting from both the increased project density and the presence of inclusionary units; (4) scale efficiencies (or inefficiencies) resulting from the construction of more dwelling units; and (5) whether the developer is permitted to downgrade the designs, floor areas, and lot areas of inclusionary units.

Id.

[323] See generally Powell & Stringham, supra note 10; Means et al., supra note 22.

[324] See Powell & Stringham, supra note 10; see also Means et al., supra note 22; Emrath, supra note 301.

[325] A multifamily development includes "apartment buildings, townhouses, condominiums, and shared housing." Pepper Tree Homes, Multi-Family, http://www.peppertreehomes.com/multi-family/ (last visited Nov. 20, 2009). "These buildings may be communities, or merely a collection of separate entities. "[M]ulti family dwellings are an affordable and potentially fun alternative to the single family home." Id.

[326] Benjamin Powell & Edward Stringham, "The Economics of Inclusionary Zoning Reclaimed": How Effective Are Price Controls?, 33 Fla. St. U. L. Rev. 471, 486 (2005). When a designer increases the overall height of a building several factors are included. Id. The most obvious factor is the increased weight of the building, which requires higher gauge steel beams or larger wooden beams in the lower floors to support the additional weight. Id. A thicker foundation and larger footings are also required to hold and displace the load of the extra construction. Id. Consequently, an increase of mass in the building's key structural components increases the cost per structural feature. Id. (noting that "worthless density bonuses occur with high-rises where building any higher would be too costly"). For example, going from a standard 18 gauge by 4" wide, 16" on-center steel beam to a more weight supporting 16 gauge by 4" wide, 16" on-center steel beam increases your cost by $2.05 per linear foot. RS Means Building Construction Cost Data 2009, Metals, Structural Steel Metal Stud Framing, Load Bearing Stud Framing (67th ed. 2008). That means that every eight-foot stud used in the building will cost an extra $16.40. Also, more tenants over the same size footprint increases the number of amenities and amount of infrastructure required. This is well illustrated by Doug Bibby, President of the National Multi Housing Council in Washington, D.C.:

[A]dding more units often requires owners to add more parking, and in mid-rise and high-rise construction, parking is a significant cost. Adding two parking spaces to a high-rise building for a density bonus unit could add another $40,000 to $60,000 to costs. In other words, sometimes a building simply cannot accommodate 10 additional units or 10 more parking spaces, either because of the costs or because of the site.

Bibby, supra note 320.

[327] Single family residences are built on their own lot, thus, the one-lot-per-home scheme requires more land to include

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density. However, municipalities regulate curb, side lot, and back yard set-backs. The smaller the set back requirement, the smaller the lot; therefore, density can also be increased by decreasing the sizes of the lots.

328 Powell & Stringham, supra note 326, at 485-86. In the late twentieth century, infill developments became major contributors to new housing in older, well-established communities like Denver, Colorado and Atlanta, Georgia. Northeast-Midwest Institute & Congress for the New Urbanism, Strategies for Successful Infill Development 40 (2001) ("'As more Atlantans become fed up with traffic snarls, they are demanding new housing that is close to work,' John Glover of Post Properties told the Atlanta Business Chronicle .... Added the Chronicle, 'One of the key strategies for Post and many other Atlanta home builders is their adoption of "infill" programs.'"). Infill projects are developments that are built in small pockets of existing cities and communities, on sites that are either empty or blighted. As a result, these sites are restricted to the area they are allotted and adding additional units on a confined plot is not possible. Furthermore, the density of single-family units is restricted by the lot size. See Powell & Stringham, supra note 326, at 486. Home buyers and city codes restrict the size of the lot to a minimum square footage, making density bonuses in certain situations absolutely worthless. Id.

329 See Bibby, supra note 320 ("Ultimately, the biggest problem with density bonuses is that the longer they are used in a jurisdiction, the less effective they become. [This is because] they typically do not keep up with land and construction costs.").

330 Once more, Doug Bibby appropriately illustrates an explanatory scenario:

Say a jurisdiction calculates when it creates its density bonus program in 1995 that a 10% bonus is sufficient to offset the cost of the affordable housing units.

By 2005 though, developers and owners are facing increases in taxes, insurance, utilities and other operating expenses that exceed the value of the density bonus, which typically remain static. Is the cost per unit today and the value of the density offset reflected in the density bonus of a decade ago?

See Bibby, supra note 320.

331 Id.

332 Id.

333 See Porter, supra note 6 at 227 (noting that the most common "compensatory offering is density bonuses"); supra notes 324-332 and accompanying text. If this off-set technique truly compensated for lost profits, developers would unhesitatingly comply; however, such is not the case. Powell & Stringham, supra note 326, at 486 ("If a program was voluntary and builders chose to provide below-market units in exchange for a density bonus, it would demonstrate

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that the benefits more than offset the costs. Yet when looking at most real-world ordinances, the builders do not flock to participate.").

334 The Executive Office of Envt'l Affairs & The Dep't of Hous. and Cmty. Dev., Excerpts from A Study of the Feasibility of Establishing Transferable Development Rights Under the Rivers Protection Act 1 (2002), available at http:// commpres.env.state.ma.us/publications/TDRReportExcerpts.pdf. Most transferable development rights (TDR) are structured around the following factors:

[1.] TDR is often (but not always) development-neutral in that it changes the pattern but not the total amount or type of development. The amount of development is neither increased nor decreased, but rather shifted from one location to another.

[2.] TDR is generally structured to encourage or require an increase in the allowable density of development in the receiving area while reducing the density of development in the sending area. The overall result is a concentration of development in the receiving areas, reducing development-induced fragmentation of open space and leaving more total land area in undeveloped uses (sending areas).

[3.] TDR provides equity for differently situated property owners by preserving the opportunity for economic gain for property owners in sending areas while increasing value in receiving areas. Thus, the burden of development regulations in different areas is distributed more evenly.

[4.] TDR is usually undertaken to avoid common development impacts or to accomplish an environmental goal, including protection of water quality, preservation of open space, and more efficient use of infrastructure.

[5.] TDR engages the private market in generating transactions and determining the price of development rights. While most TDR programs have some form of locally or regionally administered trading, they are designed to reflect market trends and facilitate private transactions.

Id. In inclusionary zoning, the bonuses are to merely offset losses and not to operate under the five TDR standards listed above. See also Douglas Fruehling, TDR 101, Wash. Bus. J., Aug. 17, 2007, http:// www.bizjournals.com/washington/stories/2007/08/20/focus9.html.

335 See Edward A. Tombari, Mixed Use Development 4-5 (2005), available at http://www.co.cal.md.us/assets/Planning_Zoning/TownCenters/MixedDevelopmentArticle.pdf. Trends in the real estate market indicate that homebuyers consistently show strong negative reactions to higher densities and have accepted its use only grudgingly. Id. These negative reactions are founded on the view that higher density equates to high traffic and high crime rates, irrespective of social demographics. Id.

336 See Tombari, supra note 335, at 12. There is a high potential for developers to be bombarded by protests from "residents to mixed-use, most commonly a negative reaction to 'higher density' or land uses not appropriate for residential areas." Id. The increased density of boarding properties is perceived by neighbors as "a nuisance, degradation of quality of life and loss of property value." Id. There are many recorded cases of density bonus developments being hindered by protesting neighbors. Id. Case in point, in March of 2008, a woman sued the City of Los Angeles over a new ordinance allowing builders to construct taller, bulkier buildings if they include affordable units. Kerry Cavanaugh, Density Bonus Is Targeted by Lawsuit, Daily News of L.A., April 9, 2008, at A3. In support of the woman's complaint, Planning Commission President Jane Ellison Usher criticized the density bonus ordinance, objecting that it would allow "large, bulky developments with fewer parking spaces on residential sites that have no

transit or jobs nearby," and offered a legal strategy to challenge it. Id. Business owners and homeowners in the area joined the suit and urged the Planning Department of Los Angeles to rewrite the law. Id. A lawsuit such as this will inevitably hold up any proposed development within the ordinances jurisdiction and cost the developer money. See infra note 337.

337 The perception of those within the building and development industry is that "incentives are increasingly difficult to achieve within the context of NIMBY [(Not in My Backyard)] resistance to affordable housing and density bonuses and in light of a development approval process that is increasingly driven by multiple public hearings and intense citizen input." Nat'l Ass'n of Home Builders, Inclusionary Zoning: A Close Look Reveals that Inclusionary Zoning Is Not an Effective Way to Promote Housing Affordability, in The Myths and Facts About Inclusionary Zoning 16 (2007), available at http://www.nahb.org/fileUpload_details.aspx?contentID=69634. Thus, the "incentives theoretically make it possible to recoup costs. But in the end, the potential benefits associated with such incentives are lost in the negotiations for permit approvals." Id.

338 Most real estate developers do not operate on profit dollars, but on Return of Investment (ROI). See Resource Management Systems, Inc., FAQs: IT Budgeting, http://www.rms.net/lc_faq_other_roi.htm (last visited Nov. 20, 2009) (ROI is "[a] measure of the net income a firm is able to earn with ... its total assets. Return on investment is calculated by dividing net profits after taxes by total assets."). To determine a company's ROI, subtract the cost of investment from the gain of the investment, and divide that by the cost of the investment. In real estate development, the cost of investment is comprised of all the costs included in making the housing unit (land costs, land grading costs, architectural fees, infrastructure construction costs, building costs, fees, etc.). The gain from the investment, in this industry, is the net income from the sale of a housing unit. There is, however, a time factor in real estate ROI. Because real estate cannot produce any income until it is sold, standing inventory and standing production costs drain the treasury of developers as time passes; therefore, the sooner a house or condo is sold the higher the ROI because the gain on the houses or condo can go back into producing more housing units, thereby indirectly increasing the overall gain on the initial investment. In a scenario where a project is held up by protesting neighbors, time is lapsing, and the costs that have gone into the initial start up of the development are becoming more expensive.

339 For a list of other incentives, see Porter, supra note 6, at 222-25.

340 Porter, supra note 6, at 222-25.

341 See Kautz, supra note 61, at 983 (explaining that "from a local agency standpoint, inclusionary zoning provides affordable housing at no public cost"); see also Lerman, supra note 116, at 392 ("Another important benefit of mandatory inclusionary programs is that they provide affordable housing for the community without a large public financial investment.").

342 See Powell & Stringham, supra note 326, at 487 ("If the government has the ability to offer subsidies or zoning

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exemptions that will increase the supply, then why must those policies be accompanied with a program that restricts the supply?"). Powell and Stringham further state that even if government subsidies covered the developers' costs, and the inclusionary zoning ordinances were voluntary, the technique would still negatively affect housing affordability. Id. They conclude that the financial burden on the developers reduces the overall output of housing and tax subsidies would have no positive effect on the total output. Id.

343 See Powell & Stringham, supra note 326, at 486.

The real test of whether density bonuses (or other incentives) make up for the costs of the program is if builders would voluntarily choose them. If a program was voluntary and builders chose to provide below-market units in exchange for a density bonus, it would demonstrate that the benefits more than offset the costs. Yet when looking at most real-world ordinances, the builders do not flock to participate.

Id. at 486.

344 Many proponents of mandatory programs argue that affordable housing ordinances are profitable and actually benefit the builders, but builders and developers fail to understand and recognize this. See Kautz supra note 61, at 982 ("Even where a 'relatively generous' density bonus is given for voluntary participation, developers often fail to participate because they do not understand the economics of the program ...."); see also Dietderich, supra note 22, at 76 (noting that although there are some potential short term losses, inclusionary zoning is offset by long term gains, and mandatory programs are in the interest of the developer). Recently, studies and scholars, such as Powell and Stringham, have come down on these claims as specious and unsupported:

Kautz may know something that everyone else does not, but she gives us no reason to believe why a lawyer writing in a law review article has a better understanding of the profitability of projects than actual builders who make their living doing those calculations. Even if Kautz were correct that developers are incapable of calculating the profitability of projects, as long as one or two builders stumbled into Kautz's gold mine, they would start making above-normal profits, which would encourage others to follow. The assertion that these affordable housing mandates are really profitable but builders do not understand the economics behind them is extremely dubious.

Powell & Stringham, supra note 326, at 486-87. Powell and Stringham continue their criticism by dismantling Andrew Dietderich's claim "that inclusionary zoning actually benefits builders and, thus, will not hamper supply." Id. at 488. They tackle his first claim that builders do not participate in voluntary inclusionary zoning ordinances because of a potential loss of good will; however, if a mandatory ordinance was put in place, the "builders would benefit because they would get the density bonus without losing goodwill. Id.; see also Dietderich, supra note 22, at 76. Powell and Stringham argue that:

First, if a city's residents and representatives favored affordable housing enough to pass an ordinance to encourage its production, why builders would lose goodwill for producing affordable housing is unclear. Second, at a more fundamental level, the erroneousness of this argument is demonstrated by the fact that most builders oppose inclusionary zoning. If mandatory inclusionary zoning actually benefited builders, why would they lack the foresight to support it? Economists have documented many industries where industry participants have lobbied for government regulation in order to secure gains.

Id. at 488-89 (footnote omitted). Dietderich's second explanation why builders do not embrace inclusionary zoning is due to the to the fact that multifamily developments have a spillover effect, meaning that subsequent builders will be able to take advantage of the designs and logistics findings of their predecessors and make high profits off of the efforts of the other builders. See Dietderich, supra note 22, at 76. Therefore, there are no pioneers waiting in the wings to spend the capital necessary to get the ball rolling; thus, the multifamily projects remain shelved. To end this

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quagmire, Dietderich suggests "that if all builders were forced to build high-density multifamily dwellings, they would collectively make higher profits, so the issue is just pushing them to this Pareto superior equilibrium." Powell & Stringham, supra note 326, at 489. By mandating that all builders comply with the same multifamily standard, no single builder will be forced to single-handedly bear the burden of preconstruction research and start-up costs. In response, Powell and Stringham argue:

Dietderich wants the reader to assume that the building industry does not know what is profitable. Yet he gives no reason to believe that builders lack an understanding of the concepts of learning curves or technological spillovers. If mandatory inclusionary zoning really helped builders secure higher profits, one would expect the building industry to rally around Dietderich's proposal. Because builders do not, either builders do not adequately understand their own industry or Dietderich's argument is incorrect. We strongly suspect the latter.

Powell & Stringham, supra note 326, at 489.

345 Nat'l Ass'n of Home Builders, supra note 337, at 5.

346 See Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 62 (Ct. App. 2001).

347 See Porter, supra note 6, at 222-25. Of the eleven municipalities that Porter describes that offer alternatives, all eleven employed dedication of land alternatives, in-lieu fee alternatives, or the off-site construction alternatives, or a combination of the three. Id.

348 See Lerman, supra note 116, at 390 ("Alternatives address developments where affordable units cannot be provided cost effectively."); see also Porter, supra note 6, at 229-30.

349 Sacramento, California; Sarasota, Florida; Bainbridge Island, Washington; and many other municipalities tout the flexibility of their inclusionary zoning plans by highlighting their accommodating incentives. Mun. Researchers & Serv. Ctr. of Wash., Affordable Housing Ordinances/Flexible Provisions, http://www.mrsc.org/Subjects/Housing/ords.aspx (last visited Nov. 20, 2009).

350 See Laura M. Padilla, Reflections on Inclusionary Housing and a Renewed Look at Its Viability, 23 Hofstra L. Rev. 539, 564-67 (1995) ("[I]nclusionary housing could accomplish economic, as well as racial, integration."); Linda J. Bozung, Inclusionary Housing: Experience Under a Model Program, 6 Zoning & Planning L. Rep. 89, 91 (1983) ("Concentration of [affordable] units is considered undesirable because experience with large-scale, low-income housing projects indicates that they tend to deteriorate both physically and socially, and frequently become unsafe for residents as well as the surrounding neighborhood. It is believed that scattering affordable units throughout conventional projects may avoid these problems by encouraging better tenant maintenance, increased community acceptance, and higher quality construction."); Lisa C. Young, Breaking the Color Line: Zoning and Opportunity in

America's Metropolitan Areas, 8 J. Gender Race & Just. 667, 685 (2005) ("Despite zoning's sordid history of racial segregation, exclusion, and expulsion, in some metropolitan areas, [inclusionary] zoning can actually promote the creation of affordable housing and help break the color line in housing."). The goals and principles of inclusionary are many, including:

1. Better access to expanding suburban job opportunities for workers in low-and moderate-income households--especially the unemployed

2. Greater opportunities for such households to upgrade themselves by moving into middle-income neighborhoods, thereby escaping from crisis ghetto conditions

3. Higher quality public schooling for children from low-income households who could attend schools dominated by children from middle-income households

4. Greater opportunity for the nation to reach its officially adopted goals for producing improved housing for low- and moderate-income households

5. Fairer geographic distribution of the fiscal and social costs of dealing with metropolitan-area poverty

6. Less possibility of major conflicts in the future caused by confrontations between two spatially separate and unequal societies in metropolitan areas

7. Greater possibilities of improving adverse conditions in crisis ghetto areas without displacing urban decay to adjacent neighborhoods

Anthony Downs, Opening Up the Suburbs: An Urban Strategy for America 26 (1973).

351 See supra note 347 and accompanying text.

352 In California, eighty percent of the municipalities that have inclusionary zoning ordinances have in-lieu fees as an alternative to set-asides. See John J. Delaney, Addressing the Affordable Housing Crisis--The Problem: Exclusionary Zoning; The Unfairest Solution: "Inclusionary" Zoning, SN005 ALI-ABA 1553, 1566 (2007). Sometimes, fees are only allowed under certain circumstances where the project is under a certain unit count or an affordable housing requirement calculation results in a fraction. See Colo. State Dep't of Local Affairs--Div. of Hous., Summary of Inclusionary Zoning Practices in Colorado Communities, http://dola.colorado.gov/cdh/researchers/documents/izo_summary.htm (last visited Nov. 20, 2009) ("[Under] Glenwood Springs Inclusionary Zoning ... [a] cash-in-lieu fee can be collected only if the development is small and results in a fraction."). For example, if a city requires a builder to set aside fifteen percent of its units for affordable housing, and the development has twenty-five condominium units, the developer must set aside 3.75 units. In this scenario, the builder would set aside three units and then pay in-lieu fees on the three-quarters of a unit. Therefore, if each affordable condominium is valued at $100,000, the builder will pay $75,000 into the city housing trust fund.

353 Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 62 (Ct. App. 2001); see also HousingPolicy.org, Glossary, In-lieu Fee, http:// www.housingpolicy.org/glossary.html#I (last visited Nov. 20, 2009). A housing trust fund is "a restricted account within the [municipality's] general fund and must be used exclusively to assist with affordable and special needs housing in the [municipality]." Salt Lake City, Housing Trust Fund, http:// www.ci.slc.ut.us/Ced/hand/new/pages/htfb2-1.htm (last visited Nov. 20, 2009). These funds are constantly watched

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and are not used without going through a highly regulated process (i.e., a quorum vote from the city council). Id.

354 City of Sacramento, Cal. Planning Dep't, Housing Trust Fund Ordinance, http://www.cityofsacramento.org/planning/projects/housing-trust-fund/ (last visited Nov. 20, 2009) ("Because low-wage workers are often unable to afford housing close to their work sites, the fee-generated revenue is used to increase the supply of housing affordable to these income groups, creating the nexus or linkage between jobs and housing.").

355 See Salt Lake City, supra note 353. The Salt Lake City government website states that the funds are for:

1. Acquisition, leasing, rehabilitation, or new construction of housing units for ownership or rental, including transitional housing;

2. Emergency home repairs;

3. Retrofitting to provide access for persons with disabilities;

4. Down payment and closing cost assistance;

5. Construction and gap financing;

6. Land acquisition for affordable and special needs housing units;

7. Technical assistance; [and]

8. Other activities and expenses incurred that directly assist in providing affordable and special needs housing.

Id.

356 See City of Berkeley Hous. Dep't, Housing Trust Fund Guidelines (2002) [hereinafter Berkeley Guidelines], available at http:// www.ci.berkeley.ca.us/uploadedFiles/Housing/Level_3_-_General/Housing_Trust_ Fund_Guidelines.pdf. Funds are used to assist individuals who live in mixed-income developments, with rent. Id.

357 See Salt Lake City, supra note 353 ("No expenditures may be made from the fund without the approval of the City Council. Funds may not be used for administrative expenses.").

358 Cal. Ass'n of Realtors, Inclusionary Zoning Issues Briefing Paper, in The California Inclusionary Housing Reader 43 (Bill Higgins ed., 2003), available at http://www.cacities.org/resource_files/20276.California%20Inclusionary%C20Housing%Ëeader.pdf (In lieu fee programs are not effective because "[m]any jurisdictions collect in-lieu fees, but do not leverage the revenues to build more affordable housing. Instead, in some cases, the money is not spent to produce new affordable housing."). One example is the allocation of funds from the housing trust fund in the City of Berkeley. Under its guidelines, Berkeley

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allocates funds from its housing trust to rental apartments which have sixty percent of its units below market and assist households with incomes above eighty percent of median income, or who refuse to give income information, in occupied rental units. See Berkeley Guidelines, supra note 356, at 5. Furthermore, developers can receive financing from the housing trust fund to build and manage a project as long as it observes minimum building codes like complying with the "bars on windows requirements." Id. at 8. Also, funds are used for special needs individuals. Id. at 14. "Special needs" personnel are people who are homeless, disabled, the frail elderly, and people with HIV/AIDS. Id.

359 See, e.g., Dep't of Hous. & Cmty. Dev., Massachusetts Affordable Housing Trust Fund Guidelines (2006) [hereinafter Massachusetts Guidelines], available at http://www.mass.gov/Ehed/docs/dhcd/hd/aht/ahtfguide.pdf; see also supra note 358.

360 The City of Berkeley plan gives funds to rentals that "include utilities based on the utilities schedule used for the Federal Section 8 Program Tenant-based Rental Assistance Program." Berkeley Guidelines, supra note 356, at 3. One of the fundamental purposes behind inclusionary zoning is to decentralize poverty. See supra note 350 and accompanying text.

361 See Powell & Stringham, supra note 10, at 8.

362 See Massachusetts Guidelines, supra note 359.

363 Just like supporting "Section 8" -like housing, this centralizes poverty in contradiction to inclusionary policy. See supra note 350.

364 The City and County of San Francisco notes that its transitional housing accommodates the homeless and assists them with intensive "education [courses], job training and placement, substance abuse counseling, parenting classes and childcare services." Human Serv. Agency of S.F., Transitional Housing, http://www.sfhsa.org/88.htm (last visited Nov. 20, 2009).

365 Rent standards shall be set for the units and are not necessarily based on the tenant's household income. This may result in households paying more than thirty percent of their incomes for rent, or paying less than thirty percent. See Berkeley Guidelines, supra note 356, at 3. As previously mentioned, the City of Berkeley program assists individuals who do not even have to divulge economic information to receive rent assistance and can possibly assist individuals who pay less than thirty percent of their income towards housing, which would place them outside of HUD's affordable housing criteria. HUD states that the individuals that need affordable housing are those who spend more

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than 30 percent of their income on housing because "[f]amilies who pay more than 30 percent of their income for housing are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation and medical care." U.S. Dep't of Hous. & Urban Dev., Affordable Housing, http://www.hud.gov/offices/cpd/affordablehousing/ (last visited Nov. 20, 2009).

366 Inclusionary zoning's primary function is to create affordable housing for low- and medium-income households. PolicyLink, Inclusionary Zoning--What Is It?, http://www.policylink.org/EDTK/IZ/ (last visited Nov. 20, 2009).

367 See infra notes 369-377 and accompanying text.

368 Of the 369 municipalities included in the National Center for Smart Growth Research and Education's study, fifty-seven percent included off-site allowances and twenty-five percent included land dedications. Knaap et al. supra note 59, at 8.

369 Cal. Coal. for Rural Hous. & Non-Profit Hous. Ass'n of N. Cal., Inclusionary Housing in California: 30 Years of Innovation, in Inclusionary Zoning: The California Experience 11 (2004) [hereinafter Inclusionary Housing in California], available at http:// www.calruralhousing.org/sites/default/files/Inclusionary30Years.pdf ("Developer [s] can substitute a gift of land that may accommodate an equivalent number of units in place of affordable unit construction."). Developers basically pass the baton to the local authorities by dedicating the land, placing the responsibly on the city or county to build the affordable units. Id. at 14. In this scenario, "local governments must assume responsibility for this construction and often recruit nonprofit developers to complete the task." Id. The typical procedure involves the private entity deeding the land to the municipality, "which then deeds it to a community-based nonprofit on a competitive basis, or is deeded directly by the developer to a nonprofit organization." Id.

370 Id. ("Edgewater Place in Larkspur in Marin County[, for example,] is a 50-unit development built by the Ecumenical Association for Housing on land dedicated by an adjacent condo developer. In this case, the land dedication allowed for double the number of units required under the policy by combining the land with funding from other sources.").

371 Inclusionary Housing in California, supra note 369, at 21. Not bringing together the suburban wealthy and the urban poor is one of the most pervasive criticisms of many of the inclusionary zoning programs in use today. See Lerman, supra note 116, at 402-03. Lerman notes that Massachusetts's Anti-Snob Act has produced housing that has been "swayed toward two segments of the population, the elderly and current residents of the community, thus failing to provide affordable housing for the larger population. Therefore, the Massachusetts program fails to encourage diverse and integrated affordable housing." Id. (footnotes omitted).

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[372] Inclusionary Housing in California, supra note 369, at 11.

[373] Id. at 14-15. For profit developers and non-profit builders sometimes team up. Id. at 15-16. The non-profit builder funds its project with the assets of the other which results in a win-win for all parties involved. Id. at 16.

[374] As mentioned above, although the teamwork between profit and nonprofit builders appears to be a win-win, the housing developments are built away from one another, isolating the affordable units from the market-rate units. See Inclusionary Housing in California, supra note 369, at 16. "Allowing off-site construction and design differences threaten some of the potential benefits of inclusionary programs, such as simultaneous development of market-and below market-rate units, functional and aesthetic integration of affordable units into new neighborhoods, and minimization of neighborhood opposition." Id. at 15.

[375] See supra notes 68-77 and accompanying text.

[376] Jay A. Riffkin, Comment, Responsible Development? The Need for Revision to Seattle's Inclusionary Housing Plan, 32 Seattle U. L. Rev. 443, 450 (2009) ("Developing buildings that are constructed entirely of low-income units often creates anxiety amongst community members who fear that affordable housing will increase crime and stunt property values." (footnote omitted)). Although the position is very controversial, several studies and investigations have found that "[i]n areas comprised mostly of low-income housing ... crime can be higher." Cal. Planning Roundtable, Myths & Facts About Affordable and High Density Housing, http:// www.abag.ca.gov/services/finance/fan/housingmyths2.htm (last visited Nov. 20, 2009); see also Hanna Rosin, American Murder Mystery, Atlantic Monthly, July/Aug. 2008, at 40, available at http:// www.theatlantic.com/doc/200807/memphis-crime (stating that low-income housing is the culprit in the rise of crime); Mary Lynne Vellinga, Natomas Crime Wave Raises Concerns About Affordable Housing, Sacramento Bee, July 22, 2008, at 8A. Regardless of the veracity of these discriminatory sentiments, local government will have to deal with such prejudices because "ultimately, the success of [larger affordable housing developments] depends on ... the level of public acceptance by the surrounding community." Inclusionary Housing in California, supra note 369, at 15.

[377] A wide range of neighborhoods across the country have had success with delaying or halting construction of unwanted development. See Joshua Akers, New Wal-Mart Blocked, Albuquerque J. Feb. 2, 2004, at 2, available at http://www.abqjournal.com/biz/outlook/140156*o*utlook02-02-04.htm (noting that a neighborhood group stopped the construction of a Wal-Mart); see also Mike Tysarczyk, Wilkinsburg Residents Seek to "Drive Envirotest Out," Pittsburgh Tribune-Rev., June 30, 1994, at 1 (highlighting the ability of a neighborhood coalition against a common cause (i.e., a six-lane highway)).

[378] See supra notes 110-377 and accompanying text.

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[379] See supra notes 317-43 and accompanying text.

[380] See infra note 393 and accompanying text; see also supra notes 258-345 and accompanying text (concerning the lack of adequate compensation argument).

[381] Especially during economic recessions and depressions, developer-focused solutions take advantage of the strengths of the private sector, and by refraining from governmental meddling, policymakers unleash the strength of the private sector. See Megan J. Ballard, Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Housing Tax Credits, 55 Hastings L.J. 211, 244 (2003) (noting that "[d]uring economic downturns, lawmakers will likely be more supportive of for-profit housing developers because of the importance of housing to national economic health"). This point is advanced by Howard Husock, director of the Case Program at the John F. Kennedy School of Government at Harvard University, who advocates the policy of letting the private market work unobstructed:

The unsubsidized housing market ... [plays a] crucial role in weaving a healthy social fabric and inspiring individuals to advance.... [Intervention] to provide the poor with better housing than they could otherwise afford ... interfer[es] with a delicate system that rewards effort and achievement by giving people the chance to live in better homes in better neighborhoods.

Howard Husock, America's Trillion-Dollar Housing Mistake 23-24 (2003).

[382] The most recent studies on mandatory inclusionary zoning have not been supportive of this affordable housing technique. The Home Builders Association holding, the legal foothold of many mandatory inclusionary zoning programs, has been heavily criticized. The findings in Below Market Housing Mandates as Takings: Measuring Their Impact show that the economic and political assertions made by the California Supreme Court in Home Builders Association are contrary to the newest research and data collected. See Means et al., supra note 22, at 15-16. Furthermore, in the last four years, scholars and think-tanks have concluded that mandatory inclusionary programs produce few units, have high costs, make "non-affordable" priced homes more expensive than true market-value, restrict the supply of new homes, cost government revenues, and do not address the cause of the affordability problem. See Powell & Stringham, supra note 10, at 3.

[383] For comprehensive data, see Powell & Stringham, supra note 10; Means et al., supra note 22. Moreover, if it is more important to create affordable housing than to realize the societal goals of social and economic integration, many alternatives and programs listed have proven inadequate and, in some circumstances, counterproductive. See, e.g., Inclusionary Housing in California, supra note 369, at 15. The town in the case study has touted its accomplishments of creating 600 units of affordable housing; however, the in-lieu fees, off site construction, and land dedications have allowed those units to be segregated from market-value units. Id. Effectively, the town has substituted production over integration. Id.

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384 The consolidation of poverty occurs when production is valued over integration. Id.

385 A University of Maryland study on the long-term effectiveness of inclusionary zoning programs highlights the impotence and outright counterproductive tendencies of this affordable housing technique. Nat'l Ass'n of Home Builders, Inclusionary Zoning Acts as a Tax on Housing: Studies Show Alternatives More Effective In Addressing Affordability Problems, Mar. 6, 2008, http://www.nahb.org/news_details.aspx?newsID=6327 ("According to standard economic theory, inclusionary zoning acts like a tax on housing construction. And just like other taxes, the burdens of inclusionary zoning are passed on to housing consumers, housing producers, and landowners. More specifically, economic theory suggests that inclusionary zoning requirements act to decrease the supply of housing at every price, raise housing prices, and slow housing construction. As a result, inclusionary zoning policies could exacerbate the affordable housing problem that they are designed to address.").

386 See Powell & Stringham, supra note 10, at 18. Pro-mandatory inclusionary zoning activists believe that this technique is a cure all for every jurisdiction are undermined by recent studies and reports, which, although attempting to suppress the impact on housing, reveal that negative effects do occur. See Dan Mitchell, Rethinking Real Estate, N.Y. Times, Mar. 29, 2008, at C5, available at http:// www.nytimes.com/2008/03/29/technology/29online.html ("Not so, says a report from the Furman Center for Real Estate and Urban Policy, which studied how the programs affected housing in San Francisco, Boston and Washington[]. If there are jumps in prices, they are minimal.... In suburban Boston, the policy 'seems to have resulted in small decreases in production and slight increases in the prices of single-family houses.'").

387 See supra notes 110-380 and accompanying text.

388 Bibby, supra note 320. It is important that the partnership be a true joint partnership and not a collaboration between an "ant and an elephant," where the government basically takes the reins on the whole operation, effectively dissolving the benefits and necessity of mutualism. Thomas Sowell, Random Thoughts, Townhall.com, Feb. 11, 2009, http:// townhall.com/columnists/ThomasSowell/2009/02/11/random_thoughts.

389 See Alyssa Katz, Inclusionary Zoning's Big Moment: Cities Across the Country are Forcing Developers to Build Affordable Housing. Could New York Soon Join Them?, City Limits, Jan. 1, 2005, at 22, available at http:// www.citylimits.org/content/articles/articleView.cfm?articlenumber=1212 ("Real estate developers hold some high-value cards, too. The entire venture, after all, depends on someone's willingness to produce and finance the development."). Developers are basically tossed aside as merely a means to an end, and idealism has dehumanized the most important entity involved in creating housing. It is assumed that because the developers are possibly making a profit on the project the developer can be the one who pays for the affordable housing. See Lerman, supra note 116, at 388 n.38, 391 (noting that the "burden of the [mandatory inclusionary zoning] program will fall on developers" and "create a cost to the developer"); see also Dietderich, supra note 22, at 103-04 (commenting that "[e]ven inclusionary programs that threaten builders' profits change the nature of the housing stock, increase the Filter Rate, distribute the regional tax base more evenly, lessen price pressure in existing urban communities, and increase the mobility, opportunities, and wealth of the American poor"). Certain ideologues praise inclusionary zoning as a progressive means of distributing wealth. See Chi. Metro. Agency for Planning, Inclusionary Zoning Strategy Report (2008),

available at http:// www.goto2040.org/uploadedFiles/RCP/Strategy_Reports/Zoning/Inclusionary%20Zoning%Report.pdf. Unfortunately, by focusing on the claimed "wealth distributing" under these programs, many proponents have undermined any wealth creating possibilities (a goal that is truly progressive), resulting in private entities being responsible for duties and burdened by requirements that ultimately cause financial hardship. See Means et al., supra note 22, at 5-6. One program in California requires developers to sell homes that have a median price of $838,750 for $180,022 because of its inclusionary housing scheme. Id. at 5. This is a loss of $658,748 per house that must be carried by the developer. Id.

390 Some of the larger firms are quite massive (i.e., Shea Homes, Pulte Homes, and KB Homes) and are publicly traded; however, these companies employ and hire hundreds of individuals, some who are qualified for affordable housing. See Simply Hired, Average Homebuilders Salary for Calabasas, California, http://www.simplyhired.com/a/salary/search/q-homebuilder/l-91301 (last visited Nov. 20, 2009). The average construction superintendent in Calabasas, California makes $67,000. Id. This is $3,000 less than the median income for Californians. See infra note 414.

391 See infra note 393 and accompanying text.

392 Because it is evident that mandatory policies--policies of coercion and force--have proven faulty under scrutinous inspection, it is crucial that a new tactic is utilized in order to bring about the most success. "Thus the Sun was declared the conqueror; and it has ever been deemed that persuasion is better than force ...." Aesop, The Wind and the Sun, in Aesop's Fables (Unknown trans., W. L. Allison 1881), available at http:// www.litscape.com/author/Aesop/The_Wind_And_The_Sun.html.

393 As they currently operate, mandatory inclusionary zoning plans and voluntary inclusionary plans are not attracting developers. The biggest complaint from housing advocates is that voluntary inclusionary zoning programs do not work. See Tetreault, supra note 119, at 19 ("There are many jurisdictions that have voluntary, or incentive-based, inclusionary zoning ordinances. The problem is that most of them, because of their voluntary nature, produce very few units."). Furthermore, Powell and Stringham note that "when the California Coalition for Rural Housing reported its survey results, it noted that 'truly voluntary programs are generally unsuccessful in producing affordable units."' See Powell & Stringham, supra note 326, at 486. It is apparent from the lack of developer gusto that the incentives and benefits are not compensating for the losses attributed to compliance. See supra notes 317-43 and accompanying text. As mentioned above, mandatory inclusionary zoning programs have proven to be just as ineffective, both in creating affordable units and accomplishing the goals of inclusionary zoning. See supra notes 346-76 and accompanying text. Regardless of these findings, mandatory inclusionary zoning advocates still point to the holding in Home Builders Association that "below-market housing mandates offer compensating benefits and necessarily increase the supply of affordable housing." News Release, Indep. Inst., New Study Shows "Inclusionary Zoning" Hinders Development and Makes Housing Less Affordable (Nov. 12, 2007) (citing Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 64 (Ct. App. 2001)), available at http:// www.independent.org/newsroom/news_detail.asp?newsID=94. If builders are not flocking to be a part of these programs, yet advocates and courts are touting the benefits of these programs, then why must they be mandated? This point is aptly addressed in The Economics of Inclusionary Zoning Reclaimed: How Effective Are Price Controls?:

The real test of whether density bonuses (or other incentives) make up for the costs of the program is if builders would voluntarily choose them. If a program was voluntary and builders chose to provide below-market units in exchange for a density bonus, it would demonstrate that the benefits more than offset the costs.

See Powell & Stringham, supra note 326, at 486.

394 This concept is supported by Paul Emrath, Ph.D, in The Economics of Inclusionary Zoning:

Again, the market adjusts by transferring the cost of IZ onto the buyers of new market rate housing units in the form of fewer available units to buy and higher prices....The effect on overall housing production and existing house prices remains ambiguous, depending on how far the affordable house price is set below builders' costs and how much of the loss can be passed on to buyers of new market rate homes.

What if ... costs are lowered enough so builders can produce affordable units at a normal profit? A jurisdiction may be able to accomplish this through the use of direct subsidies, effective density bonuses, other development concessions, or builder incentives. If costs can be lowered to a certain threshold this way, production and prices on both categories of new housing are the same as they would be in the unregulated market (unless the affordable set aside is so large that not all of the affordable units built can not [sic] be sold at the maximum allowable price). From a purely economic perspective, if costs are reduced far enough, the IZ ordinance becomes irrelevant .... From a political perspective, some municipal decision makers may feel they can only introduce strong cost reducing policies only the under cover of an IZ ordinance.

Emrath, supra note 301. The problem with a voluntary program is that "[d]evelopers have no incentive to participate in a voluntary program unless they are better off as a result of such participation." Marc T. Smith et al., Inclusionary Housing Programs: Issues and Outcomes, 25 Real Est. L.J. 155, 164 (1996). Even in the event that the developer will be equally well off in complying with the program, a perfect balance of cost and profit "is probably not a sufficient incentive, given the potential problems in implementation.... [Thus], the cost side is the only place in which an incentive can be created, and the incentive must be sufficiently large to more than offset lower prices on non-market units." Id.

395 The possible fees needed to be paid are: plan check fees, environmental impact fees, building check fees, building permit fees, public works fees, grading permit fees, electrical permit fees, mechanical permit fees, plumbing permit fees, utility connection fees, sewer fees, storm drainage fees, water connection fees, watershed fees, traffic mitigation fees, regional traffic fees, fire service fees, police service fees, public safety fees, school fees, school mitigation fees, capital facilities fees, park fees, open space fees, special assessment fees, and senior housing fees. Dep't of Hous. & Cmty. Dev., Pay to Play: Residential Development Fees in California Cities and Counties, 1999, app. B (2001), available at http:// www.hcd.ca.gov/hpd/pay2play/app_b.pdf; see also Bibby, supra note 320.

The single most important step a municipality can take is to provide additional tax abatement to the density bonus units to make them affordable. Also, when jurisdictions review and update their land-use and zoning requirements, this process must look at the changing supply and mix of residential and commercial properties and the full set of public policies that can be linked to the plans and codes.

Id.

396 Dep't of Hous. & Cmty. Dev., Pay to Play: Residential Development Fees in California Cities and Counties, 1999, at 87 (2001), available at http://www.hcd.ca.gov/hpd/pay2play/fee_rpt.pdf ("California's high residential development

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fees significantly contribute to its high housing costs and prices.").

397 Building fees can be quite extensive, and eliminating them can greatly reduce building costs. For an illustration on how far-reaching fees can be, see the fee schedule for Los Angeles County. L.A. County Dep't of Pub. Works, Land Development Division: 2008-2009 Fee Schedule (2008), available at http://dpw.lacounty.gov/ldd/lib/publications/fees/2008/LandDevelopmentFees_ 2008-2009.pdf.

398 For example, assume that it would cost fictional builder HBC $300,000 to build a single family home. Of the building cost, $75,000 is fees. Thus, true value building cost is $225,000. Therefore, if the city did not charge fees for the production of that home, and if HBC sold the house at $300,000, HBC would make $75,000 on the home. To make a comparable profit (twenty-five percent), the $300,000 home would have to be sold for $400,000.

399 See infra notes 414-18 and accompanying text. Fees are not required by state law, so by eliminating or greatly reducing building fees developers would be able to realize a profit by building the affordable units and selling them for market-rate building cost. The California state legislature and judiciary mentions the extent of fees, but does not demand that fees be charged to builders. See Jean O. Pasco, State High Court Ruling Puts Officials on Notice AboutFees, L.A. Times, Jan. 11, 2006, at B3. "California cities and counties cannot overcharge developersfor building inspection and permit fees as a way to fatten theircoffers, the state Supreme Court ruledrecently." Id.

400 Building fees account for a substantial percentage of building costs, equating to a large amount of money collected by the municipality per unit built. See infra note 417. If a house costs $500,000, and sixteen percent of that cost is city fees, the local government would collect approximately $80,000 from the sale. Id.

401 See supra note 342 and accompanying text.

402 Because inclusionary zoning restricts resale values for a number of years, the loss in annual tax revenue can become substantial. See Powell & Stringham, supra note 10, at 4 (noting that since the beginning of the ordinance's enactment in San Francisco and the Bay Area, "[t]he total present value of lost government revenue ... is upwards of $553 million").

403 See supra notes 239-345 and accompanying text.

404 See id; see also Means et al., supra note 22, at 3-4 (noting that the Lucas holding, which is a part of the Lingle

holding, raises issue with the framework, structure, and execution of current mandatory inclusionary zoning programs).

405 Density bonuses are truly limited by the feasible amount of units that can be added to a project; thus, by not instituting, or requiring institution of, this type of offset, affordable inventory is not limited by space and area restrictions. See supra notes 317-338 and accompanying text. A program that allows for a density bonus in return for affordable units cannot create affordable housing beyond what the building site allows for. Therefore, a density bonus beyond a certain amount is worthless. See Powell & Stringham, supra note 326, at 485-86. By not needing a density bonus to off-set the losses on affordable housing units, a program can potentially constitute a very high percentage of affordable housing. Id.

406 See Powell & Stringham, supra note 326, at 486.

407 See Emrath, supra note 301 (noting that the volatility of demand contributes to a hyper-volatility in price). Building costs are not directly related to the volatility of housing demands. Although the list below is tailored to highway construction, many of the factors below are relevant in housing construction costs:

[1.] Localized material shortages for specific construction products,

[2.] Consolidation in the ... industry (number of prime contractors, ownership of quarries, etc.),

[3.] Larger ... construction programs with the same number of contractors,

[4.] Increased construction market opportunities in other areas ...,

[5.] Downsizing of workforce due to instability of [the market] ...,

[6.] Spot shortages of skilled labor,

[7.] Regulatory restrictions ...,

[8.] Increased technical requirements in contracts, [and]

[9.] Bankruptcies ....

U.S. Dep't of Transp., Highway Construction Cost Increases and Competition Issues, http://www.fhwa.dot.gov/programadmin/contracts/price.cfm (last visited Nov. 20, 2009).

408 A great danger is the allowance of unqualified candidates getting the units, but many municipalities have strict qualification guidelines written into their affordable housing program. See L.A. Hous. Dep't, Commonly Asked Questions About Affordable Housing 1-2 (2007), available at http://lahd.lacity.org/lahdinternet/Portals/0/Policy/affhsgrosterQA.pdf (describing who is qualified for affordable housing in the City of Los Angeles).

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409 See supra notes 295-307 and accompanying text.

410 See supra notes 317-38 and accompanying text.

411 See supra notes 335-38; supra notes 368-77 and accompanying text (noting that NIMBY issues can cause not only negative publicity for the project, but also price increases from project delays).

412 Currently, many municipalities must offer alternatives for their mandatory inclusionary zoning program to work. See supra notes 346-76 and accompanying text. Some cities have found that alternatives are necessary for their inclusionary zoning program to function. See Cent. City Ass'n of L.A., Alternative to Inclusionary Zoning Plan: "Housing for All: Fair Share Program", CCA Focus, 3d Quarter 2004, available at http://www.ccala.org/downloads/1_03_ newsletter/Q3_2004_CCA_Focus.pdf.

413 The author used California in this illustration because it is the largest state and has the most inclusionary zoning programs, thus providing the author with the widest collection of possible empirical data. See Means et al., supra note 22, at 8.

414 See U.S. Census Bureau, Income, http:// www.census.gov/hhes/www/income/4person.html (last visited Nov. 20, 2009).

415 See National Association of REALTORS, Median Sales Price of Existing Single-Family Homes for Metropolitan Areas (2008), available at http:// www.realtor.org/wps/wcm/connect/c5200d804bf84ae9beb7befda086cc0a/REL08Q3T.pdf? MOD=AJPERES&CACHEID=c5200d804bf84ae9beb7befda086cc0a.

416 This percentage of income is likely overvalued since the median price in California, based on an average of median prices in California's seven largest metropolitan areas, dropped from $613,000 in the third quarter of 2007 to $427,271 in the third quarter of 2008. Id. This is a drop of more than thirty percent. In the illustration in the text, twenty percent was used based on the assertion that developers go into projects anticipating a return of twenty percent on their investments. See supra text accompanying note 300; Langston, supra note 300.

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417 A Public Policy Institute of California Research Brief states that in 1997, "fees imposed on new [residential] construction [we]re significant, typically falling in the range of $20,000 to $30,000 per dwelling." Pub. Policy Inst. of Cal., Development Fees and New Homes: Paying the Price in California 1 (1997), available at http://www.ppic.org/content/pubs/rb/RB_697SSRB.pdf. That same year, the average home price in California was $169,000. John Karevoll, SoCal Home Sales and Prices Surge, DQNews.com, Aug. 1997, http:// archive.dqnews.com/AA1997SCA08.shtm. This means that the percentage of fees on the sale price of the home in California is roughly sixteen percent. In the illustration above, the average fees in California, using the ratio data from 1997, are about $68,363.36.

418 This number is determined by adding a 20% profit margin of $54,690.69 on top of $273,453.44.

419 The price controls are set using different formulas so that the "inclusionary" units will be affordable to either "Very Low," "Low," or "Moderate" income households, or some combination thereof. See Affordable Housing Online, Common Questions, http:// www.affordablehousingonline.com/whatis.htm (last visited Nov. 20, 2009). "Very Low" income is most often classified as up to 50% of county median income, "low" as 50 to 80% of median, and "moderate" as 80 to 120% of median. Id.

420 U.S. Census Bureau, Income, http:// www.census.gov/hhes/www/income/4person.html (last visited Nov. 20, 2009). It is possible to determine the "low" and "very low" income levels based on the median income for California. See supra note 419.

421 Assuming that "Very Low" and "Low" income families spend 30 to 35% of their income on housing to qualify for affordable housing, these two categories can only spend between $875 and $1,341 per month on housing. Based on a simple mortgage calculator, after a $15,000 down payment, an interest rate of 5.75%, and a thirty-year loan, these two categories can qualify to buy a house ranging from $164,938.43 to $244,791.36. The median home price in California, based on an averaging of the 2008 median home prices in California's seven largest metropolitan areas, was $427,271.

422 See generally Powell & Stringham, supra note 10. The findings of some of the more aggressive inclusionary zoning programs reveal the extensive failures of these policies in their assistance of the poor. Id. The plethora of housing programs, no matter how "progressive," continues to fail the neediest.

Some states and municipalities have adopted measures to incentivize or require the construction of limited affordable housing, such as linkage fees (which require contributions from housing developers for off-site, low-income housing construction) and inclusionary zoning measures (which require developers to designate a percentage of their residential projects to low- or moderate-income housing), but these programs have been unable to satisfy demand, particularly for the lowest-income groups.

Michelle Wilde Anderson, Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe, 55 UCLA L. Rev. 1095, 1147 n.180 (2008); see also supra note 389 (noting the excessive burden that must be endured by developers

under a highly radical mandatory inclusionary zoning program).

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Column

Real Property, Probate and Trust Law
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AN ANALYSIS OF AFFORDABLE/WORK-FORCE HOUSING INITIATIVES AND THEIR LEGALITY IN THE STATE OF FLORIDA PART II

In Florida, "local governments have no ... authority to tax, other than ad valorem taxes, except as provided by general law."[1] Up until the middle of the 20th century, local governments in Florida relied almost exclusively on public revenue sources, such as ad valorem taxes, to fund capital growth. However, over the past 40 years, local governments have increasingly turned to private revenue sources by imposing impact fees and exactions on new development. "The basic theory behind ... impact fees [i]s that users of capital facilities such as sewers or roads could fairly be charged the cost of providing the additional facilities required for their use."[2] This type of cost-shifting helps local governments finance necessary infrastructure improvements without dipping into the public coffers.[3] Nevertheless, impact fees and development exactions must not violate the Florida Constitution, U.S. Constitution, or any federal legislation that binds the states.[4] Many of the early attempts in Florida to impose impact fees were challenged on the basis that such fees constituted an illegal and unconstitutional tax.[5] From those early cases evolved a test that local governments must satisfy to lawfully impose impact fees or development exactions.

The Impact Fee Rationale

The seminal case addressing the legal requirements attendant to the assessment of an impact fee is the Florida Supreme Court case of *Contractors and Builders Association of Pinellas County, et al. v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976). The *Dunedin* case involved a challenge to a City of Dunedin ordinance that required payment of a connection fee as a condition for receiving the city's water and sewer services. The city claimed that the ordinance simply raised revenue that was needed for expanding the water and sewer systems to accommodate the increased demand that each new connection would create. The plaintiff argued that the connection fees were not legitimate regulatory fees, but were taxes that the city could not lawfully impose.[6]

In *Dunedin*, the Florida Supreme Court accepted the concept that new development may be required to pay for its "fair share" of any additional regulatory costs *that it creates*, rejecting the claim that connection fees are unlawful taxes, per se. Reasoning against a windfall for existing property owners, the Florida Supreme Court cautioned, however, that the connection charges would be considered illegal taxes if they had "no relationship to and [were] greatly in excess of the costs of the regulation which [were] supposed to justify their collection." Thus, the *Dunedin* case teaches that local governments must operate within the following parameters when imposing a fee on new development:

• The money collected must be used to meet the costs of expanding the public facility.

• Only users who are benefited from the expansion should be responsible for the costs of expansion.

• To the extent fees are collected from new users, those users are not required to finance replacing public facilities, but only for the additional capacity their uses require.[7]

The *Dunedin* case involved the most common type of impact fee -- those based on the amount of public infrastructure that the new development will consume. These so-called "consumption based fees" are calculated by determining the "value of the public infrastructure consumed per unit of land use."[8] The other type of impact fee is known as an "improvement based" fee. Improvement based fees are usually based on a set of improvement projects that the local government has set forth in its long-range capital growth plans. New developments are charged their proportionate share of the costs of those projects.[9] A third approach is to require a developer to actually construct the additional infrastructure required to serve the new development.

All of these approaches share some common characteristics. In particular, the local government must always establish a level of service standard for each facet of infrastructure that it finances with impact fees, such as police, fire, transportation, wastewater treatment services, etc. This required level of service is then applied to both new and existing development. If the level of service standard is lower than current service levels, then a deficiency exists in that service, and as ruled in *Dunedin*, new development cannot be charged fees to make up for existing deficiencies. Each new development can only be charged for accommodating level of service deficiencies that are the result of that particular development.[10]

***54 The "Dual Rational Nexus" Test**

Since *Dunedin*, a two-pronged test had developed under Florida law that all local governments must satisfy to lawfully impose an impact fee or development exaction. More specifically, local governments must demonstrate 1) a rational nexus between proposed development and the need for additional capital facilities for which the fee or exaction is imposed; and 2) a rational nexus between the improvement/expenditure of funds collected or exaction and the benefits accruing to the subject property.[11] This is known as the "dual rational nexus" test.[12]

While *Dunedin* marked the critical differences between impact fees and taxes, the foundation for the rational basis test was established that same year in *Wald Corporation v. Metropolitan Dade County*, 338 So. 2d 863 (Fla. 3d DCA 1976). In *Wald*, the plaintiff challenged a condition that required the dedication of a drainage canal and drainage easement for subdivision approval. The plaintiff claimed that the requirement violated the Florida Constitution and the Due Process and Equal Protection clauses of the U.S. Constitution.[13] The Third District Court of Appeal upheld the condition upon determining that the condition was rationally related to the fact that the subject property required drainage and that adjacent properties would have been adversely impacted absent the drainage improvements.[14]

Like the U.S. Supreme Court eventually did in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Third District reached its decision by striking a balance between two divergent standards for reviewing land use exactions. The court refused to review the constitutionality of the exaction under a "merely reasonable" standard, a highly deferential standard that would have provided local governments with too much unfettered discretion. The court also refused to require the exaction to be "specifically and uniquely attributable" to the proposed development because the court believed that such scrutiny would prevent local governments from ever considering how a proposed subdivision plan affects surrounding residents.[15] Instead, relying on the same Minnesota Supreme Court case that the U.S. Supreme Court would later cite in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Florida court adopted a compromised approach, the "rational nexus" test.[16]

Subsequently, in 1983, the Fourth District Court of Appeal rendered its decision in *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th DCA 1983), and fully articulated the "dual rational nexus" test. The Fourth District stated:

... the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision [and] ... the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision.[17]

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The Florida Supreme Court ultimately adopted the "dual rational nexus" test in the 1991 decision of *St. Johns County v. Northeast Florida Builders Association, Inc.*, 583 So. 2d 635, 638 (Fla. 1991).

Application of the Dual Rational Nexus Test

Similar to the "essential nexus" requirement under *Nollan/Dolan*, the first prong of the dual rational nexus test requires an assessment of the local government's "rational basis" to require the improvements. In that regard, the local government must be able to reasonably show that the new development will create more than a possible or incidental need for increased capacity of any public facilities that serve the new development. Further, like the rough proportionality requirement, a developer must only pay fees or dedicate property that represent its pro rata share of the burden imposed on public facilities by the new development. In *Hollywood, Inc.*, the county satisfied this "needs" requirement by presenting evidence that it had to acquire and develop additional land to maintain a previously adopted level of service for parks as new residents moved into new residential developments.[18]

In contrast, the Fifth District Court of Appeal applied the dual rational nexus test in case of *Hernando County v. Budget Inns of Florida, Inc.*, 555 So. 2d 1319 (Fla. 5th DCA 1990), to strike development exaction. The county imposed a condition of approval on a proposed hotel development that required the developer to design a frontage road servicing the hotel and then to construct the road at some time in the future when the county decided it was necessary. Notably, the county conceded to the fact that "no present need for the road exist[ed]." As a result, the court found that the condition failed to satisfy the dual rational nexus test because:

for the nexus test to apply, thus making a compulsory dedication constitutionally valid, the nexus must be rational. This means it must be substantial, demonstrably clear and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specifically and contemplated immediate improvements -- not for the purpose of "banking" the land for use in a projected but unscheduled possible future use ....[19]

The second prong of the dual rational nexus test demands an assessment of whether the new development will "benefit" from the local government's use of the collected fees. The local government must demonstrate that the new development will actually receive more than an incidental benefit from the expenditure of the impact fees or dedication of property.[20]

In sum, cases such as *Hollywood, Inc., St. Johns County*, and *Dunedin* illustrate the basic contours of the "dual rational nexus" test as follows:

• The local government must be able to justify the fees or exactions by showing that the new development will create more than a possible or incidental need for increased capacity of any public facilities that serve the new development.

• The local government must demonstrate that the new development will actually receive more than an incidental benefit from the expenditure of the impact fees or dedication of property.

• The developer cannot be required to pay impact fees or dedicate property that exceed a pro rata share of the burden imposed on those public facilities.

***55** • In the case of impact fees, the fees must be earmarked to fund expansion of capital facilities that serve the area in which the new development is located.

• The impact fees must be used to provide only the additional capacity required by the new development and not any existing deficiencies.

• The impact fees must not be used to benefit other residents by financing capital growth that is bound to occur with or without the proposed development.

• The impact fees must be spent within a defined, reasonably short amount of time or returned to the payer of the fee.

• The local government's showing of a rational nexus between the proposed development and the community's need for increased capacity of public services, or between the expenditure of the impact fees and the benefit accrued to the new development, may be refuted by the developer with additional evidence or an alternate study.[21]

An Affordable Housing Tax May be Unlawful

As noted by the Florida Supreme Court, satisfaction of the dual rational nexus requirements is important because of the relationship between taxes and fees.[22] A local government that wishes to impose affordable housing fees or mandatory exactions on a new development without first establishing the dual nexus requirements must rely upon an explicit and unequivocal grant of such taxing authority from the legislature or Florida Constitution.[23] To that end, a local government will not be able to avail itself of F.S. §166.04151 or §125.01055 because those statutes merely state that local governments *may* enact inclusionary zoning ordinances, but they do not proscribe how those ordinances can operate, *i.e.*, whether they can be mandatory or voluntary. As such, the legislature has not removed all doubt as to whether local governments can impose an affordable housing tax on new development.[24] The most logical conclusion that can be drawn from F.S. § §166.04151 and 125.01055 is that while local governments have ***56** no authority to levy affordable housing taxes, they may adopt an affordable housing law, rule, ordinance, or other measure provided that any such measure satisfies the "dual rational nexus" test.

However, the authors submit that a mandatory affordable housing impact fee or exaction program would have a difficult time surviving the scrutiny employed by the "dual rational nexus" test. The imposition of such a program would necessarily raise several problematic questions. For instance, how could an affordable impact fee be tailored to benefit solely the developer or the new residents of the project? Moreover, given that the affordable housing problem already exists, is it legal (let alone equitable) to require the developer, and ultimately the prospective purchaser of other-market rate housing in the development to pay to address an existing problem? Pondering such questions only leads to other, perhaps more difficult questions. The task of adopting a level of service for affordable housing is not as easy as measuring the amount of potable water required to service new development. The capacity to provide traditional municipal services is almost always controllable by either the local government or a utility. By contrast, the availability of housing depends in large measure on individual property owners and the price they are willing to sell their properties, an item generally outside of direct government control. Therefore, how does a local government measure its need for affordable housing?

Significantly, the Florida Supreme Court has held that a countywide need for infrastructure improvements cannot serve as the basis for an impact fee or exaction. In *Volusia County*, the Florida Supreme Court explained that a countywide standard would amount to an unlawful tax because:

there is no requirement that taxes provide any specific benefit to the property; instead they may be levied throughout the particular taxing unit for the general benefit of residents and property. Fees, by contrast, must confer a special benefit on feepayers in a manner not shared by those not paying the fee.[25]

Thus, in *Volusia County*, the court held that an otherwise valid school impact fee could not be applied to dwelling units that were governed by a deed restriction that explicitly prohibited school age children from residing in them. It simply did not matter that the county needed new schools if the new development at issue was neither responsible for contributing to that need nor would not have benefited from the expenditure of funds to address that need.[26]

Moreover, even if a local government is convinced that sound public policy calls for the implementation of an affordable housing impact fee, it may not sidestep the "dual rational nexus" requirements. In Collier County v. State, 733 So. 2d 1012 (Fla. 1999), Collier County had imposed an "interim governmental services fee" because it believed that the then-current ad valorem scheme unfairly created a windfall for property owners of recently improved property. According to the county, owners of improved property did not always pay their fair share of county services because of the lag time between the improvement and updated property appraisals.[27] The fee was meant to correct the inequities in the system, but the court determined it constituted a tax because it did not meet the dual nexus requirements.[28] The Florida Supreme Court instructed that "[i]f there is a windfall created by the current statutory scheme, ..., the [c]ounty's redress lies with the [l]egislature."[29]

Conclusion

For the reasons set forth above, mandatory inclusionary zoning programs will face considerable judicial scrutiny and raise a panoply of questions that most local governments are not prepared to answer. The authors submit that mandatory programs have been proposed and in some instances adopted because they are both politically expedient and provide an easy answer. The affordable housing crises didn't appear overnight, and will not be solved overnight. The authors submit that local governments should consider making such programs voluntary. To ensure voluntary programs achieve the same result as mandatory programs, local governments must strive to eliminate doubt as to the availability of their incentives through clearly drafted land development regulations duly adopted after consultation with the development community and the public. As one of the early fathers of land-use law, Richard Babcock, noted years ago, "[w]hat is required from all participants, laymen, planners, lawyers, and judges is an effort to turn zoning from the petty parochial device it now is to a viable tool of land-use policy." Through coordinated efforts, the authors submit that voluntary programs premised on respect between the public, development community, and local governments has the potential to yield far better results than legally questionable mandatory programs.

Footnotes

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1 *Collier Cty. v. State*, 733 So. 2d 1012, 1014 (Fla. 1999); *Broward County v. Janus Development Corporation, et al.*, 311 So. 2d 371 (Fla. 4th D.C.A. 1975).

2 William M. Merrill & Robert K. Lincoln, *The Missing Link: Legal Issues and Implementation Strategies for Affordable Housing Linkage Fees and Fair Share Regulations*, 22 STET. L. REV. 469, 474 (1993).

3 Impact fees are simply a nontaxation source of revenue paid by those persons who are responsible for additional capital expenditures. James Nicolas, *et al., Impact Fees in Florida: Their Evolution, Methodology, Current Issues and Comparisons with Other States* 2-4 (Sept. 2005) (unpublished manuscript on file with the Florida Impact Fee Review Task Force, Florida Committee on Intergovernmental Relations).

4 *Hollywood, Inc. v. Broward County*, 431 So. 2d 606, 609 (Fla. 4th D.C.A. 1983).

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5 *Contractors and Builders Association of Pinellas County, et al. v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976).

6 *Id.* at 315-16.

7 *Id.* at 321-22. *See also Janus*, 311 So. 2d at 374-75 (ruling that an ordinance imposing an impact fee to be used for building roads, streets, highways, and bridges was "simply an exaction of money" when there are no provisions in the ordinance that specified where or when, if ever, the government would spend the money collected). In *Home Builders & Contractors Association of Palm Beach County v. Board of County Commissioners of Palm Beach County, et al.*, 446 So. 2d 140 (Fla. 4th D.C.A. 1984), the Fourth District Court of Appeal upheld a county ordinance that imposed an impact fee for new roads.

8 Nicolas, *Impact Fees in Florida: Their Evolution, Methodology, Current Issues and Comparisons with Other States* at 7 (Sept. 2005).

9 *Id.* at 8-9.

10 *Id.* at 10.

11 *Hollywood, Inc. v. Broward County*, 431 So. 2d 606, 611 (Fla. 4th D.C.A. 1983).

12 In addition to the dual rational nexus test, all locally adopted impact fee ordinances must comply with the requirements of the "Florida Impact Fee Act," which was created by the Florida Legislature during the 2006 session. The Florida Impact Fee Act is intended to ensure that local governments assume a certain level of accountability given the "growth of impact fee collections and local governments' reliance on impact fees." FLA. STAT. §163.31801(2) (2006). To that end, the Florida Impact Fee Act requires that impact fee ordinances must, at a minimum: "(a) Require that the calculation of the impact fee be based on the most recent and localized data. (b) Provide for an accounting and reporting of impact fee collections and expenditures ... [and] account for the revenues and expenditures of such impact fee in a separate accounting fund. (c) Limit administrative charges for the collection of impact fees to actual costs. (d) Require that notice be provided no less than 90 days before the effective date of an ordinance or resolution imposing a new or amended impact fee." FLA. STAT. §163.31801(3)(a)-(d).

13 *Wald*, 338 So. 2d 863, 864 (Fla. 3d D.C.A. 1976).

14 *Id.* at 868.

15 *Id.* at 867.

16 *Id.* at 868 (citing *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 448 (1966)).

17 *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th D.C.A. 1983).

18 *Id.*

19 *Hernando County v. Budget Inns of Florida, Inc.*, 555 So. 2d 1319 (Fla. 5th D.C.A. 1990). ***But see*** *St. Johns County*, 583 So. 2d at 638 (ruling that school impact fees would be valid even if the additional capacity in public schools may or may not be used in the immediate future because "[d]uring the useful life of the dwelling unit, school-aged children may come and go.").

20 *Hollywood*, 431 So. 2d 606 (Fla. 4th D.C.A. 1983).

21 *See* Nicolas, *Impact Fees in Florida: Their Evolution, Methodology, Current Issues and Comparisons with Other States* at 15 (Sept. 2005).

22 *Volusia County v. Aberdeen at Ormand Beach, LP*, 760 So. 2d 126, 135 (Fla. 2000).

23 For example, municipalities have been granted the statutory authority to levy public service taxes on "the purchase of electricity, metered natural gas, liquified petroleum gas ..., manufactured gas ..., and water service." FLA. STAT. §166.231(1)(a) (2005). Certain counties have been granted the authority to levy tourist development taxes and convention development taxes. FLA. STAT. §§125.0104, 212.0305 (2005).

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[24] *See State v. City of Port Orange*, 650 So. 2d 1, 3 (Fla. 1995).

[25] *Volusia County*, 760 So. 2d at 135 (internal citations and quotations omitted).

[26] *Id.*

[27] *Collier County*, 733 So. 2d 1012 (Fla. 1999).

[28] *Id.* at 1015-1018.

[29] *Id.* at 1019.

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Column

Real Property, Probate and Trust Law
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AN ANALYSIS OF AFFORDABLE/WORK-FORCE HOUSING INITIATIVES AND THEIR LEGALITY IN THE STATE OF FLORIDA, PART I

Despite the nationwide slowdown in the housing market and the 2007 property tax package adopted by the Florida Legislature, many communities in Florida are still struggling to foster the development of affordable housing. In some areas, housing prices have become so high that many local governments have changed the vernacular from striving to provide "affordable housing" to providing "work-force housing."[1] The difference in terms reflects a change in priorities from assisting the poor to ensuring that low- to middle-income workers (*e.g.*, police officers, teachers, paramedics) are able to live in the same communities that they serve.

There are a host of reasons that could be cited for the current disparity between average housing prices and average household incomes. Culprits for the so-called "affordability gap" include high land costs, exclusionary design and zoning regulations, high development and construction costs, lack of buildable land, tourism, and government impact fees. While a complete discussion of these factors and their effects on the housing market is beyond the scope of this article, the authors concede that a range of initiatives to encourage both affordable and workforce housing is necessary. Nevertheless, despite the panoply of reasons for the affordable housing dilemma, many local governments have limited their responses to the imposition of mandatory affordable housing requirements as a condition of granting development approvals. Developers are often forced either to pay into an affordable housing fund or set aside a certain number of newly constructed dwelling units to be utilized as affordable housing. These mandatory measures — generally referred to as "inclusionary zoning" — have significant legal constraints not often considered at the time they are adopted. In this article, the authors will provide an analysis of the current state of Florida and federal law regarding impact fees and development exactions as they relate to mandatory inclusionary zoning initiatives.

Planning and Zoning as a Way to Encourage Affordable Housing

Government interest in affordable housing is not a new phenomenon. Beginning with the United States Housing Act of 1937 and continuing today with programs such as the Low-Income Housing Tax Credit, governments at all levels have sponsored a variety of programs designed to either increase the supply of affordable housing units or assist individuals in locating and meeting the demand of paying for suitable housing they could not otherwise afford. Over the same duration, however, local governments have established and enforced zoning policies and land use regulations to effectively prevent the construction of affordable housing. Referred to as "exclusionary zoning," these development regulations include mechanisms that often limit residential development to single-family homes at low overall residential densities with little to no opportunity for the

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development of a variety of housing types that are affordable to low- to middle-income residents. These local regulatory regimes have "work[ed] indirectly by shaping local housing markets, encouraging or prohibiting the construction of certain types of housing, and thereby conditioning the tenure (rent versus own) and price of housing."[2]

In 1975, the New Jersey Supreme Court set out to reverse the exclusionary aspects of local land use controls by requiring local governments in that state to provide meaningful opportunities for affordable housing through their zoning regulations. In *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. 1975) (*Mt. Laurel I*), the New Jersey Supreme Court held that:

[T]he presumptive obligation arises for each municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires, and resources of all categories of people who may desire to live within its boundaries.[3]

In the wake of the *Mt. Laurel* decision, the New Jersey Legislature enacted the state's Fair Housing Act, which codified the requirement that affordable housing must be considered and ensured in the context of local land development regulations.

***80** By comparison, the Florida Legislature has enacted the Growth Management Act, which is codified in F.S. Ch. 163, Part II. The cornerstone of the Growth Management Act is the requirement that Florida counties and municipalities must adopt comprehensive plans that operate as a blueprint for future growth in the community. These comprehensive plans are required to take into account housing supply and affordability. Moreover, the Growth Management Act further requires that local government land development regulations must be consistent with and implement the adopted comprehensive plan.

Despite its laudable intentions, the authors submit that comprehensive planning has resulted in more aspirational goal-setting as opposed to realistic planning. Specifically, the goals, policies, and objectives of local plans have often gone unrealized or been less than fully implemented. The classic example of this paradigm is the community that expresses a desire for affordable housing; establishes maximum residential densities in the comprehensive plan consistent with achieving the goal; but then promulgates development regulations that cap permissible development at a density far less than the density envisioned by the comprehensive plan.

The authors also recognize that the restrictive nature of land development regulations is not the sole cause of the affordable housing crisis. Opponents to intensive residential development could make a persuasive argument that unbridled residential development could result in land speculation, over-inflated pricing, and give rise to a luxury housing market intended to capitalize on residents who live in Florida on a seasonal basis. There are simply no guarantees that merely opening the floodgates to more residential development would necessarily result in more affordable housing for the community. Look no further than Florida's current housing market as proof: a market with an overabundance of housing units, but one in which the affordability problem persists nonetheless.

• *Heightened Sensitivity to the Regulation of Identity of Users Rather Than the Physical Attributes of the Development*

The failure of effective land use planning has compelled some local governments to incorporate inclusionary zoning measures in their land development regulations.[4] Other local governments have opted to wait for the dust to settle on at least one ongoing challenge against the City of Tallahassee's recently adopted inclusionary zoning ordinance. Whether a local government can require developers to build a certain number of units, or pay a fee for affordable housing through inclusionary zoning, depends on whether the state delegated such authority in an enabling act or in other legislative measures.

Historically, courts have examined whether local government authority to review development proposals is confined to a review of the geometric or physical elements of a development proposal (*e.g.*, the type of land use, lot size, setbacks, building height, floor area ratio) and not the economic characteristics of the prospective owners or users of the development. For example, in *Fox v. The Town of Bay Harbor Islands*, 450 So. 2d 559 (Fla. 3d DCA 1984), the Third District Court of Appeal held that an ordinance requiring the bottom floor of an apartment building to be utilized solely by a building superintendent was arbitrary and invalid. Writing for the court, Judge Pierson explained the court's heightened sensitivity to land development regulations geared toward the identity of the user rather than the physical characteristics or actual use of the structure:

The generally accepted justifications for a reasonable setback requirement are that it secures adequate air and light, promotes safety from fire and other dangers, prevents overcrowding of land...and enhances aesthetic values.... *Particularly pertinent here is the principle that zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users*. Consistent with that principle, courts have struck down ordinances which limited the occupancy of a dwelling unit to a narrowly defined family on the ground, among others, that such ordinances have, at most, a tenuous relation to the city's legitimate goal of preventing overcrowding, defraying traffic problems, and avoiding an overload in the school system.... It is clear to us that in the ordinance under consideration the identity of the person who occupies the ground floor apartment has not the slightest bearing upon the health, safety, morals or welfare of the public at large....[5]

• *State Policy on Authorization of Inclusionary Zoning*

Legislative authorization for inclusionary zoning measures differs from state to state.[6] In Florida, the state legislature has authorized cities and counties to adopt inclusionary zoning measures in their land development codes. In 2001, the Florida Legislature enacted legislation stating that municipalities and counties "may adopt and maintain in effect any law, ordinance, rule, or other measure that is adopted for the purpose of increasing the supply of affordable housing using land use mechanisms such as inclusionary housing ordinances."[7]

Under the foregoing legislative framework, local governments in Florida may examine a number of affordable housing strategies.[8] As suggested by the legislature, a local government may attempt to establish an inclusionary zoning program. The local government must decide, however, whether the program should be made voluntary or mandatory.

Under a voluntary program, a local government would encourage affordable housing by offering various incentives to the developer in exchange for either providing affordable housing as part of the new development or paying a fee in lieu of providing any inclusionary units. Incentives could include any combination of density bonuses, impact fee waivers, expedited permitting, or more flexible development standards (*e.g.*, less strenuous setback requirements).

Under a more aggressive mandatory program, local governments would require new development either to set aside a specified number of residential units to be sold as affordable housing units, or pay a fee in lieu of providing units. Mandatory programs sometimes provide a density bonus to the developer, and, in some instances, the developer may be allowed to provide offsite inclusionary units. A local government could also decide simply to impose mandatory linkage fees on all new development instead of allowing the option to provide inclusionary units and then use the revenues raised to construct affordable units on its own. In any event, a mandatory program leaves the developer with no choice as ***81** to whether an affordable housing element will be part of the project.

The common theme with either strategy is that each one is designed to provide affordable housing with limited governmental resources, primarily because the cost burden is borne by the developer, and ultimately passed on to the buyers of the units sold at market rate.[9] The task for the local government is to ensure that the chosen strategy is lawfully implemented. Therefore, local governments must understand the nature of that task in order to determine which strategy to pursue.

The Scope of Local Government Authority to Impose Mandatory Inclusionary Zoning Measures

No Florida court has squarely addressed the issue of how local governments can lawfully increase the supply of affordable units and bridge the "affordability gap" through land use controls. Florida courts have shown sensitivity, however, to developers when local governments have attempted to arbitrarily hoist the responsibility of providing affordable housing on individual developers. In the often-quoted case of *Debes v. City of Key West*, 690 So. 2d 700 (Fla. 3d DCA 1997), Judge Schwartz of the Third District Court of Appeal stated:

The claim that the city's action may be justified as promoting the creation of adequate housing is, if anything, even more obviously deficient. While this aim may represent a desirable public policy — which might support, for example, the condemnation of property for that use... *it emphatically may not be promoted on the back of a private landowner by depriving him of the constitutionally protected use of his property*.[10]

The authors note that *Debes* involved a challenge to the City of Key West's decision to deny an application to rezone a parcel

of property from residential to commercial. The city, in pertinent part, attempted to justify its denial on the basis of preserving affordable housing in the city without providing any nexus between the denial and the need for affordable housing.[11] Further, *Debes* did not involve an inclusionary zoning ordinance. Nevertheless, the court's pronouncements in *Debes*, coupled with numerous Florida and federal cases pertaining to the law of exactions and impact fees, provide a compelling indication that inclusionary zoning ordinances requiring mandatory set-asides or fees in lieu thereof will be highly problematic and subject to considerable judicial scrutiny.

• *Inclusionary Zoning Under a Taking Analysis*

Since its landmark decision in *Village of Euclid v. Ambler Realty, Co.*, 272 U.S. 365 (1926), the U. S. Supreme Court has repeatedly held that state and local governments have the authority to adopt land use regulations pursuant to the police power. The U.S. Supreme Court has also indicated, however, that there are instances in which land use regulations may violate the Takings Clause of the Fifth Amendment of the U.S. Constitution.

The U.S. Supreme Court has identified five forms of governmental action that may be unconstitutional under the Takings Clause of the Fifth Amendment. These are 1) direct governmental seizures of private property; 2) permanent physical invasions of private property as described in *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982); 3) regulations that completely deprive a private landowner of any economic value in property, like the regulation at issue in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); 4) regulations that fail to satisfy the factors set forth in *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978); and 5) takings that result from development exactions imposed on landowners as a condition of development approvals, such as those described in *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).[12] The first two categories are considered takings per se and require just compensation to the landowner "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[13] The third and fourth categories are generally referred to as "regulatory takings," and they occur when the government over-regulates or limits the use of private property while not physically intruding upon it.[14] The fifth category is the most amorphous in that development exactions "share certain features of each form of taking [per se and regulatory], but like any offspring, struggle to fashion their own identity."[15]

Development exactions in the form of land dedications "resemble physical takings in the sense that they typically require the permanent surrender of private property for public use."[16] On the other hand, mandatory fees in lieu of dedications, connections charges, and impact fees are more closely related to regulatory takings.[17] Of course, virtually all inclusionary zoning ordinances incorporate both mandatory set-asides and fees-in-lieu thereof. Therefore, the authors submit that inclusionary zoning ordinances properly fall within the development exactions category and are subject to the *Nollan/Dolan* analysis.

• *The* Nollan/Dolan *Analysis*

In *Nollan*, the U.S. Supreme Court articulated a "means-ends" standard for reviewing land development exactions under the Takings Clause of the Fifth Amendment of the U. S. Constitution. The property owners in *Nollan* sought a permit to replace their small beachfront bungalow with a new, larger home.[18] The California Coastal Commission agreed to grant the building permit, but only if the owners dedicated an easement on the beach that traversed their property. The easement would have been located between the high water line and a seawall that ran along the rear property line. The commission justified the exaction on the basis that the new home would block public view of the beach and further contribute to a "psychological barrier" to the public beach when placed next to other homes along the shore.[19]

The U.S. Supreme Court began its analysis by establishing that an unconstitutional taking of property would have occurred if the commission had just outright demanded an uncompensated easement along the beach. The issue, however, was whether the commission could constitutionally demand that same uncompensated easement as a condition of approval for a development permit. In that regard, the Supreme Court reiterated the concept that "a land use regulation does not effect a taking if it substantially advances a legitimate state interest and does not deny an owner economically viable use of this land."[20]

***82** In other words, a land use restriction must, at the very least, substantially advance a legitimate state interest.[21] Then,

without deciding whether public views and minimizing psychological barriers to the beach were substantial governmental purposes, the U.S. Supreme Court found that the required easement did nothing to advance those objectives.[22] By failing to advance a legitimate state interest, the uncompensated exaction was deemed unconstitutional.

The commission argued that the easement would have served the public interest because it was part of a "comprehensive program" to provide continuous public access along the beach. In response, the U.S. Supreme Court said it:

may well be right that [the comprehensive program] is a good idea, but that does not establish that the Nollans alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose"; but if it wants an easement across the Nollans' property, it must pay for it.[23]

Seven years later, the U.S. Supreme Court explained that the permit conditions in *Nollan* may have been valid if the commission had simply imposed limitations on building width or height, or required the provision of a "viewing spot" along the property perpendicular to the beach. The commission's regulatory authority was "set completely adrift from its constitutional moorings," because there was absolutely no connection, or "essential nexus," between the easement and visual access to the beach.[24] Because no nexus was found, the U.S. Supreme Court had no reason to decide the degree to which any such nexus should exist. That question was answered in *Dolan*.

In *Dolan*, a property owner applied for a permit to redevelop land on which her plumbing and electric supply store was located. The property owner wanted to construct a larger store and a paved parking lot. The city commission granted approval of the project, but imposed a condition that the owner had to dedicate a portion of her land that was within the 100-year floodplain to be used as an open greenway and another portion of her land for a public pedestrian/bicycle path.[25] The property owner argued that the conditions had no relation to her proposed redevelopment and, thus, constituted an unconstitutional taking of property.[26]

The U.S. Supreme Court found an essential nexus between the exactions and the justifications advanced by the city in *Dolan*. More specifically, the city's interest in preventing flooding in the area of the proposed redevelopment was related to the need for an open greenway given that the redevelopment would contribute to increased storm-water runoff. Further, the proposed redevelopment featured a larger store than what previously existed onsite, which in turn, would result in 435 additional vehicle trips to the property. The city wanted to mitigate any congestion caused by higher traffic and the pedestrian/bicycle pathway was related to that objective because it facilitated alternative means of transportation.[27]

The U.S. Supreme Court then addressed the issue of whether the nexus was "constitutionally sufficient to justify the conditions imposed by the city."[28] Citing the Wisconsin Supreme Court's decision in *Jordan v. Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965), the U.S. Supreme Court ruled that "the dedication should have some reasonable relationship to the needs created by the [development]."[29] In doing so, the U.S. Supreme Court established an intermediate standard of review to be used in development exaction cases. To avoid confusing this standard with the more deferential rational basis test used in equal protection cases, the U.S. Supreme Court avoided the phrase "rational nexus," but clarified that:

the term "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the [c]ity must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.[30]

The exactions in *Dolan* were unconstitutional because they were not "roughly proportionate" to the impacts created by the proposed redevelopment. The U.S. Supreme Court acknowledged that an open greenway would help alleviate flooding by keeping the floodplain open, but the exaction was not proportionate because the city did not simply require that the space be left open. The city demanded that the land be handed over as *public* space, although it never showed why a public greenway instead of a private greenway was required for flood control.[31]

The U.S. Supreme Court also accepted the city's argument that the proposed store would increase traffic in the area. However, the dedication of the pedestrian/bicycle pathway did not reasonably relate to that increase. The city merely stated that the pathway "could offset some of the traffic demand ... [which] is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand."[32]

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In the final analysis, *Nollan* and *Dolan* require that a local government must do more than assert mere conclusory statements when imposing conditions upon new development. The local government must take affirmative steps to quantify its findings that justify the imposition of exactions, regardless of how commendable the government's motives may be. The U.S. Supreme Court concluded the *Dolan* decision by explaining that "[a] strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[33]

Local governments should take heed of the analysis set forth in *Nollan* and *Dolan* and duly consider how or whether new development actually affects the supply of affordable housing. It is one thing to assert that new development gives rise to housing needs because it generates employment opportunities. It also may be easy to accept that these new jobs offer low to median wages. It is another thing altogether, however, to maintain that new development actually makes the housing needed by those employees to be prohibitively expensive. Thus, even if a local government performs the rigorous analysis of linking the construction of new residential, commercial, or industrial space to an increased demand for housing for low-to median-wage workers, a mandatory program that does not justly compensate new development will likely fail to meet the threshold nexus requirement described by the U.S. Supreme Court in *Nollan* for one very important reason: it is virtually impossible to demonstrate ***83** that new residential or nonresidential development in and of itself *causes housing to be unaffordable*.

In *Nollan*, the U.S. Supreme Court assumed that the California Coastal Commission's reasons for requiring the easement at issue in that case (visual access and overcoming psychological barriers to the beach) were legitimate state interests; however, that fact did not dispose of the issue of whether the exaction was permissible.[34] Likewise, the fact that affordable housing is needed within the community because a median-income household cannot obtain an average-priced home cannot, on its own, be the foundation upon which mandatory exactions on new development are based.[35] In discussing the required nexus between development exactions and legitimate state interests, the U.S. Supreme Court revealed in *Nollan* that exactions must serve those interests in the same manner that a prohibition on new development would serve it.[36] The U.S. Supreme Court explained in *Nollan* that "the [c]ommission unquestionably would be able to deny the Nollans their permit outright if their new house ... would substantially impede these [legitimate state] interests, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking."[37]

The California Coastal Commission took this statement to mean that anything less than a prohibition (*i.e.*, imposing a condition to a development permit) must also fall with its police power if the police power may be construed so broadly. The U.S. Supreme Court agreed, but only to the extent *the condition and the prohibition would accomplish the same legitimate purpose*. However, "[T]he evident constitutional propriety disappears ... *if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition*."[38]

The U.S. Supreme Court further explained that:

the lack of nexus *between the condition and the original purpose of the building restriction* coverts that purpose to something other than what it was.... In short, *unless the permit condition serves the same governmental purpose as the development ban*, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."[39]

Thus, under *Nollan*, it must be shown that a development condition is an adequate substitution for a prohibition on development.

Based on *Nollan*, if the legitimate state interest behind mandatory affordable housing fees or exactions is the desire to increase the supply of affordable housing units, the underlying truth must be that a moratorium on new development would also achieve that purpose. Any local government measure that imposes affordable housing mandates will survive a challenge brought under *Nollan* only if the local government demonstrates that a moratorium would also serve the affordable housing shortage. The authors respectfully submit that a moratorium on new development will not necessarily serve the affordability crisis and it will be the local government's task to prove otherwise. Indeed, to the extent that the legitimate state interest is simply to increase the supply of affordable units, then a moratorium would certainly not advance that interest because no new units would be constructed in the community. As such, the housing crisis cannot be blamed on new development (because even in the absence of it, the affordability problems will likely persist, if not worsen), and as a matter of well-established law, new development cannot be burdened with a problem that is not of its creation. In sum, the local government has to make

some kind of factual showing that new development is causing the inability for people to find housing that is affordable.[40]

• *The Level of Constitutional Scrutiny May Depend on the Manner by Which Inclusionary Zoning is Applied*

As previously stated, the manner by which a mandatory inclusionary zoning ordinance is attacked may depend on how it is applied. Most local governments will likely defend an inclusionary zoning ordinance on the grounds that it is a legislative act and, therefore, entitled to greater judicial deference than adjudicatory decisions. Generally speaking, land use ordinances are considered constitutional unless they are "clearly arbitrary and unreasonable" and "bear no substantial relation to the public health, safety, morals, or general welfare."[41] By focusing on the fact that inclusionary zoning ordinances are legislatively imposed, while development exactions are typically imposed as a condition of approval in an adjudicatory or quasi-adjudicatory proceeding, a local government may argue that the "rough proportionality" standard does not apply. Moreover, by characterizing an inclusionary zoning ordinance as a generally applicable zoning regulation, the landowner will shoulder the initial burden of proving that the ordinance is unconstitutional, whereas the government must make the threshold showing of rough proportionality under the *Nollan/Dolan* analysis. That is exactly what happened in the California case of *Home Builders Association of Northern California v. City of Napa*, 108 Cal. Rptr. 2d 60 (2001).

In *Napa*, the California Appellate Court upheld an inclusionary zoning ordinance that required, in pertinent part, that residential developers[42] had to chose between 1) developing 10 percent of their units for affordable housing; 2) submitting an alternative equivalent proposal such as the dedication of land, or the construction of affordable housing units on the other site if the proposed alternative results in affordable housing opportunities equal to or greater than those created by the 10 percent requirement; 3) paying a fee into a housing trust fund; or 4) appealing for an adjustment or waiver of the requirement if the required dedication lacked a reasonable relationship or nexus between the impact of the development and the inclusionary requirement.[43] In exchange, the ordinance offered development incentives, loans, and expedited processing of development applications. A consortium of builders challenged the ordinance arguing, inter alia, that the ordinance constituted an unconstitutional taking on its face and violated the due process clause of the federal and state constitutions.[44]

The California court upheld the ordinance against the facial challenge because it gave developers the right to request a waiver of the inclusionary requirements. In that regard, the court stated, "Since the [c]ity has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a ***84** taking."[45]

Napa rejected the developers' claim that the waiver provision improperly placed the burden upon them to show a waiver would be appropriate. Relying on *Dolan, Napa* ruled that the party challenging a generally applicable zoning regulation has the burden of showing there could be no constitutional application.[46]

Napa also ruled that the ordinance satisfied the takings analysis described in *Agins v. City of Tiburon*, 477 U.S. 255 (1980), because it did not fail to substantially advance the legitimate state interest of producing affordable housing units. On that point, the developers contended that the *Napa* ordinance should not be afforded the deference given to traditional zoning ordinances, but rather, scrutinized under the intermediate level of review established in *Nollan* and *Dolan* that applies to development exactions.[47] *Napa* disagreed, stating that the:

[i]ntermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address ... land use bargains between property owners and regulatory bodies.... But a different standard applies to development fees that are generally applicable through legislative action because the heightened risk of extortionate use of the police power to exact unconstitutional conditions is not present.[48]

Finally, *Napa* concluded that the City of Napa could enforce the inclusionary zoning measures despite that its past zoning policies may have contributed to the housing shortage.[49]

Whether *Napa* will influence Florida courts is an open question. The authors note, however, that *Napa* should not serve as a bell-weather for an ultimate constitutional determination regarding inclusionary zoning ordinances. First, *Napa* held that the ordinance could not be facially unconstitutional by virtue of the waiver provision. Specifically, the court could envision circumstances in which the city waived the requirement, thereby saving the ordinance from constitutional infirmity. By contrast, in the context of facial challenges to ordinances, Florida courts have permitted certain facial challenges to be heard without requiring the aggrieved party to first appear before an administrative body.[50]

Depending on its text, a waiver provision itself may run afoul of Florida law prohibiting arbitrary decisionmaking and lack of meaningful standards. Put simply, in the context of quasi-judicial proceedings, Florida courts may reject a local government's ability to selectively waive a requirement in their code. As Judge Fletcher noted in his concurring opinion in *Miami-Dade County v. Brennan, Miami-Dade County v. Brennan,* 802 So. 2d 1153 (Fla. 3d DCA 2001), the failure to afford definitive standards:

places the quasi-judicial zoning boards in a position where they are able to amend the zoning regulations within the various categories...on specific application so as to create non-uniform requirements for properties within the same zoning category. Obviously amending the zoning regulations themselves is a legislative function which cannot be delegated to a quasi-judicial board....[51]

Moreover, *Napa* refused to review the ordinance under the *Nollan/Dolan* analysis given that the inclusionary zoning ordinance was of general applicability rather than a development exaction imposed as a condition of approval designed to offset the impacts caused by a specifically proposed plan of development. However, the "legislative/adjudicatory" dichotomy is not as clear cut as the California court suggests in *Napa*. The court essentially reasoned that the ordinance was a legislative function of the city and, therefore, subject to a lesser standard of review. However, the authors note that most land use decisions cannot be placed neatly in either the legislative or adjudicative camps, and "courts and scholars are unanimous in their assessment that the scope of the *Nollan/Dolan* analysis is unsettled."[52]

In *B.A.M. Development v. Salt Lake County,* 128 P.3d 1161 (Utah 2006), the Utah Supreme Court was presented with the question of whether a county ordinance that required developers to dedicate land as a condition of subdivision approval should be reviewed under the *Nollan/Dolan* test. The government argued that rough proportionality did not apply given that the ordinance was one of general applicability. Ultimately, the Utah Supreme Court did not have to answer the question presented because it found that the Utah Legislature had codified the *Nollan/Dolan* analysis in a statute that set forth the basis for development exactions in that state.[53] Therefore, rough proportionality applied, not because the court resolved the legislative/adjudicatory debate, but because the legislature had already said so. As in Utah, the heightened level of scrutiny established in *Nollan* and *Dolan* is essentially the same level of scrutiny that Florida law demands of both impact fee ordinances passed legislatively and development exactions made in exchange for a specific development approval.

Note: In Part II, the authors analyze the law of impact fees and development exactions in Florida, drawing parallels with the *Nollan/Dolan* analysis, and then discuss how Florida courts should review the legality of inclusionary zoning initiatives before providing their conclusions.

Footnotes

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William P. Sklar and Richard R. Gans, editors.

1 For example, in Palm Beach County, the term "work-force housing" refers to housing that is affordable to households earning up to 120 percent of the median household income in a particular community. In Palm Beach County, a household must earn an annual salary of at least $130,000 to qualify for a median-priced house, which currently sells for more than $400,000. Linda Rawls, *Palm Beach County Home Sales Bust the Boom*, PALM BEACH POST, July 26, 2006. The median household income in Palm Beach County is not $130,000 or even $100,000. Most households earn far less than that amount. In fact, 120 percent of the median household income in Palm Beach County is only about $70,000. Hector Florin, *Survey: Affordable Housing Dwindles in Palm Beach County*, PALM BEACH POST, July 6, 2006.

2 Bruce Katz, Margery A. Turner, Karen D. Brown, Mary Cunningham, and Noah Sawyer, *Rethinking Local Affordable Housing Strategies: Lessons From 70 Years of Policy and Practice*, The Brookings Institution Center on Urban and Metropolitan Policy and The Urban Institute 68 (December 2003), *available at* www.brookings.edu/~/media/Files/rc/reports/2003/12metropolitanpolicy_ katz/housingreview.pdf.

3 *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d at 727-28. In its subsequent decision in *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390 (N.J. 1983) (*Mt. Laurel II*), the New Jersey Supreme Court elaborated on the municipalities' duty to provide realistic affordable housing opportunities. The *Mt. Laurel II* court explained that the municipality should offer incentives for the provision of affordable housing, but if incentives were not successful, then devices such as mandatory set-asides or affordable housing zoning districts would need to be utilized. *Id.* at 446. Then, the New Jersey Supreme Court ruled in *Holmdel Builders Association v. Township of Holmdel, et al.*, 583 A.2d 277, 280 (N.J. 1990), that it was constitutionally sufficient for new development to pay affordable housing impact fees instead of actually constructing affordable housing units, reasoning that the two requirements were functionally equivalent. *Holmdel*, 583 A.2d at 288-91.

4 On November 20, 2007, the Second Circuit Court granted the City of Tallahassee's Motion for Summary Judgment — thus upholding the city's ordinance against a facial challenge. *Florida Home Builders Association, Inc. v. City of Tallahassee Builders Association, Inc.*, Case No. 37 2006 CA 000579 (November 20, 2007). In that case, a coalition of builders argued that the city's ordinance constituted a physical taking of property. The court in pertinent part ruled that the city's ordinance could not be categorized as a physical taking of property. *Id.* at 5. As in the *Napa* decision, the court further noted that there may be instances where the ordinance could be applied constitutionally (*e.g.*, the added value of the property due to density bonuses may serve as compensation or the developer could request a waiver). *Id.* at 8. The court further found that because the ordinance is a regulation, it does not constitute an unlawful tax. *Id.* at 9. At the time of submittal for publication, the case had been appealed by both parties and is under review by the First District Court of Appeal.

5 *Fox*, 450 So. 2d 559 (emphasis added) (citations omitted).

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6 For example, in California, the state legislature has granted broad land use planning authority to local governments and California courts have interpreted the state's enabling act and subsequent legislation as permitting inclusionary zoning measures §65913.9, California Government Code; *Home Builders Ass'n of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2001). In sharp contrast, an *en banc* opinion of the Virginia Supreme Court struck down an early inclusionary zoning program initiative that required developers to set aside a certain number of dwelling units for low-medium income residents. *Board of Supervisors of Fairfax County v. De Groff Enterprises, Inc.*, 214 Va. 235 (Va. 1973) (ruling that "[t]he amendment, in establishing maximum rental and sale prices for 15 percent of the units in the development, exceeds the authority granted by the enabling act to the local governing body because it is socioeconomic zoning and attempts to control the compensation for the use of land and the improvements thereon").

7 FLA. STAT. §166.04151, (2005) (municipalities); FLA. STAT. § 125.01055 (2005) (counties).

8 Similarly, the Growth Management Act provides that counties are "encourage[d] [to use] innovative land development regulations which include provisions such as transfer of development rights, incentive and inclusionary zoning, planned-unit development, impact fees, and performance zoning." FLA. STAT. §163.3202(2)(h)(3) (2005). FLA. STAT. §163.3177 of the Growth Management Act further states, in pertinent part, that local governments shall incorporate a housing element in their comprehensive plans to encourage, among other things, the "creation or preservation of affordable housing to minimize the need for additional local services and avoid the concentration of affordable housing units only in specific areas of the jurisdiction."

Other Florida Statutes with provisions that relate to local governments and affordable housing are:

• FLA. STAT. §§125.379 and 166.0451 direct counties and municipalities to draft an inventory list of all government-owned lands that are appropriate sites for affordable housing.

• The "Community Redevelopment Act of 1969" allows for the creation of community redevelopment agencies. FLA. STAT. §§163.330, *et seq*. (2005).

• FLA. STAT. §§253.034 and 253.0341 allow local governments to request the surplus of the state-owned lands, and directs the State of Florida to surplus state-owned lands upon request for the purposes of providing or maintaining affordable housing;

• FLA. STAT. §1001.43 authorizes school districts to use portions of school sites to provide affordable housing for teachers and other school district personnel;

• FLA. STAT. §380.06 provides greater development of regional impact standards and substantial deviation thresholds for developments of regional impact when they provide a certain amount of affordable housing.

9 William M. Merrill & Robert K. Lincoln, *The Missing Link: Legal Issues and Implementation Strategies for Affordable Housing Linkage Fees and Fair Share Regulations*, 22 STET. L. REV. 469, 474 (1993).

10 *Debes*, 690 So. 2d at 702 (emphasis added).

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[11] *Id.*

[12] *Lingle v. Chevron, Inc.*, 544 U.S 528, 537-38 (2005).

[13] *Loretto*, 458 U.S. at 434-35.

[14] *Yee v. City of Escondido*, 503 U.S. 519, 532, 539 (1992).

[15] *B.A.M. Development, L.L.C. v. Salt Lake County*, 128 P.3d 1161 (Utah 2006).

[16] *Id.*

[17] *Id.*

[18] *Nollan*, 483 U.S. at 828.

[19] *Id.*

[20] *Id.* at 834 (citing *Agins v. Tiburon*, 444 U.S. 255 (1980)).

[21] *Id.*

[22] *Id*. at 838-39.

[23] *Id*. at 841-42.

[24] *Dolan*, 512 U.S. at 388.

[25] *Id*. at 380.

[26] *Id*. at 382.

[27] *Id*. at 387-88.

[28] *Id*. at 390.

[29] *Id*. at 390-91 (citing *Jordan v. Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965)).

[30] *Id*. at 391.

[31] *Id*. at 393-94.

[32] *Id*. at 395 (emphasis in original) (citations omitted).

[33] *Id*. at 396 (quoting *Penn. Coal*, 260 U.S. at 416).

[34] *Nollan*, 483 U.S. at 835.

[35] *See also*, *Volusia County*, 760 So. 2d at 135 (rejecting countywide need for improvements as basis for imposing

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impact fees on new development).

[36] *Nollan*, 483 U.S. at 835-36.

[37] *Id*.

[38] *Id.* at 837 (emphasis added).

[39] *Id*. (quoting *J.E.D. Assoc., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (1981) (emphasis added)).

[40] *Nollan*, 483 U.S. at 841.

[41] *Village of Euclid v. Ambler Realty, Co.*, 272 U.S. 365, 395 (1926); *Agins v. City of Tiburon*, 477 U.S. 255, 260-63 (1980).

[42] The City of Napa's inclusionary zoning ordinance applied to both nonresidential and residential development. Developers of nonresidential projects are required to pay a housing fee. The court's opinion primarily speaks to the requirements placed on residential developers. *See* City of Napa Code of Ordinances §15.94.040.

[43] The nature of the development (*e.g.*, multi-family vs. single family) dictated whether the options were available as of right or whether approval from the city council was required. For example, developers of single-family units could pay a fee into the affordable housing fund as of right whereas developers of multi-family units were required to obtain the consent of the city council before they could exercise the option to pay a fee in lieu of constructing units. *Id*. at 192.

[44] *Napa*, 108 Cal. Rptr. 2d at 63.

[45] *Id.* at 64.

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[46] *Id.*

[47] *Id.* at 65.

[48] *Id.*

[49] *Id.* at 66.

[50] *Sarnoff v. Florida Dept. of Hwy.* Safety, 825 So. 2d 351, 357 (Fla. 2002).

[51] *Miami-Dade County v. Brennan*, 802 So. 2d 1153 (Fla. 3d D.C.A. 2001).

[52] *B.A.M. Development v. Salt Lake County*, 2004 UT App. 34, 43 (Utah App. 2004).

[53] *Id.* at 46.

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