Comments

In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing

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A CALIFORNIA COURT of appeal has decisively upheld the constitutionality of inclusionary zoning—a program that in the past twenty-five years has housed over 50,000 low- and moderate-income families[1] in new homes that they would otherwise have been unable to afford. Inclusionary zoning requires a developer of new residences to make a certain percentage of its homes available to low- and/or moderate-

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1. In California, very low-income families are defined as those earning less than 50% of the median income in a Metropolitan Statistical Area ("MSA"), *see* CAL. HEALTH & SAFETY CODE § 50105 (West 1996); lower income families as those earning less than 80% of the median family income, *see* CAL. HEALTH & SAFETY CODE § 50079.5 (West 1996); and moderate-income families as those earning less than 120% of the median family income, *see* CAL. HEALTH & SAFETY CODE § 50093 (West 1996 & Supp. 2002). Incomes vary widely by county and MSA. *See* CAL. DEPT. OF HOUS. & CMTY. DEV., MEMORANDUM: INCOME LIMITS PURSUANT TO TITLE 25, § 6932 CALIFORNIA CODE OF REGULATIONS (CCR) (2002), *available at* http://www.hcd.ca.gov/hpd/hrc/rep/state/inc2k2.pdf (last visited July 15, 2002). In Oakland, California, for instance, a three-person, very low income family earns less than $33,550 per year, while in Fresno, California, the same family earns less than $18,150 per year. In Oakland, a lower income three-person family earns less than $52,200 per year, while a moderate-income family earns less than $80,450 per year. *See id.* In New Jersey, "low income" conforms with California's very low income category, while "moderate income" corresponds to California's low income category. *See* Nico Calavita et al., *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 HOUSING POL'Y DEBATE 109, 116 (1997).

income households at an affordable price.[2] In *Home Builders Ass'n v. City of Napa*,[3] Napa's inclusionary zoning withstood a major takings[4] challenge mounted by the Home Builders Association of Northern California ("HBA") and the Pacific Legal Foundation, both leaders in the property rights movement.[5] The California Supreme Court and the United States Supreme Court have denied certiorari, and thus local governments can continue to use inclusionary zoning as an effective tool to provide affordable housing.

Inclusionary zoning ordinances are used extensively in California, New Jersey, and Montgomery County, Maryland,[6] and sporadically elsewhere.[7] They were instituted as a response to suburban zoning policies that tended to exclude low-income residents ("exclusionary

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

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

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

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

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

7. Communities in Massachusetts have created approximately 1,000 affordable units through various kinds of "affordability zoning," some of which is mandatory. *See* Philip B. Herr, *Zoning for Affordability in Massachusetts: An Overview*, *in* INCLUSIONARY ZONING: LESSONS LEARNED IN MASSACHUSETTS, NHC AFFORDABLE HOUSING POL'Y REV. 3–4 (Jan. 2002). Other communities with inclusionary ordinances include Boulder and Telluride, Colorado, and Fairfax County, Virginia. *See* BOULDER, COLO. REV. CODE § 9–6.5 (2000), *available at* http://www.ci.boulder.co.us/clerk/previous/2001/010102/11.html (last accessed Apr. 19, 2002); TELLURIDE, COLO., LAND USE CODE DIV. 7 AFFORDABLE HOUSING REQUIREMENTS § 3–710

zoning"),[8] to severe shortages of affordable housing combined with a reduction of federal housing subsidies,[9] and to legal pressures in California and New Jersey.[10] Policymakers and citizens in areas as diverse as Brookline, Massachusetts,[11] Chicago, Illinois,[12] Leon County, Florida,[13] Denver, Colorado,[14] and Madison, Wisconsin,[15] continue to promote inclusionary zoning as a way to solve shortages of affordable housing.

An inclusionary program works like this: A developer proposes to build a new subdivision, called Sweetbriar, in Suburbia Ritz, USA. The developer plans 100 homes and 100 apartments. Suburbia requires that ten percent of all new homes be sold at prices affordable to moderate-income families and that ten percent of all new apartments be rented at prices affordable to lower income families (the affordable units are sometimes called "inclusionary units"). While the market price of the new homes is $500,000, requiring an annual income of $144,000,[16] the ten inclusionary homes are sold to moderate-income families earning a maximum of $89,400 per year, for $308,000.[17] Similarly, while the market rent of the luxury two-bedroom apartments is $2,135 per month, requiring an annual income of $85,400,[18] the ten inclusionary apartments are rented to lower income families, who earn a maximum of $46,400 per year, for $894 per month. Suburbia

(2001), *available at* http://www.town.telluride.co.us/plan/landuse/art3div7.html (last accessed May 31, 2002); and FAIRFAX COUNTY, VA., ZONING ORD. § 2-800 (1998).

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

9. *See* Richard A. Judd & David Paul Rosen, *Inclusionary Housing in California: Creating Affordability Without Public Subsidy*, 2 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 4 (1992).

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

11. *See* Joe Warner, *Deal Aims To Keep All Happy—And In Town*, BOSTON GLOBE, Apr. 28, 2002, at 12.

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

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

14. *See* Peter Blake, *At City Council, Son Lobbies Mom*, ROCKY MTN. NEWS, Feb. 6, 2002, at 33A.

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

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

17. Affordable sales prices are based on a complex set of assumptions that include down payment, interest rate, homeowners association payments, and utility costs. This calculation is based on those developed by the City of San Mateo. *See* SAN MATEO, CAL., BELOW MARKET RATE (INCLUSIONARY) PROGRAM, BELOW MARKET RATE HOUSING PROGRAM MAXIMUM UNIT RATES (Feb. 2002).

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

controls the resale price of the homes and rent increases in the apartments so that they remain affordable for at least fifty years. The net effect is that twenty families are able to live in Sweetbriar who could not otherwise have done so. The families are happy, as is Suburbia, which created affordable housing at no public cost. However, the developer finds himself with $1,920,000 less in proceeds from sales (3.8% less than the $50 million he would otherwise receive) and with $12,410 less per month in rent (5.8% less than the $213,500 he would otherwise receive).

A program that so clearly reduces developers' incomes while subsidizing low-income households can be expected to be controversial. While inclusionary zoning is not used widely when viewed on a national basis, it has attracted significant hostile commentary,[19] balanced by equally strong support.[20] Opponents argue that cities have created a housing shortage through their exclusionary policies and then, to solve the problem, have forced developers to subsidize affordable housing, rather than changing their own policies.[21] Worse, opponents argue, inclusionary zoning actually reduces the supply of affordable housing in the long run.[22] Proponents counter that inclusionary zoning merely corrects suburban exclusionary zoning that artificially raises prices.[23] Most importantly, they argue, mandatory inclusionary

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

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

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

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

23. *See* Dietderich, *supra* note 20, at 25–26; Daniel R. Mandelker, *The Constitutionality of Inclusionary Zoning: An Overview*, *in* INCLUSIONARY ZONING MOVES DOWNTOWN 31, 33–34 (Dwight Merriam et al. eds., 1985).

zoning creates more affordable housing than any voluntary program.[24]

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

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

24. *See* Gregory Mellon Fox & Barbara Rosenfeld Davis, *Density Bonus Zoning to Provide and Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1067 (1976); Herr, *supra* note 7, at 4; Sam Stonefield, *Affordable Housing in Suburbia: The Importance But Limited Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. 323, 343 (2001); Clark Ziegler, *Introduction*, INCLUSIONARY ZONING: LESSONS LEARNED IN MASSACHUSETTS, 2 NHC AFFORDABLE HOUSING POL'Y REV. 1–2 (Jan. 2002).

25. *See* Thomas Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 UCLA L. REV. 1432, 1490 (1974). *See also* Fred P. Bosselman et al., *Panel Comments*, *in* INCLUSIONARY ZONING MOVES DOWNTOWN 41–54 (Dwight Merriam et al. eds., 1985); Mandelker, *supra* note 23, at 35–36; Merrill & Lincoln, *supra* note 20, at 274. On the other hand, many commentators simply assume that inclusionary housing is an exaction. *See* Berger, *supra* note 19, at 221; Brian W. Blaesser, *Inclusionary Housing: There's a Better Way*, INCLUSIONARY ZONING: LESSONS LEARNED IN MASSACHUSETTS, 2 NHC AFFORDABLE HOUSING POL'Y REV. 14, 15 (Jan. 2002); Susan M. Denbo, *Development Exactions: A New Way to Fund State and Local Government Infrastructure Improvements and Affordable Housing*, 23 REAL ESTATE L.J. 7, 11 (1994); Ellickson, *supra* note 19, at 1211.

26. *See* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 9.32, at 675 (3d ed. 2000).

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

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

27. *See* discussion *infra* Part II.

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

29. *See* discussion *infra* Part IV.B.

30. *See* CAL. CIV. CODE §§ 1954.50–.535 (2001) (requiring decontrol of prices when tenants vacate and establishing other restrictions on local rent control ordinances); COLO. REV. STAT. § 38–12–301 (2001) (prohibiting local rent control except on property in which a local agency has an interest); discussion *infra* Part IV.D.

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

32. 108 Cal. Rptr. 2d 60.

33. 483 U.S. 825 (1987).

34. 512 U.S. 374 (1994).

35. *See* 483 U.S. at 827.

36. *See* 512 U.S. at 380.

37. 483 U.S. at 837.

38. 512 U.S. at 391.

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

scrutiny of inclusionary ordinances as either exactions or rent control ordinances.

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

I. The Development of Inclusionary Zoning and the Policy Debate

A. History of Inclusionary Zoning

Fairfax County, Virginia adopted the first inclusionary zoning ordinance in the country in 1971,[40] and it was shortly followed in 1973 by Montgomery County, Maryland.[41] The inclusionary zoning technique is now used extensively in California and New Jersey, with scattered use elsewhere,[42] although it is increasingly discussed in other

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

41. *See* DIV. OF HOUS. & CODE ENFORCEMENT, MONTGOMERY COUNTY, MD., THE MODERATELY PRICED DWELLING UNIT PROGRAM: MONTGOMERY COUNTY, MARYLAND'S, INCLUSIONARY ZONING ORDINANCE, *available at* http://hca.emontgomery.org/Housing/MPDU/summary.htm (last visited Mar. 23, 2002) [hereinafter MONTGOMERY COUNTY].

42. *See* BOULDER, COLO. REV. CODE, § 9-6.5 (2000); TELLURIDE, COLO., LAND USE CODE § 3-710 (2001); and FAIRFAX COUNTY, VA., ZONING ORD. § 2-800 (1998); Roisman, *supra* note 6, at 71; Smith et al., *supra* note 2, at 157–58. Although Roisman also lists Massachusetts, Oregon, and Florida as having effective inclusionary programs, *see* Roisman, *supra* note 6, at 71, the Oregon and Florida programs are statewide growth management programs with inclusionary elements, not comparable to the local zoning ordinances reviewed here, *see* Smith et al., *supra* note 2, at 157–58, while the mandatory element of Massachusetts' program involves state review of local decisions regarding affordable housing projects. However, in Massachusetts, some communities have adopted mandatory inclusionary ordinances. *See* Calavita et al., *supra* note 1, at 111; Herr, *supra* note 7, at 3–4.

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

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

43. *See supra* notes 11–15 and accompanying text.

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

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

46. *See id.*

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

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

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

50. *See* 456 A.2d at 448.

51. *See* CAL. GOV'T CODE § 65580 (West Supp. 2001).

52. CAL. GOV'T CODE § 65583(c) (West Supp. 2001).

found that a local community's fear of lawsuits based on an inadequate housing element was a significant factor in local jurisdictions' adoption of inclusionary zoning.[53]

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

B. A Primer on Typical Features of Inclusionary Ordinances

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

Understanding the requirements typically contained in an inclusionary ordinance may help to explain the disagreement over whether these ordinances should be characterized as exactions or land use regulations. To determine common features, the author reviewed thirty-

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

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

55. *See* John M. Payne, *Fairly Sharing Affordable Housing Obligations: The* Mount Laurel *Matrix*, 22 W. NEW ENG. L. REV. 365, 368 (2000).

56. *Id.*

57. *See* Calavita et al., *supra* note 1, at 111; MONTGOMERY COUNTY, *supra* note 41, at 7.

58. *See infra* notes 145–47 and accompanying text.

four California inclusionary ordinances and/or policies.[59] This section briefly summarizes the range of key provisions included in these ordinances, concentrating in particular on the characteristics discussed by the court of appeal in *City of Napa.*

1. Required Affordable Housing

At the heart of these inclusionary zoning ordinances is a requirement that some portion of newly constructed housing be affordable to very low- income, low-income, or moderate-income families.[60] Most require that either ten or fifteen percent of the housing be affordable; six cities, however, require that twenty percent or more of the housing be affordable, with the most aggressive city requiring thirty-five percent affordability. The ordinances also prescribe the required level of affordability (whether for very low-, low-, or moderate-income households) and the length of time the units must remain affordable. In about half the ordinances, rental units are required to be more affordable than for-sale housing. For instance, one city requires ten percent of ownership housing to be affordable to moderate-income families (earning up to 120 percent of the median income), while ten percent of rental housing must be affordable to low-income families (earning only eighty percent of the median income). Some cities require greater affordability in larger projects, while others require a higher percentage of affordable units in more dense projects. The period of affordability ranges from ten to ninety-nine years to perpetuity; most typically, the units are required to remain affordable for thirty years. In almost every case, rents and sale prices are tied to median incomes, rather than to the developer's construction costs. Typically, monthly payments are set at thirty percent of income. Two cities do provide, however, that sale prices may be increased if they do not cover the developer's financing and construction costs.

2. Alternatives to On-Site Provision of Affordable Units

Almost every ordinance allows a developer to build the affordable housing on another site if it is infeasible to construct the housing as part of the project. It remains the developer's responsibility to find

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

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

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

3. Incentives

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

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

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

4. Complete Waivers from the Terms of the Ordinance

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

C. The Policy Debate

1. Support for Inclusionary Zoning

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

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

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

Inclusionary zoning is also supported as a means of correcting the detrimental effects of exclusionary zoning.[69] Exclusionary zoning separates the poor from the non-poor, leading to such problems as underfunded public institutions, economically depressed communi-

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

64. *See* NAPA, CAL., CODE § 15.94.080 (A) (1999).

65. *See* Padilla, *supra* note 2, at 564.

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

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

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

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

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

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

2. Critiques of Inclusionary Zoning

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

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

The cost of the inclusionary units must be borne by someone, whether landowners, developers, or market-rate buyers in a project. The usual argument made in opposition to inclusionary ordinances is that the developer will raise the price of the remaining homes by the difference between the inclusionary price and the market price. In the case of Suburbia, for example, the developer would raise the cost of

70. *See* Mallakh, *supra* note 31, at 1853–54.

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

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

the ninety market-priced single-family homes by $21,333 each ($1,920,000 divided by ninety market-priced homes) to compensate for the reduced prices of the ten inclusionary units. Using an identical analysis, the Northern California Homebuilders Association charged that a fifteen percent inclusionary requirement proposed in Union City, California, would raise the price of each market-rate unit by nearly $31,000 to make up for the reduced prices of the inclusionary units.[73] However, this assertion is too simplistic. It assumes that developers can raise their prices without constraint; or, viewed another way, that developers would charge less than the market can bear if they did not have to provide inclusionary housing.[74]

In a more sophisticated and very influential 1981 article,[75] Robert Ellickson[76] concluded that the costs might be borne by other homebuyers or renters, the developer, or the landowner.[77] Theoretically, programs could be designed that would create no additional costs for anyone; communities could provide density bonuses large enough to cover the entire cost of the inclusionary units. In practice, however, they rarely did so.[78] Who bore the costs in the long run would depend on the desirability of the community and its place in the regional housing market. If the community were highly desirable, the developer would be able to raise his prices to cover at least part of the reduced price for the inclusionary units, and at least part of the cost would be borne by the buyers or renters of the market-rate units.[79] However, if the city were not particularly sought-after, and the developer could not raise his prices to compensate for the decreased profits, the developer would bear the entire cost initially. Once the ordinances were in effect, owners of residential land would bear at least part of the cost. Developers would bid less for residential land

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

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

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

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

77. *See id.* at 1190.

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

79. *See* Ellickson, *supra* note 19, at 1190–91.

because of the inclusionary requirements.[80] In other words, builders would pay less for land because the inclusionary zoning would lower their profits. In a city that was not sought-after, "in the long run, the owners of underdeveloped land bear *all* of the burden."[81] Where the city was unique, landowners would bear only "*part* of the burden,"[82] in which case part of the cost would be passed on to buyers.[83] Ellickson concluded that most cities imposing these requirements were highly desirable; hence the programs increased costs to market-rate homebuyers and renters in almost all cases.[84]

b. Reductions in Housing Affordability

Ellickson's most devastating charge was that inclusionary zoning actually decreased the supply of affordable housing. He concluded that most inclusionary units were bestowed on families in the middle third of the income distribution,[85] but that only a "tiny fraction" of even those families benefited.[86] At the same time, the costs of the inclusionary housing acted as a tax on housing and reduced its profitability to developers, lowering the overall housing supply by discouraging housing development.[87] The reduced supply resulted in less housing "filtering down" to lower-income families, and overall housing prices became much higher.[88] The result? Higher housing prices for the majority of middle-income families that did not benefit from the program.[89] Thus, the irony of so-called "inclusionary" programs.

3. Responses and Conclusion

a. Who Pays for Inclusionary Housing?

The assertion that other homeowners will pay for inclusionary housing is a particularly potent political argument, because it seems inherently unfair that new homebuyers should be forced to subsidize

80. *See id.* at 1190.
81. *Id.* at 1191.
82. *Id.*
83. *See id.* at 1190–91.
84. *See id.* at 1192.
85. *See. id.* at 1215–16.
86. *Id.* at 1184.
87. *See generally* Serna, *supra* note 73.
88. *See id.*; Ellickson, *supra* note 19, at 1203–04. The concept of "filtering down" assumes that as new market-priced housing is built, existing owners will "move up" to better housing, and eventually the least expensive existing housing will "filter down" to lower income families. *See* Dietderich, *supra* note 20, at 43.
89. *See* Ellickson, *supra* note 19, at 1215–16.

others. The argument continues to be used by opponents of inclusionary ordinances.[90]

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

90. *See, e.g.*, Michael Neal, *Inclusionary strategies only add to housing costs*, SAN DIEGO UNION-TRIBUNE, Apr. 17, 2002, at B7.

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

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

91. *See* Smith et al., *supra* note 2, at 162 ("In the long run . . . the price effects of inclusionary zoning may be borne by landowners who sell land to builders. Builders would incorporate the cost into a lower bid price for land."); KEYSER MARSTON ASSOCIATES, INC., IMPACT EVALUATION: BMR AND NEXUS FEE PROPOSAL, PREPARED FOR CITY OF SAN MATEO, CAL. (May 2001), 5 (on file at the University of San Francisco Law Review office) (concluding that land prices would be reduced forty percent if an existing inclusionary requirement were increased from ten to twenty percent with greater affordability) [hereinafter IMPACT EVALUATION]; MUNDIE & ASSOCIATES, ANALYSIS OF AFFORDABLE HOUSING REQUIREMENTS INCORPORATED IN THE HOUSING ELEMENT OF THE GENERAL PLAN, CITY OF SAN LUIS OBISPO, CAL. (1997 Update), 1–2, 24 (July 1997) (on file at the University of San Francisco Law Review office) (showing reduction in land value of 7 to 65 percent and increase in market price of 1 to 17 percent depending on inclusionary program selected) [hereinafter MUNDIE & ASSOCIATES]; e-mail from Diana Elrod, Solutions for Affordable Housing, to Barbara Kautz (May 28, 2002, 02:47 PM PDT) (citing CITY OF MOUNTAIN VIEW, CAL., HOUSING ELEMENT) (on file at the University of San Francisco Law Review office) ("[A]ccording to . . . the consensus of a focus group of local developers, the cost of the [inclusionary housing] program is generally passed on to the property owner selling his land for housing—rather than to the price or rental of the housing units."); e-mail from Darin Smith, Economic & Planning Systems, Inc., to Barbara Kautz (May 29, 2002, 04:22 PM PDT) (on file at the University of San Francisco Law Review office) ("[T]he short answer is that, while the costs may be shared among developers and landowners, the landowners likely suffer the most loss. Prospective homeowners are least likely to be affected, as their willingness to pay is what sets the market price, not the costs incurred by the developer."). Note that, by providing adequate density bonuses, cities may design their programs so that there are no costs to anyone.

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

93. *See id.* at 159.

"[i]n the long run . . . the price effects . . . [are] borne by landowners who sell land to builders."[94]

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

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

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

95. *See* Calavita & Grimes, *supra* note 53, at 152; Dwight Merriam, *Panel Comments, in* INCLUSIONARY ZONING MOVES DOWNTOWN 95–96 (Dwight Merriam et al. eds., 1985).

96. *See, e.g.*, EDWARD L. GLAESER & JOSEPH GYOURKO, THE IMPACT OF ZONING ON HOUSING AFFORDABILITY, Working Paper 8835, National Bureau of Economic Research (2002); *available at* http://www.nber.org/papers/w8835 (last visited June 25, 2002).

97. *See* Merriam, *supra* note 95, at 95.

98. *See* Dietderich, *supra* note 20, at 103.

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

b. Does Inclusionary Zoning Increase Housing Costs?

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

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

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

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100. *See* Dietderich, *supra* note 20, at 28.

101. *See* Ellickson, *supra* note 19, at 1180.

102. *See* e-mail from Kate Funk, Keyser-Marston Associates, to Barbara Kautz (May 31, 2002, 11:48 PDT) (on file at the University of San Francisco Law Review office).

103. *See* Thomas Kleven, *Inclusionary Ordinances and the Nexus Issue, in* INCLUSIONARY ZONING MOVES DOWNTOWN 109, 124 (Dwight Merriam et al. eds., 1985).

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

II. Inclusionary Ordinances: Land Use Regulations or Exactions?

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

A. The *Agins* Standard for Takings

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

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

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

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

108. 272 U.S. 365 (1926).

109. *Id.* at 395.

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

nance was reasonably related to the general welfare, it would be upheld.[111]

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

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

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

112. 447 U.S. 255 (1980).

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

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

115. *Id.* at 260.

116. *See id.* at 261–62.

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

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

119. 483 U.S. 825 (1987).

120. *See id.* at 834 n.3.

interests or by denying all economically viable use of the property.[121] Local regulations have not often been overturned based on the *Agins* standard alone.[122]

B. The Standard for Review of Exactions

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

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

Both *Nollan* and *Dolan* involved property owners who were required to dedicate property to a public agency as a condition of development approval. In *Nollan*, the California Coastal Commission demanded a public access easement across the beach at the front of Nollan's lot to mitigate the view blockage from Highway 1 caused by his new house.[125] The Supreme Court found no nexus between the project's impact (blocking views from Highway 1) and a pedestrian access across the front of the property that provided no views from the highway.[126] Because a portion of Nollan's property was clearly being taken for public use (for a public easement), the Supreme Court required that there be an "essential nexus" between the condition of approval and the impacts of the Nollans' project to meet *Agins'* re-

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

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

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

124. Holloway & Guy, *supra* note 98, at 8–9.

125. *See* 483 U.S. 828–29.

126. *See id.* at 836–37.

quirement that a governmental action "substantially advance" a legitimate state interest.[127]

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

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

127. *See id.* at 837.
128. *See* 512 U.S. at 394–96.
129. *See id.* at 387–88.
130. *Id.* at 391.
131. *See id.*
132. *See id.* at 391 n.8.
133. *See supra* notes 48–53 and accompanying text.

standards, economic studies, and incentives such as density bonuses could all be used to support the economic viability of the ordinance.

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

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

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

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

135. "The donation of land or creation of an easement for public use." BLACK'S LAW DICTIONARY, 7th ed. (2000).

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

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

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

What has not been defined by the Court is an "exaction;" and whether the *Nollan/Dolan* test applies to *all* exactions.[139] To date, there is not a "consistent jurisprudence" for applying the test.[140] Even where a requirement is clearly an exaction—such as the payment of fees and construction of public improvements—the *Nollan/Dolan* test is not always applied. Some courts, in fact, have limited the test to the dedication of land.[141] A further issue is whether the test applies to exactions imposed pursuant to generally applicable legislative acts as well as to conditions applied during the review of individual development applications.[142] There is a "recently emerging body of case law" holding that generally applicable *fees* applied on a uniform basis to development projects are not subject to *Nollan/Dolan.*[143] Since *Del Monte Dunes,* the lower courts have tended to further restrict the applicability of *Nollan/Dolan* to individualized exactions.[144]

In California, the Supreme Court has specifically limited *Nollan/Dolan* to fees and dedication of property required on an "*individualized*

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

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

141. *See* Nancy E. Stroud, *A Review of* Del Monte Dunes v. City of Monterey *and Its Implications,* 15 J. LAND USE & ENVTL. L 195, 203–04(1999); Ziegler, *supra* note 117, at 162 n.39–40.

142. *See* Ziegler, *supra* note 117, at 163–64.

143. *Id.* at 164–65 n.51.

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

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

2. State Law Standards for Exactions

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

This "reasonable relationship" test was recently elaborated by the California Supreme Court in *San Remo Hotel v. City and County of San Francisco.*[151] The court considered a takings challenge to a San Francisco ordinance having some similarity to an inclusionary ordinance. It required that any hotel converting a residential hotel room[152] to

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

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

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

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

149. *See* DANIEL J. CURTIN, JR. & CECILY T. TALBERT, CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW, at 269 (22nd ed. 2002).

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

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

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

another use either replace each room lost on a one-for-one basis, or pay a fee equal to the cost of a replacement site plus a portion of the new construction costs.[153] After being assessed a fee of $567,000 to convert its sixty-two room hotel to tourist use,[154] the San Remo Hotel alleged (among other claims) that the ordinance did not "substantially advance a legitimate government interest" because the fee was not "roughly proportional" to the impact of the project (the *Nollan/Dolan* test).[155] While rejecting the application of *Nollan/Dolan* to a generally applicable fee and upholding the city's ordinance (both facially and as-applied),[156] the court stated:

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

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

153. *See id.*

154. *See id.* at 95.

155. *Id.*

156. *See id.* at 111.

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

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

C. Other Courts' Review of Inclusionary Ordinances

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

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

The first inclusionary ordinance in the country was adopted on September 1, 1971 by the Fairfax County Board of Supervisors. It required any developer of fifty or more housing units to make at least fifteen percent of the units affordable to low- and moderate-income families.[160] The Supreme Court of Virginia agreed that the provision of affordable housing served a legitimate state interest.[161] However, it concluded that the state's zoning enabling act permitted localities to enact only zoning ordinances that were directed at traditional physical characteristics of developments and not ordinances directed at including or excluding "any particular socio-economic group."[162] Further, the ordinance's attempt to "control compensation" for property not only exceeded the authority granted by the zoning enabling act but also constituted a taking of property under the Virginia constitution.[163] The ordinance was consequently invalidated.[164]

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

159. 198 S.E.2d 600 (Va. 1973).
160. *See id.*
161. *See id.* at 601.
162. *Id.* at 602.
163. *See id.*
164. *See id.*
165. MANDELKER, *supra* note 2, § 7.26 at 325.
166. *See* VA. CODE ANN. § 15.2-2304 (Michie Supp. 2001).
167. *See* FAIRFAX COUNTY, VA., ZONING ORD. § 2-800 (1998), *available at* http://www.fairfaxcounty.gov/dpz/PDF_files/Ordinance/art02.pdf; FAIRFAX COUNTY, VA., KEY PROVISIONS OF THE FAIRFAX COUNTY AFFORDABLE DWELLING UNIT (ADU) ORDINANCE (Mar. 31, 1998), *available at* http://www.co.fairfax.va.us/gov/rha/adu/Keyprovisions.pdf (last visited June 26, 2002).

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

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

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

In 1990, in *Holmdel Builders Ass'n v. Township of Holmdel,*[175] the New Jersey Supreme Court revisited the issue while reviewing the constitutionality of affordable housing fees required by several New Jersey

168. 456 A.2d 390 (N.J. 1983).
169. *Id.* at 449.
170. *Id.* at 448.
171. *See id.* at 449.
172. *See id.* at 448.
173. *Id.* at 449–50.
174. *Id.* at 449.
175. 583 A.2d 277 (N.J. 1990).

cities. The court continued to view inclusionary devices as zoning ordinances rather than as exactions similar to "off-site infrastructure improvements occasioned by a particular development."[176] Consequently, the court refused to apply the *Nollan* "essential nexus" test, concluding that "the rational-nexus test is not apposite in determining the validity of inclusionary zoning devices generally."[177] Rather than basing affordable housing requirements on the *impact* of a project, "the relationship is to be founded on the relationship that . . . development has on both the need for lower-income residential development and on the opportunity and capacity of municipalities to meet that need. . . ."[178]

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

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

City of Napa is the first appellate court decision to review the constitutionality of inclusionary zoning since the United States Supreme Court's decisions in both *Nollan* and *Dolan*. The latter two cases have created the "specter of a possible constitutional challenge"[183] to inclusionary zoning despite the technique's success in creating affordable housing. Had the HBA been successful in invalidating Napa's ordinance—in particular, had the HBA been granted certiorari and succeeded in having the ordinance invalidated by the Supreme Court—it would have greatly expanded the application of the *Nollan/Dolan* test

176. *Id.* at 288.

177. *Id.*

178. *Id.*

179. *See id.*

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

181. See discussion *infra* Part III.B.1.

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

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

to a generally applicable legislative requirement that required no dedication of property. In that sense, the case was largely declaratory of existing law regarding the limited applicability of *Nollan/Dolan* to inclusionary ordinances. However, it confirmed that inclusionary zoning *can* withstand a constitutional challenge and provided greater assurance to cities desiring to enact an inclusionary ordinance.

A. The Case

1. The Parties

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

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

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

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

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

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

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

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

2. The Napa Inclusionary Ordinance

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

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

3. Takings Issues Raised and Their Disposition

HBA attacked the ordinance based on the *Agins* "substantially advance" standard typically applicable to a land use regulation. However,

190. *See* NAPA, CAL., MUN. CODE § 15.94.050(A) (1999). Note that the definition of "affordable" as used in the ordinance is complex but generally means that monthly payments are limited to ensure that units are affordable to persons earning less than eighty percent of the median income. *See id.*

191. *See id.* § 15.94.050(B).

192. *See id.* § 15.94.050(F).

193. *Id.* § 15.94.080(A).

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

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

the major part of its briefing represented an effort to apply the *Nollan/Dolan* standard to a generally applicable zoning ordinance.[196]

a. The *Agins* Test

HBA claimed that the ordinance constituted a taking both because it failed to "substantially advance legitimate state interests"[197] and because Napa's own restrictive zoning had created the housing shortage facing the City.[198] To show a legitimate state interest, the city, intervenors and amici provided extensive documentation regarding California cities' authority (and obligation) to foster affordable housing; evidence of the shortage of affordable housing both statewide and in Napa; and the relationship between the ordinance's provisions and Napa's goal of creating more affordable housing.[199] In response to HBA's specific claim that Napa's zoning had created the shortage of affordable housing, the intervenors cited *Pennsylvania Central Transportation Co. v. New York City*[200] for the proposition that there is a legitimate state interest in a land use regulation even if the problem being addressed was caused by historical land use regulations.[201] Even if it were true that inflated prices were caused by the City's policies, the prime beneficiaries were the very landowners and developers represented by HBA.[202]

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

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

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

198. *See id.* at 66.

199. *See id.* at 64–65.

200. 438 U.S. 104 (1978).

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

202. *See* Brief for Intervenors-Respondents at 27.

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

204. *Id.* at 65.

and that in fact case law, such as *Penn Central,* was directly to the contrary.[205]

b. Heightened Scrutiny Under the *Nollan/Dolan* Test

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

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

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

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

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

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

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

210. *Id.* at 66.

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

212. *Id.* at 65–66 (quoting *Santa Monica Beach,* 968 P.2d at 1002).

B. Future Takings Challenges to Inclusionary Zoning

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

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

1. Future Facial Challenges to Inclusionary Ordinances

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

213. Daniel J. Curtin, Jr., *Residential Inclusion,* SAN FRANCISCO DAILY J. at 5 (July 20, 2001). *See also* summary of case in *Development: In-Lieu Fee Substitutes for Affordable Housing,* REAL ESTATE L. REPORT, November 2001, at 7.

214. *See* Serna, *supra* note 73.

215. *Id.*

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

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

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

fornia and New Jersey, creates an affirmative obligation on local governments to provide affordable housing.[219]

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

219. *See supra* notes 48–53 and accompanying text.

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

221. *Id.* at 1118 (Thomas, J., dissenting from denial of certiorari). The ordinance in question required existing parking lots to install at least one tree for every eight parking spaces and to devote ten percent of their surface area to landscaping—a typical land use regulation. The Supreme Court of Georgia reviewed the ordinance pursuant to *Agins* and refused to apply *Nollan/Dolan* because it was not an individualized determination. *See id.* at 1116–17.

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

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

This analysis confuses the two prongs of a takings analysis. The heightened scrutiny *Nollan/Dolan* test is used to determine whether the government's action is a "*substantial* advancing of a legitimate state interest," *see* Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987), *not* whether there is an economic taking. *See also* Edward J. Sullivan, *Return of the Platonic Guardians:* Nollan *and* Dolan *and the First Prong of* Agins, 34 URB. LAW. 39, 41 (2002) ("*Nollan* and *Dolan* [are] founded exclusively on the first prong of the *Agins* test . . . ."). Whether the test is used depends entirely on the nature of the government's

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

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

A closer question is whether inclusionary ordinances will be considered exactions subject to the "reasonable relationship" test. In *City of Napa,* this intermediate standard was never considered by the court of appeal because California's Mitigation Fee Act[225] requires all challenges to be made *after* the fee is paid,[226] and HBA made a pre-development facial challenge.[227] The City of Napa and *amicus* argued that the in-lieu fees permitted by the ordinance were not impact fees as defined by the Act because the underlying inclusionary requirement was not a monetary exaction, fees were paid only at the election of the developer, and the fees did not pay for public facilities as defined in

action, rather than on its economic impact. Note that in *Nollan,* the Court agreed that the Coastal Commission could have required the Nollans to dedicate the beach easement had the required dedication actually advanced the state's asserted interest. The dedication did not create an economic taking; rather, it did not "substantially advance" the state's interest. *See Nollan,* 483 U.S. at 836–37. The Court has imposed the test only when reviewing required dedications of property, *see supra* pages 21–24, and has stated in dicta that it applies only to "exactions." *See* City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 702 (1999). Thus, the issue is whether inclusionary requirements are *exactions* subject to the *Nollan/Dolan* test, not whether they are "takings." In addition, the *Penn Central* test is almost never appropriate when reviewing an ordinance on its face; rather, it is an "essentially ad hoc, factual inquir[y]" generally utilized in an as-applied challenge. *Penn Central,* 438 U.S. at 124.

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

225. CAL. GOV'T CODE § 66000 (West Supp. 2002).

226. *See* CAL. GOV'T CODE § 66020(d)(1) (West Supp. 2002).

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

the Mitigation Fee Act.[228] However, in *San Remo Hotel,* the California Supreme Court reviewed a similar in-lieu fee under the "reasonable relationship" test.[229] There, the San Francisco ordinance gave the developer the choice of replacing each room lost on a one-for-one basis or paying a fee equal to the cost of a replacement site plus a portion of the new construction costs.[230] Like Napa's inclusionary ordinance, the hotel conversion ordinance's underlying requirement was not a monetary exaction, fees were paid only at the election of the developer, and the fees did not pay for public facilities. Nonetheless, it was considered to be an impact fee—a type of exaction—subject to the "reasonable relationship" test.

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

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

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

230. *See id.* at 92.

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

2. Future As-Applied Challenges to Inclusionary Ordinances

In California, so long as an inclusionary ordinance is generally applicable to a class of projects and leaves local officials with "no meaningful . . . discretion," the *Nollan/Dolan* test will not be utilized even in an as-applied challenge.[232] Only if a local inclusionary ordinance requires developers to negotiate individually, with meaningful discretion applied by the government, would *Nollan/Dolan* apply to a particular project. In the City of Napa, for example, a developer may negotiate with the city for individualized concessions and incentives[233] and may also negotiate for an "alternative equivalent action"[234] if she does not want to provide the affordable housing or in-lieu fees specified in the ordinance. Conceivably, such an individualized bargain could be challenged and reviewed under the heightened scrutiny specified in *Nollan/Dolan.*[235] However, in reality, this is unlikely to happen. A city faced with a developer who had requested an "alternative equivalent action" and then objected to the bargain would most probably simply tell the developer to comply with the non-discretionary standards included in the ordinance by providing the units on-site or paying established fees.

Napa's ordinance permits all inclusionary requirements to be completely waived if a developer can show that there is no nexus between his project and the city's inclusionary requirements.[236] Relying on this language—which was construed by the HBA as an admission by Napa that *Nollan's* "essential nexus" standard[237] applies—the HBA stated its intent to bring an as-applied challenge.[238] If a developer were to provide a study showing that his project does not create a demand for affordable housing, and that there is consequently no nexus between the inclusionary requirement and the project, the City of Napa could be forced to prepare an expensive nexus study of its own to rebut the assertion.[239] An easier solution is simply to modify the waiver provision to base the waiver on grounds other than lack of

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

233. *See* NAPA, CAL., MUN. CODE § 15.94.050(F).

234. *Id.* § 15.94.050(B).

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

236. *See* NAPA, CAL., MUN. CODE § 15.94.080(A) (1999).

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

238. *See* Serna, *supra* note 73.

239. *See* Recent Case, *supra* note 183, at 2061–62.

a nexus. While the waiver did help Napa's ordinance survive a facial challenge,[240] a waiver based on other criteria would enable an ordinance to survive a facial challenge without suggesting that *Nollan's* nexus analysis is appropriate.[241]

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

3. *Penn Central*: The Final Takings Test

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

So long as the adoption of an inclusionary ordinance is accompanied by an economic study demonstrating that the requirements are reasonable and allow an economically viable use, it is highly unlikely that a *Penn Central* challenge will be able to establish a substantial economic impact or interference with reasonable investment-backed expectations. The *Penn Central* Court noted, for instance, that it had

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

241. *See* discussion *infra* Part V.D.3.

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

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

244. *See id.* at 108.

245. *Id.* at 124.

246. *See id.* at 138.

247. Wendie L. Kellingham, *New Takes on Old Takes: A Takings Law Update*, 2001 ALI-ABA LAND USE INST. 511, 515 (2001).

approved land use controls resulting in 75 to 87.5 percent diminution in value;[248] by comparison, one study of a twenty percent inclusionary requirement (substantially higher than is usual) showed a diminution in land value of forty percent.[249] The character of the government action is the imposition of rent and price controls—a permissible governmental action recognized by the courts. The requirements would need to be much more draconian before *Penn Central* would likely apply. In *City of Napa*, the HBA stated explicitly that it did not believe that the ordinance constituted an economic taking under the *Penn Central* test.[250]

IV. Inclusionary Housing Viewed As Rent and Price Controls

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

A. Is an Inclusionary Ordinance a Rent Control Ordinance?

In *City of Napa*, HBA argued that the ordinance was a rent control ordinance[251] and that it violated the Due Process Clause[252] because it required the sale or rental of ten percent of housing units at a fixed price without any provision for a fair return on investment to the developer.[253] The City responded that its ordinance was *not* a rent or price control but rather a land use ordinance and that "fair return" standards had never been applied to applicants attempting to develop property.[254] While never specifically dealing with HBA's contention that Napa's ordinance was rent control, the court of appeal agreed that there was no case that held that a housing *developer* was entitled to

248. *See* Penn Central, 438 U.S. at 131.

249. *See* Impact Evaluation, *supra* note 91, at 5.

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

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

252. *See* U.S. CONST. amend. XIV, § 1.

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

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

a fair rate of return.[255] Further, under the specific provisions of the Napa ordinance, no developer was actually required to rent units or to sell them at a reduced price; the developer instead could choose to build the units, donate vacant land or pay in-lieu fees.[256]

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

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

Even the New Jersey Supreme Court, when deciding *Mt. Laurel II*,[264] recognized that the limitations on rents imposed by inclusionary ordinances could be a type of rent control. The court suggested that rent increases permissible in affordable units as tenants' incomes in-

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

256. *See id.*

257. *See* Mallakh, *supra* note 31, at 1872–76.

258. *See id.*

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

260. *See id.* at 32.

261. *Id.*

262. *Id.*

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

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

creased would generally parallel normal rent increases permitted under a rent control ordinance, ensuring that the owners would achieve a fair return.[265]

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

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

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

In *Pennell v. City of San Jose*,[270] the United States Supreme Court reviewed a constitutional challenge to a San Jose, California, rent control ordinance based on a provision that permitted the City to *consider* "hardship to a tenant" when setting rents[271]—a provision that could be considered akin to basing rents on tenant incomes, rather than on landlord costs. In the case of the provision reviewed in *Pennell*, however, there was no *requirement* that the rents be reduced based on ten-

265. *See id.* at 446 n.30.

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

267. *See id.* at 999.

268. *See* CAL. GOV'T CODE § 65915(c).

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

270. 485 U.S. 1 (1988).

271. *See id.* at 4.

ant hardship. The Court held that the provision was not unconstitutional absent any evidence of its actual impact.[272]

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

C. Premium Pricing

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

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

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

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

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

276. *See id.*, slip op. at 23.

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

$50,000 from the developer to the first buyer but not creating affordable housing, the ostensible purpose of the ordinance.

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

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

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

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

279. *See id.* at 530.

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

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

282. *See id.* at 1165–66.

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

284. *Id.* at 1033.

285. *See id.* at 1037.

D. Conflicts with State Statutes Related to Rent Control

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

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

Whether Costa-Hawkins was intended to apply to inclusionary ordinances is unclear.[292] Only one exception is included in the bill:

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

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

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

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

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

291. *See* Mallakh, *supra* note 31, at 1850–51.

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

"where the owner has otherwise agreed by contract with a public entity in consideration for a direct financial contribution or any other forms of assistance specified in [the Density Bonus law]."[293] If a project receives a density bonus or other assistance under the Density Bonus law,[294] then cities can clearly require that the rents be controlled. It is also possible to interpret section 1954.52(b) as exempting from Costa-Hawkins *any* inclusionary housing given a financial contribution or other form of assistance that is discussed in the Density Bonus law, whether or not the incentive was actually given pursuant to the Density Bonus law. In other words, if inclusionary housing receives any one of the forms of assistance specified in the Density Bonus law—mixed-use zoning and parking concessions, for instance—then it may be exempt from Costa-Hawkins.[295]

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

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

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

Twenty percent affordable to lower income households; or

Ten percent affordable to very low income households; or

Fifty percent occupied by senior citizens.

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

295. *See* CAL. GOV'T CODE § 65915(h).

296. *See* CAL. CIV. CODE § 1954.52(b) (West Supp. 2002); Mallakh, *supra* note 31, at 1865–68.

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

298. *See* CAL. GOV'T CODE § 65583(c)(1)(A) (West Supp. 2002).

299. *See* discussion *supra* Part II.C.2.

1954.52(b) is interpreted as exempting only inclusionary units that comply with the state's Density Bonus law, then *only* inclusionary units complying with the Density Bonus law would comply with Costa-Hawkins.

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

> 1. Pay an "affordable housing fee" to provide funds for the construction of affordable housing; or
> 2. Develop affordable units onsite that qualify for a density bonus under the State's Density Bonus Law. Onsite inclusionary units *do not fulfill the city's inclusionary requirements* unless they qualify for a density bonus under state law.[301]

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

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

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

301. *See* SANTA MONICA, CAL., MUN. CODE § 9.56.040 (1998).

302. COLO. REV. STAT. § 38-12-301 (2001).

303. *See* BOULDER, COLO., REV. CODE, § 9-6.5-3 (2000); CITY OF BOULDER, COLO., CITY COUNCIL AGENDA ITEM 11 (Jan. 2, 2001), *available at* http://www.ci.boulder.co.us/clerk/previous/2001/010102/11.html (last visited Apr. 19, 2002).

V. Guidelines for Practitioners

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

An approach that may be worth considering in drafting future inclusionary ordinances is to position them more clearly as either exactions or land use regulations. Most inclusionary ordinances are neither fish nor fowl. They appear to be exactions because in-lieu fees can be paid to comply with the ordinance—inviting the courts "to treat the entire inclusionary program as a development exaction."[307] They also appear to be exactions when they provide incentives to developers in exchange for the inclusionary units—yet keep the incentives small in relation to the restrictions on the inclusionary units. At the same time, most communities assert that inclusionary ordinances are *not* an exaction and don't complete the kind of "nexus" or even "reasonable relationship" study that would make them less vulnerable to a future challenge.

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

1. Draft an ordinance—like that in Montgomery County, Maryland[308]—with a large enough density bonus to compensate developers for the restricted prices.
2. Draft an ordinance—like the Housing Element policy in San Mateo, California[309]—that looks like an ordinary land use regulation because it allows no in-lieu fees and contains no incentives.

304. *See* Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 63 (Ct. App. 2001).
305. *See id.* at 64.
306. *See* discussion *supra* Part II.B.
307. Judd & Rosen, *supra* note 9, at 7.
308. *See* MONTGOMERY COUNTY, MD., CODE, ch. 25A (2002); MONTGOMERY COUNTY, *supra* note 41.
309. *See* SAN MATEO, CAL., CITY OF SAN MATEO HOUSING ELEMENT H2.3–H2.5 (2002) [hereinafter SAN MATEO HOUSING ELEMENT].

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

A. The Density Bonus Approach

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

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

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

B. The Pure Land Use Regulation Approach

San Mateo, California, requires that ten percent of all residential projects having eleven or more units be made affordable to either low- or moderate-income families. This requirement was part of an initia-

310. *See* SANTA MONICA, CAL., MUN. CODE ch. 9.56 (1998).
311. *See* Ellickson, *supra* note 19, at 1180.
312. *See* Dietderich, *supra* note 20, at 28.
313. MONTGOMERY COUNTY, *supra* note 41.
314. *See id.*
315. *See supra* note 54 and accompanying text.
316. *See* discussion *supra* Part I.B.3.

tive adopted by the voters in 1990.[317] It includes no density bonuses except those required by state law and specifically states that in-lieu fees are not an acceptable alternative to providing units on-site.[318] The provisions cannot be waived because they are required by the city's general plan, and all development must conform to the plan.[319]

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

C. The Pure Exactions Approach

The City of Santa Monica chose to levy an impact fee on most new market-rate housing developments (although developers may, in some cases, have the option of providing the units off- or on-site).[320] To justify the fee, the city completed a nexus study[321] that looked at the impact of new, market-rate housing on the demand for affordable housing. It calculated the demand for goods and services created by new residents of market-rate housing; the number of low- and moderate-wage workers needed to satisfy that demand; and the cost of producing affordable housing needed by those workers.[322] The report concluded that an impact fee of $5.41 to $8.01 per square foot was needed to provide housing for the low-income workers who would serve the residents of the new market-rate homes.[323] As a further justification for the fee, Santa Monica included in its findings, but did not

317. *See* CITY OF SAN MATEO, CAL., VISION 2010: SAN MATEO GENERAL PLAN, app. R § 3(D)(5)(b) (1990) [hereinafter SAN MATEO GENERAL PLAN].

318. *See* SAN MATEO HOUSING ELEMENT, *supra* note 309, at H2.4.

319. *See* SAN MATEO GENERAL PLAN, *supra* note 317, Policy LU 6A.1 at II-30.

320. *See* SANTA MONICA, CAL., MUN. CODE § 9.56.040 (1998).

321. *See* HAMILTON, RABINOVITZ & ALSCHULER, INC, THE NEXUS BETWEEN NEW MARKET RATE MULTI-FAMILY DEVELOPMENTS IN THE CITY OF SANTA MONICA AND THE NEED FOR AFFORDABLE HOUSING (July 7, 1998) (on file at the University of San Francisco Law Review office) [hereinafter HR&A REPORT].

322. *See* CITY OF SANTA MONICA, CAL., ITEM 9-A, SECOND SUPPLEMENTAL STAFF REPORT (June 9, 1998), *available at* http://www.santa-monica.org/cityclerk/council/agendas/1998/s98060909-A/html (last visited Mar. 24, 2002).

323. *See* HR&A REPORT, *supra* note 321, at 6. *See also* KEYSER MARSTON ASSOCIATES, INC., PALO ALTO BMR PROGRAM RESIDENTIAL NEXUS: ISSUES AND RECOMMENDATIONS A–6 (Apr. 1995) (concluding that at least 7.05 workers with moderate-income wages or below would be supported by the retail expenditures of every 100 houses and calculating an impact fee based on this ratio) (on file at the University of San Francisco Law Review office) [hereinafter KMA REPORT].

quantify, an assertion that impact fees are needed because market-rate housing consumes land that will no longer be available for affordable housing.[324] Santa Monica anticipated that most developers would pay a fee rather than construct affordable housing on-site; anticipated that the fee might be attacked as an exaction; and completed studies to show a nexus between the fee and the impacts of new housing on affordable housing. As a generally applicable fee, Santa Monica's housing fee—and any similar fee—would likely be reviewed under the "reasonable relationship" standard established by the California courts. The nexus study completed by Santa Monica is an excellent model for cities that want to acknowledge inclusionary requirements and in-lieu fees as impact fees.

D. Other Advice for Practitioners

1. Establish an Adequate Factual Record

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

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

In California, regional agencies calculate each community's 'fair share' of the regional housing need every five years, dividing the total housing demand into that needed by various income groups.[325] In New Jersey, the Council on Affordable Housing has established detailed standards for affordable housing in each community.[326] Consol-

324. *See* SANTA MONICA, CAL., MUN. CODE § 9.56.010(f). The Santa Monica ordinance contains an excellent set of findings that can be used as a model by drafters of future inclusionary ordinances. *Id.* at § 9.56.010. *See also* Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277, 285 (N.J. 1990) ("Land must be viewed as an essential but exhaustible resource; any land that is developed for any purpose reduces the supply of land capable of being used to build affordable housing."); Merrill & Lincoln, *supra* note 20, at 285–87 (describing an economic methodology showing a link between the construction of market-rate housing and reduced opportunities for affordable housing); KMA REPORT, *supra* note 323, at 6 ("[T]he construction of market-rate housing means a lost opportunity to build below-market-rate housing."). *See generally* MUNDIE & ASSOCS. ET AL., AN INCLUSIONARY HOUSING STRATEGY FOR MENDOCINO COUNTY (Nov. 1995) (on file at the University of San Francisco Law Review office) (quantifying affordable housing needs based in part on limited land available for affordable units).

325. *See* CAL. GOV'T CODE § 65584(a) (West Supp. 2002).

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

idated Plans required by the Department of Housing and Urban Development as a condition of federal Community Development Block Grants and other housing grants also document housing needs.[327] All these will allow a city to demonstrate that there is a need for affordable housing in the community and that the required affordable housing "substantially advances a legitimate state interest[ ]."[328]

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

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

2. Minimize Discretion

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

3. Consider Including a Hardship Waiver

The *City of Napa* court found that since Napa could grant a *complete* waiver from the inclusionary zoning ordinance, the ordinance could not result in a taking.[331] A waiver provision, then, can provide strong assurance that an inclusionary ordinance can withstand a facial challenge. The difficulty, however, lies in determining the basis for a complete waiver. Zoning and land use ordinances typically permit variances if the usual zoning requirements will cause a hardship. A typical

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

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

329. *Id.*

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

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

provision allows a variance when, because of a special condition of the property, literally enforcing the ordinance would cause unnecessary hardship.[332] In contrast, many of the inclusionary ordinances that permit waivers allow them if the ordinance would cause a *taking* of some kind.[333] This suggests that cities (or city attorneys) are not convinced that inclusionary zoning is constitutional and wish to create an escape valve. The difficulty is that the waiver provision draws attention to that uncertain status.

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

4. Eliminate Conflicts with Rent Control Laws

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

In addition, two provisions will help avoid an *unconstitutional* application. First, units need to remain affordable over a period of years (at least twenty, and ideally much longer) to ensure that the ordinance "substantially advances" its goal of creating affordable housing

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

333. *See, e.g.*, NAPA, CAL., MUN. CODE § 15.94.080(A) (1999) (permitting a complete waiver if the developer can demonstrate no nexus between the inclusionary ordinance and the impacts of his project); SACRAMENTO, CAL., MUN. CODE § 17.190.130 (2001) (allowing a developer to request a determination that the inclusionary ordinance is a taking); BOULDER, COLO. REV. CODE § 9-6.5-11 (2000) (permitting a developer to apply for an adjustment on the basis that the requirements constitute a taking).

334. *See supra* notes 293–94 and accompanying text.

and does not create "premium pricing" for the first buyer.[335] Second,[336]cities may want to consider some provision for review of future rents should unusual conditions result in rent limitations that do not result in a fair return.

Conclusion

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

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

Finally, although cities argue that inclusionary ordinances are not exactions, the ordinances as drafted often contradict this assertion. Typically, in-lieu fees may be substituted for on-site units (implying that the units are equivalent to an impact fee); waivers can be granted if the ordinance creates a taking (implying that the drafters think this is a possibility); and the requirements can be met in a multitude of different ways (implying that the city is looking for a commodity, i.e.,

335. *See supra* Part IV.C.
336. *See supra* Part IV. B.

an exaction). Ordinances can, in fact, be defensible even if they are drafted to more closely resemble ordinary zoning ordinances, and they will be much easier to administer.

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

APPENDIX—SUMMARY OF INCLUSIONARY ZONING ORDINANCES OR POLICIES

JURISDICTION	GP	ZO	Other	Affordability	Alternatives	Incentives	Waiver Provisions	Term Basis for Rents/Prices
Agoura Hills	x	x		10+ units: 15%.	Off-site construction or in-lieu fees if not economically feasible on site. ($4,541–$6,277/unit).	None shown.	None shown.	30% of 90%: rental. 35% of 90%: sales. 15 years.
Berkeley	x	x		20% to low income.	In-lieu fees for fractional units.	None shown.	None shown.	30% of gross income; sales prices must cover construction and financing costs.
Brea	x	x		10% low to moderate income.	Compliance with state density bonus program. In-lieu fees on a case-by-case basis.	Density bonus. Reductions in development standards or impact fees. Subsidies Building Code alternatives; enough to offset the unit cost.	If City determines that units will put an economic burden on the developer or future homeowners; developer must submit an impact analysis.	20 units or more. 30 years from initial sale or rental.
Campbell	x			10+: 15% low- and moderate-income.	Off-site construction In-lieu fee.	Not yet developed.	Ordinance not drafted.	No details.
Carlsbad	x	x		15% at 70% (rental); at 80% for sales.	$4,515/unit for 6 or fewer units. Alternatives where infeasible.	Offsets at the city's discretion.	Alternatives where infeasible.	30% of gross income. 55 years rental; 30 years sales.
Corte Madera	x			≤6 du/A: 5% low or 10% moderate. >6du/A: 7.5% low or 15% moderate.	None; in-lieu fees not allowed.	Optional density bonuses.	None shown.	
Cupertino	x			15%.	9 or less: in-lieu fee. All: provide land.	None shown.	None shown.	99 years. Based on median income; annual increases.

JURISDICTION	GP	ZO	Other	Affordability	Alternatives	Incentives	Waiver Provisions	Term Basis for Rents/Prices
Davis	x	x		Sale: 25% moderate. Rental <19: 15% low, 10% very low; 20+: 25% low, 10% very low. For sales: must agree to dedicate land for 10% to city; 5% self-help.	Sale: at least 10% on-site. In lieu fees for projects with less than 30 units. Individualized programs if proposed by developer. Transfer of credits.	1:1 density bonus for on-site for-sale units. Rentals: 15–25%.	None.	30% of target income. Rentals affordable in perpetuity.
Del Mar	x	x		For m-f: 10% very low.	In-lieu fees.	None.	None.	Based on income. 30 years.
Emeryville	x	x		20% moderate, 30+ units; less if more affordability or if cheaper market-rate units.	Construction on another site.	Payment of some city fees. Discretionary density bonus of 25%. Technical assistance.		30% of income; 25 years.
Encinitas			x	10% for rental to Section 8 tenants.	In-lieu fee. Developer can require buyers to pay the fee.			10 or more units with a subdivision map. Rented at HUD Fair Market Rent.
Irvine		x		21% moderate, 5% low 15% moderate, 10% low.	In lieu fees, sale of property at reduced price.	Low income only if subsidies available; otherwise moderate.		Requirements vary by project and zoning district. 30 years; complex requirements.
Los Altos	x	x		If 4du/A: determined on a case-by-case basis.	None (may be completely waived)	At option of city.	Not required if financially infeasible (usually a very small project); generally only if low-income units; fee waivers, fast-tracking, modified zoning standards.	

JURISDICTION	GP	ZO	Other	Affordability	Alternatives	Incentives	Waiver Provisions	Term Basis for Rents/Prices
Los Gatos	x			Moderate; being revised to low. Not clear if required or permitted.		Up to 100% density bonus (if all units restricted). Possible reductions in development standards.		
Menlo Park	x	x		10% low and moderate (10-19 units); 15% moderate (20+ units).	In-lieu fees for 5-9 units or fractional units; 3% of gross sales. Off-site units.	1:1 if provided on site, up to 15%.		
Mill Valley	x	x		10%:; 10+ dus; less than 7 dus/A; 15% if 7+dus/A; mod. inc. In-lieu fee for 2-9 dus.	Construction of units on another site or donation of land if normal requirements not feasible or appropriate.	Possible waiver of parkland dedication and other fees; technical assistance. Possible density bonus if more units or affordability than standard.	None provided.	30% of gross income. Term appears indefinite.
Monterey County	x	x		7+ units: 15% inclusionary. Rental: low-income. Sales: low or moderate income.	Off-site construction. In-lieu fees (15% of median sales price of s-f home); fractional units, projects of <6 units.	Fee waivers 1:1 if more than 15%	None.	30% of income. Rental: indefinite. Sale: 30 years.
Mountain View	x	x		3-6+: 10%. Rental: low. Sales: Median.	In lieu fees for fractional units, or when s-f home prices too high. For rentals, 3% of appraised value if 9+ units; 1.5% if 5-8 units.	No density bonus.	None.	30% of target rent.
Napa	x	x		10%	In lieu fees		If no nexus shown.	

JURISDICTION	GP	ZO	Other	Affordability	Alternatives	Incentives	Waiver Provisions	Term Basis for Rents/Prices
Novato	x	x		Rental: 10% at 60% of median. Sales: 15% at 80% (fewer if more affordable).	In-lieu fees. Off-site construction. Land dedication.	Optional 10% density bonus; 25% for 50-100% affordability; density transfers. Optional fee waiver.	None shown.	30% of income. Term indefinite.
Oceanside	x	x		Sales: 10%; price does not exceed 250% of area median income. Rent: 10%; low income.	In-lieu fee equal to the median sales price of homes sold in Oceanside less the maximum affordable sales price for a 3-bedroom unit. Units provided off-site.	None shown.	None shown.	55 years. 3 or more units. Resales and rents controlled; rentals cannot be converted into condos.
Palo Alto	x			Sales: 10% affordable to 100% of median. Rental: 10% low income.	Off-site (11%) or in-lieu fees (5% of total sales price). Rental: Annual in-lieu fee or one-time payment.. Equivalent alternative.	None shown.	None shown.	Sales price must be high enough to cover construction and financing. Rental=HUD FMR; annual adjustment based on 1/3 of CPI; one-time fee=5% of appraised value.
Sacramento	x	x		10% very low income. 5% low income.	Land dedication. Off-site construction for s-f.	Optional waivers of fees, modifications of zoning, priority processing, local financial subsidies; also state density bonus law.	If city finds that requirement constitutes a taking; burden on the developer to prove this.	30% of income. 30 years.

JURISDICTION	GP	ZO	Other	Affordability	Alternatives	Incentives	Waiver Provisions	Term Basis for Rents/Prices
San Carlos	x	x		M-f: 5% low, 5% moderate. S-f: in-lieu fee of 2% of building permit valuation.	In-lieu fees for fractions and single-family.	1:1 density bonus for low-income units.	None shown.	30% of low or moderate incomes. Share in profit on resale (50-90% to city). Term not clear.
San Leandro	x	x		20+: 10% low- or moderate-income.	None.	None (separate incentive program if more units provided).	None.	No specifics.
San Mateo	x		Reso-lution	10+: 10% affordable.	Off-site if not feasible on-site. No in-lieu fees.	None.	None.	By resolution.
San Rafael	x	x		10%. Sale: 80 – 100% of median (90% used to set rents). Rental: 50 – 80 % of median (65% used).	Equal value alternative if on-site is impractical.	Priority for allocation of trips if 15%. affordable.		40 years. 10 or more units.
Santa Monica	x	x		Fees only unless comply with state density bonus law.	In lieu fees.			
Sunnyvale	x	x		Sales: 10% moderate. Rental: 10% low.	In-lieu fee if less than 20 units; difference between market and subsidized price/rents.	Optional 15% density bonus. Priority processing. Technical assistance.	None.	20 years. 30% of income; increased by housing portion of CPI.
Tiburon	x	x		10+: 5% low, 5% moderate.	2-9: in-lieu fees. Off-site construction. In-lieu fees "as a last resort."	Fee waiver. Fast track. Optional 25% density bonus.	None.	Not clear.

JURISDICTION	GP	ZO	Other	Affordability	Alternatives	Incentives	Waiver Provisions	Term Basis for Rents/Prices
Union City	x	x		Rental: 4.5% very low, 10.5% low (15% total). *Sales*: 1.5% low; 4.5% middle; 9% moderate (15% total).	In-lieu fees for <7 units or fractional unit; at $80,000/unit (multiplied by the fraction). Off-site construction.	State density bonus law. Technical assistance. Priority processing.	If unusual development costs (*e.g.*, contaminated site).	Not clear.
Watsonville	x	x		Sales: 10% low, 15% other. Rental: 10% very low, 10% low, 5% other.	In lieu fees if <8 units ($4000-$5000/unit). Off-site construction.	Priority processing if 50% affordable.	If a development agreement already providing for affordable housing.	For the life of the unit.
West Hollywood	x	x		1 unit if <10. 20% if 11+.	In-lieu fees if ≤20 units. Off-site construction.	1:1 density bonus; plus state density bonus. Increase in height limit. Waiver of standards if 25%+ affordable.	None.	Low: sales price=2.5x 65% median; moderate= 2.5x median.
Winters	x	x		6% very low. 9% moderate. Developed for each project.	Land dedication. In lieu fees. Self-help, etc.	None.	None.	55 years.