PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 37 | Issue 3 Article 4

3-15-2010

# Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning Practices

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## 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]

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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-AA21-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

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

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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.

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

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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 Housing Market*, 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,

limitations of the free market and call for an effective government response to the housing problem.[13]

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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)).

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

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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 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).

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

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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 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.
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> [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.
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> [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).

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*

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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.

*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

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.
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.

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 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.

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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. Encyclopædia Britannica, Progressive Party, Encyclopædia 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.

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

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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.*

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.*

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

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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 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.*

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]

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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.*

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

## III. INCLUSIONARY ZONING BASICS

### *A. What Is Inclusionary Zoning?*

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:

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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.*

72. *Id.* at 5.

> [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]

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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).

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.

*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

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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).

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

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, widespread 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.

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:

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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

> [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

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> 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.*

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 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.

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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.*

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.

## 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

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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%20Full%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%2F04%2D33%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.
>
> . . . .

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

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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*

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

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*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.

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 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

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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:

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]

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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.

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

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

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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").

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

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)).

"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]

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> Cities and towns use developer exactions as a strategy to offset the burdens of new development on the community. 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

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

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*Nollan* and *Dolan* necessary." (footnote omitted)).

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.

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]

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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.*

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*

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,

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.*

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

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

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]

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created by the proposed development. *Id.* at 476–77.

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.

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 burden the developer in proportion

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195. *Id.*

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.*

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*

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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.

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

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

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> 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 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.

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]

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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.

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 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

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.*

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

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).

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

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.

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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.

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).

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

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

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 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,

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]

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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.

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.

*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]

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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)).

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 City*.[266] The regulatory economic impact standard under *Penn*

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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 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).

*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

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.

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

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]

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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

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

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.").

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]

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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 (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

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

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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.*

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,

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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%20Housing%20Reader.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

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

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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-

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

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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.

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.

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

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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.

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

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 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.*

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]

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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 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

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]

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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

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,

"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 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 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

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

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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

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

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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

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

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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 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.").

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 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,

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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%20Housing%20Reader.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 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

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]

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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 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.

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]

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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).

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

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

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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/140156outlook02-02-04.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.

379. *See supra* notes 317–43 and accompanying text.

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 programs

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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.*

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

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.

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

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%20Report.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.

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]

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*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,

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

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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 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 About Fees*, L.A. TIMES, Jan. 11, 2006, at B3. "California cities and counties cannot overcharge developers for building inspection and permit fees as a way to fatten their coffers, the state Supreme Court ruled recently." *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.

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

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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,

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

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[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).

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*

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 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

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text accompanying note 300; Langston, *supra* note 300.

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.

$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.

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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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