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INCLUSIONARY ZONING

DISCUSSION PAPER

Town of Chapel Hill, North Carolina Development Ordinance Update

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INTRODUCTION

The draft Development Ordinance includes an "inclusionary zoning" provision designed to require developers to provide affordable housing. This provision is included in response to the Town Council's request to consider institutionalizing the requirements presently enforced on a case-by-case basis. The Town Council presently requires developers to provide affordable housing on a case-by-case basis during the development approval process. While some ordinances (for example, the current development ordinance) rely on regulatory incentives to require housing, the draft ordinance imposes a mandatory requirement. It does, however, involve some legal risk.[1]

Inclusionary zoning programs rely on private developers to provide or to subsidize the provision of new affordable housing. This presents a number of legal issues. First is the issue of statutory authority. Do the state statutes which authorize municipal control over land use decisions permit the local government to require the mitigation of housing? Second, what risk do such programs run of violating the constitutional rights of landowners? Takings, due process, and equal protection claims have been raised against such programs in some states.

[1] Permitting mixed uses and relaxing development regulations are typically upheld by the courts so long as they are based on a uniform, precise set of regulations which advance a legitimate public purpose. The provision of affordable housing is undoubtedly a legitimate public purpose. *Brennick v. Newington Planning and Zoning Commission*, 41 Conn.Supp. 593, 597 A.2d 346 (1991)(regional housing needs could be considered in granting a zoning permit); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 92 N.J. 158, 456 A.2d 390 (1983). The courts also routinely reject challenges to zoning approvals granted pursuant to mixed use districts and other uniform regulations designed to mix uses. White & Jourdan, *Neotraditional Development: A Legal Analysis*, 49 Land Use Law & Zoning Digest, no. 8, at 3 (August 1997); *Purser v. Mecklenburg County*, 127 N.C.App. 63, 488 S.E.2d 277 (N.C.App. 1997).

Most of the programs rely, to some extent, on the concept of mitigation. That is, these techniques are founded on the principle that new development creates a demand for affordable housing, and can therefore be required to mitigate the impacts that it creates on the need for affordable housing. Some of these techniques rely on site-specific exactions, while others rely on fees.

The "inclusionary zoning" technique relies on the local government's authority to control land use rather than on mitigation. Inclusionary zoning requires, or provides incentives, for developers to set aside housing units for low or moderate income households. This technique may be, but is seldom, justified by mitigation principles. However, mitigation studies serve to bolster the local government's legal justification for set-aside requirements.

While no specific authority for inclusionary zoning exists under North Carolina law, there are strong arguments that the Town can implement the technique under its broad land use authority and general police powers. While individual landowners could argue that the technique constitutes a taking of property, most recent cases have rejected takings challenges to housing mitigation programs. The decision to proceed rests with the Town Council.

GENERAL PRINCIPLES

Inclusionary zoning ordinances are mandatory or voluntary/incentive-based requirements that developers of residential housing set aside units for occupancy by low- and moderate-income persons. Set asides are normally tied to a discretionary development approval such as annexation, rezoning, or subdivision plat. Set asides are often accompanied by other incentives such as flexible development standards expedited approvals, or permission for least-cost housing ("least-cost" housing refers to housing that can be produced at the lowest possible price consistent with minimal standards of health and safety). *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390 (1983).

Unlike linkage fees, which are a form of development exaction, inclusionary zoning ordinances are typically characterized as a zoning district standard. A. MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES 36-37 (1984). Unlike infrastructure exactions, which typically involve the transfer of land for roadways, open space or utility rights-of-way to public ownership, developers maintain ownership and economic gains in the form of rents, sales transactions and government assistance for inclusionary units. Inclusionary requirements are generally susceptible to challenge under exactions standards only where the developer is required to construct units off-site, as under a linkage program (see discussion below). *Id.*, at 166-173.

Policy considerations in designing and/or structuring an inclusionary zoning program include:

- defining which projects will be subject to the program
- defining "affordable" housing according to income and sales prices
- use of enforcement mechanisms, which may include development agreements; sequential approval; conditional zoning; subdivision approval; special permitting; environmental mitigation; and specific plans

- whether to include additional subsidies and incentives, such as housing subsidies derived from local revenue sources or tax exempt bond financing, may be needed to make the program attractive to developers.

Two broad legal requirements apply to the establishment of housing mitigation programs. First, the program must be authorized by state law. The technique must be expressly or impliedly authorized by state law, and it cannot conflict with matters of statewide concern. Second, the program must not violate a landowners' consitutional rights. The constitutional claims typically raised against such programs include:

1) ***Taking of private property without just compensation.*** Does the program leave the landowner with a reasonable economic use? If exactions are involved, do they have a nexus to the types of needs created by the development, and is the exaction roughly proportionate to the impacts created by the development? Because these programs involve novel uses of land use authority, these issues have seldom been litigated. However, the weight of authority indicates that reasonable inclusionary zoning requirements do not result in a taking of private property.

2) ***Equal protection of the law.*** Does the program discriminate against similarly situated landowners without a rational basis? Equal protection challenges based on discrimination against the developer or neighboring landowners are not likely to be successful. Neither developers nor neighboring landowners fall within a "suspect classification." Further, the right to develop, as well as the right not to have affordable housing sited in one's neighborhood, are not typically considered "fundamental rights." *Cf. Spiker v. City of Lakewood*, 603 P.2d 130, 133 (Colo. 1979)(interest of adjacent landowners in zoning is not a vested right). Accordingly, the courts typically accede to any discrimination against a developer or neighboring landowner where there is a rational basis for the classification. *Mahoney v. Board of Adjustment of Winchester*, 366 Mass. 228, 316 N.E.2d 606, *diss'd*, 420 U.S. 903 (dismissing equal protection challenge by neighboring landowners to "anti-snob" inclusionary zoning statute). The courts afford extreme deference to the local government's actions in drawing such classifications.

3) ***Due process.*** Does the provision of housing advance a legitimate public purpose? Several United States Supreme Court decisions indicate that the local government's determination on the issue of legitimacy is broad and nearly conclusive. *Berman v. Parker*, 348 U.S. 26, 33 (1954)("The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. If those who govern the [local government] decide that the [community] should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)(" Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . ."). There is little doubt that the provision of affordable housing advances a legitimate public purpose.

Because most cases have involved constitutional claims, and because these claims pose the greatest financial risk to the City, this memorandum will stress those issues.

JUDICIAL RESPONSES TO INCLUSIONARY ZONING.

Inclusionary zoning did not fare well in early zoning decisions. The Virginia Supreme Court rejected a mandatory set-aside ordinance as *ultra vires* the state zoning enabling legislation and as a taking of private property in an early decision. *Board of Supervisors of Fairfax County v. DeGroff Enterprises*, 214 Va. 235, 198 S.E.2d 600 (1973). The Fairfax County ordinance required developers in five zoning districts to set aside 15% of all residential units in new developments as low- or moderate- income housing, as a condition of rezoning or site plan approval. The *DeGroff* court reasoned that an ordinance utilized to effectuate socioeconomic purposes exceeded the authority conferred under the zoning enabling legislation to regulate land.

It must be kept in mind that Virginia is a strict "Dillon's Rule" state, and has a very conservative tradition of property rights. *DeGroff* relied heavily on an earlier case which had invalidated a large-lot zoning ordinance designed to exclude low and moderate income persons, therefore concluding that a zoning ordinance can be neither exclusionary nor inclusionary. See *Board of Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959). Because all zoning has socioeconomic effects, this distinction has been largely discredited as artificial. *DeGroff* has not been followed outside of Virginia, and was expressly rejected in the leading case of *Southern Burlington County NAACP v. Township of Mt. Laurel*, 92 N.J. 158, 456 A.2d 390 (1983). The case has recently been superseded, in part, by the state legislature.

Inclusionary zoning has been approved as a mechanism for local governments to further the production of housing in response to constitutional mandates. In its landmark decision in *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975), the New Jersey Supreme Court imposed a mandatory obligation under the state constitution for all local governments to utilize affirmative measures for the production of affordable housing, such as mandatory set-asides, where the removal of regulatory barriers would not suffice. In *In re Egg Harbor Associates*, 94 N.J. 358, 464 A.2d 115 (1983), the court upheld a condition attached to a development permit by a state environmental agency requiring the developer to set aside 10% of its residential units for low-income housing and 10% for moderate-income housing. The court found that the condition was authorized by the state enabling legislation and did not amount to a taking of private property.

In *Iodice v. City of Newton*, 397 Mass. 329, 491 N.E.2d 618 (1986), the court upheld a condition to the issuance of a special use permit requiring that 10% of the proposed development be operated as low or moderate income housing. The Massachusetts statutes expressly authorized the imposition of set-aside requirements for special use permits. *Compare Middlesex v. Aldermen of Newton*, 371 Mass. 849, 359 N.E.2d 1279 (1977)(invalidating 10% set-aside requirement absent express authority in zoning legislation).

The Montgomery County, Maryland Moderately Priced Dwelling Unit (MPDU) program, adopted in 1974, was one of the first inclusionary zoning programs enacted in the nation. The Maryland General Assembly specifically authorizes local governments to develop and administer affordable housing programs which include restrictions and regulations on the sale and purchase of those properties (Md. Code, Art. 66B, § 12.01). The MPDU authorizes an increase in the zoning density of a residential real estate development if the developer includes MPDUs. The ordinance requires there to be an agreement between the developer and the County, and that recorded covenants be imposed by the developer on the MPDU lots. These covenants "run with the land for the entire period of control," and they bind the applicant, any assignee, mortgagee, or buyer, and all other parties that receive title to the property. The covenants must be senior to all instruments

securing permanent financing. The period of control for MPDUs built for sale, as contrasted with those built for rental, is ten years from the date of initial sale.

> The ordinance also sets forth rules on maximum sale and resale prices and addresses foreclosure and judicial sales of MPDUs. When such a unit is sold by a developer to the first grantee, there is a maximum selling price established by the County Executive. The maximum price for resale of an MPDU within the control period is fixed is as follows:
>
> "(a) *Resale price and terms.* Except for foreclosure proceedings, any MPDU constructed or offered for sale ... under this Chapter must not be resold during the control period for a price greater than the original selling price plus:
>
> "(1) A percentage of the unit's original selling price equal to the increase in the cost of living since the unit was first sold, as determined by the Consumer Price Index;
>
> "(2) The fair market value of improvements made to the unit between the date of original sale and the date of resale;
>
> "(3) An allowance for closing costs which were not paid by the initial seller, but which will be paid by the initial buyer for the benefit of the later buyer; and
>
> "(4) A reasonable sales commission if the unit is not sold during the priority marketing period to an eligible person from the [County's] eligibility list."

Before any MPDU may be offered for resale during the control period, it must first be offered exclusively for 60 days to the Montgomery County Department of Housing and Community Affairs (the Department). If there is no resale of an MPDU during the control period, then, on the first sale of the unit after the control period ends, "the seller must pay to the Housing Initiative Fund one-half of the excess of the total resale price over" a maximum price computed under the ordinance. Funds allocated to the Montgomery Housing Initiative may be spent to:

> "(1) Construct or acquire affordable housing units;
> "(2) Buy and rehabilitate existing rental units that would otherwise be removed from the supply of affordable housing; and
> "(3) Participate in housing or mixed-use developments that will include affordable housing."

While no court decision has ruled on the validity or constituional implications of the MPDU program, a recent court decision found that neither Montgomery County's ordinance creating Moderately Priced Dwelling Unit (MPDU) Program, nor covenants imposed on the subject property pursuant to that program, create a lien on the subject property or a property interest therein. *Montgomery County v. May Department Stores Company*, No. 19 (Md. 1998); see also *Marshall v. Fitzgerald*, 47 Md.App. 319, 423 A.2d 967 (1981)(involving res judicata issues; merits of program not considered).

GENERAL PRINCIPLES

The concept of inclusionary zoning standards as a formal component of land development regulations has not been tested in North Carolina. However, the concept has been tested and upheld

in other states. Further, state law might imply authority to tie rezoning and plat approval to inclusionary zoning standards.

While the North Carolina zoning and subdivision enabling legislation does not specifically enumerate an "inclusionary zoning" ordinance as a regulatory technique, inclusionary standards could be viewed as nothing more than a standard governing the issuance of permits under zoning or subdivision authority. As is discussed below, the state zoning and subdivision legislation provides very broad authority to regulate land development for a number of different purposes.

Further, while North Carolina is sometimes described as a "Dillon's Rule" state[2], the courts in North Carolina no longer apply Dillon's Rule to limit the scope of regulatory authority. "Dillon's Rule" provides:

> [A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,--not simply convenient, but indispensable.

DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, § 237 (5th ed. 1911); *Smith v. New Bern*, 70 N.C. 14 (1874); *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 276 S.E.2d 443 (1981), *appeal after remand*, 61 N.C.App. 682, 301 S.E.2d 530, rev. denied, 308 N.C. 675, 304 S.E.2d 757 (1983). While this rule is often used to construe local government powers narrowly, the City enabling legislation now provides as follows:

> § 160A-4. Broad construction. It is the policy of the General Assembly that the cities of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.

In *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 442 S.E.2d 45 (N.C. 1994), the North Carolina Supreme Court considered a series of user fees not expressly authorized by statute. The City of Charlotte had imposed a number of user fees for permit processing, none of which were expressly authorized by the zoning or subdivision enabling legislation. In upholding the fees, the court recited the broad authority of cities to adopt ordinances which "define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and ... abate nuisances" (NCGS § 160A-174). The court noted that the statutes now provide that the enumeration of specific powers in a statute does not foreclose other powers not enumerated (NCGS § 160A-177). The court also recited the City's zoning, subdivision, erosion and sedimentation, and tree preservation enabling legislation.[3] The Court's ensuing discussion indicates that Dillons' Rule is no longer a viable rule of construction in the State of North Carolina:

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[2] Dillon's Rule is a rule of narrow construction of statutory authority. Virginia is an example of a state which rigorously follows the doctrine. South Carolina has abolished Dillon's rule.

[3] The tree preservation legislation was adopted by general statute.

This statute makes it clear that the provisions of chapter 160A and of city charters shall be broadly construed and that grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect. We treat this language as a "legislative mandate that we are to construe in a broad fashion the provisions and grants of power contained in Chapter 160A." *River Birch Assoc. v. City of Raleigh*, 326 N.C. 100, 109, 388 S.E.2d 538, 543 (1990); see also *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 443, 358 S.E.2d 372, 374 (1987); *Smith v. Keator*, 285 N.C. 530, 534, 206 S.E.2d 203, 205-06, *appeal dismissed*, 419 U.S. 1043, 95 S.Ct. 613, 42 L.Ed.2d 636 (1974); *Town of West Jefferson v. Edwards*, 74 N.C.App. 377, 385, 329 S.E.2d 407, 412-13 (1985); *City of Durham v. Herndon*, 61 N.C.App. 275, 278, 300 S.E.2d 460, 462 (1983). In contrast to N.C.G.S. § 160A-4, Dillon's Rule suggests a narrow construction, allowing a municipal corporation only those powers "granted in express words, ... necessarily or fairly implied in or incident to the powers expressly granted, ... and those essential to the accomplishment of the declared objects and purposes of the corporation." DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, § 237 (5th ed. 1911). The City contends that the imposition of user fees should be upheld even under application of Dillon's Rule. We find it unnecessary to decide that question since we conclude that the proper rule of construction is the one set forth in the statute.

Therefore:

1. City powers are broadly, not narrowly, construed (NCGS § 160A-4 – see discussion above).

2. "A city may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city; and may define and abate nuisances." (NCGS § 160A-174(a)).

3. "The enumeration in [Chapter 160A] of specific powers to define, regulate, prohibit, or abate acts, omissions, or conditions is not exclusive, nor is it a limit on the general authority to adopt ordinances conferred on cities by G.S. 160A-174." [Note: the terms of this section are limited to the powers enumerated in the general city enabling statutes, Chapter 160A. This chapter includes the City zoning, subdivision, and erosion and sedimentation control legislation. It does not expressly apply to powers enumerated in other chapters.]

Cities do, however, remain subject to state preemption claims. Where the state provides a complete and integrated regulatory scheme to the exclusion of local regulation, provides language which restrict local governments to a particular method of legislation, or where the ordinance is contrary to State or federal law or the public policy of the State, state preemption may apply. *Homebuilder's Association v. City of Charlotte, supra*, 442 S.E.2d at 50-51. However, the preemptive language must be clear from the statute.

Accordingly, North Carolina cities enjoy broad powers to regulate land use pursuant to their zoning and subdivision statutes. While these statutes provide specific methods for regulating land use, those methods are not exclusive of other powers in the land use legislation or the City's broad police powers delegated in NCGS § 160A-121. Further, no specific statute appears to remove the authority to deny land use approval where affordable housing is not provided.

In North Carolina, City (NCGS § 160A-372) subdivision regulations may provide the following:

- orderly growth and development
- coordination of streets and highways within proposed subdivisions with existing or planned streets and highways and with other public facilities
- distribution of population and traffic in a manner that will avoid congestion and overcrowding and will create conditions essential to public health, safety, and the general welfare.

The City's authority under the subdivision enabling legislation is broad. *Batch v. Town of Chapel Hill*, 387 S.E.2d 655 (N.C. 1990)(Town could require subdivisions to take future, as well as existing, roads into consideration in laying out internal roads).

RENT CONTROL

Inclusionary zoning ordinances may be precluded by state legislation banning rent control. North Carolina's statute provides as follows:

> § 42-14.1. Rent control
>
> No county or city as defined by G.S. 160A-1 may enact, maintain, or enforce any ordinance or resolution which regulates the amount of rent to be charged for privately owned, single-family or multiple unit residential or commercial rental property. This section shall not be construed as prohibiting any county or city, or any authority created by a county or city for that purpose, from:
>
> (1) Regulating in any way property belonging to that city, county, or authority;
>
> (2) Entering into agreements with private persons which regulate the amount of rent charged for subsidized rental properties; or
>
> (3) Enacting ordinances or resolutions restricting rent for properties assisted with Community Development Block Grant Funds. [Added by Laws 1987, c. 458, § 1.]

This statute has not been construed. However, at least one other state court has invalidated inclusionary zoning based on rent control statutes. In *Town of Telluride v. Lot 34 Venture*, 3 P.3d 30 (Colo. 2000), the court invalidated a housing mitigation ordinance which required a developer to satisfy inclusionary zoning requirements through, *inter alia*, constructing new housing units with fixed rental rates. The Colorado statute reads as follows: "The general assembly finds and declares that the imposition of rent control on private residential housing units is a matter of statewide concern; therefore, no county or municipality may enact any ordinance or resolution which would control rents on private residential property. This section is not intended to impair the right of any state agency, county, or municipality to manage and control any property in which it has an interest through a housing authority or similar agency." While this language is broader than the North Carolina statute, the case is nevertheless persuasive authority against the use of rent controls to satisfy inclusionary zoning obligations. The Town could avoid the rent control restrictions by allowing a developer to convey units to the town of or a public agency, or by entering into agreements for the control of rents. These approaches, however, could implicate takings issues (discussed below).

TAKINGS

Both North Carolina and federal law prohibit the taking of private property without just compensation. The Fifth and Fourteenth Amendments of the federal Constitution prohibit the taking of private property for public use without just compensation. *First English Evangelical Lutheran Church v. Los Angles County*, Cal., 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

As a general rule, a taking of property occurs when the entity clothed with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property. A taking can be effected by a legal interference with the physical use, possession, disposition, or enjoyment of the property, or by acts which constitute an exercise of dominion and control by a governmental entity. A taking also occurs if an owner is required to forego all economically beneficial use of his or her property.

Takings liability can arise in several different ways. First, takings liability may be predicated on a regulation which is so overly oppressive that it amounts to confiscation of the landower's economic value. A governmental regulation that prohibits all reasonable use of property constitutes a taking.

IS INCLUSIONARY ZONING AN EXACTION OR A USE RESTRICTION?

If inclusionary zoning is considered an exaction, the nexus and proportionality standards of state and federal law apply. The Town would need to demonstrate that new development creates a need for affordable housing, and that the set-aside requirement is proportionate to that need. However, if the requirement is viewed as a use restriction, a landowner would have to prove that the requirement deprives him of nearly all economic use of his property. A leading commentator on inclusionary zoning, Alan Mallach, concludes that inclusionary zoning is a use restriction rather than an exaction:

> ... the imposition of an inclusionary zoning ordinance is a use of the police power in order to serve the general welfare ... by setting specific standards to govern the nature of the development that will take place in certain districts.

ALLAN MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES (1984), at 37.

Cases which have addressed inclusionary zoning as a use restriction have generally rejected takings claims. In *Home Builders Assn. of Northern California v. City of Napa*, 108 Cal.Rptr.2d 60 (Cal.App. 1 Dist., June 6, 2001). the City of Napa Valley adopted an inclusionary zoning ordinance which required that ten percent of all newly constructed units must be "affordable" as that term is defined. The ordinance offers developers two alternatives. First, developers of single-family units may, at their option, satisfy the so called inclusionary requirement through an "alternative equivalent proposal" such as a dedication of land, or the construction of affordable units on another site. Developers of multi-family units may also satisfy the 10 percent requirement through an "alternative equivalent proposal" if the City Council, in its sole discretion, determines that the proposed alternative results in affordable housing opportunities equal to or greater than those created by the basic inclusionary requirement. The court noted that, while the ordinance imposes economic burdens, it also provides significant benefits private developers. Developments that include affordable housing are eligible for expedited processing, fee deferrals, loans or grants, and density bonuses. More critically, the ordinance permits a developer to appeal for a reduction, adjustment, or complete waiver of the ordinance's requirements. Since City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking. The *Napa* case involved only a facial takings claim, rather than one applied to a specific property. It is unclear whether these restrictions would produce takings when applied to specific property.

In *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390 (1983), the New Jersey Supreme Court mandated the use of set-asides if local governments were otherwise unable to meet their regional fair share housing obligations. The court rejected arguments that this amounted to unlawful socioeconomic zoning and a taking of property. The court analogized the technique to an earlier case in which it upheld a zoning ordinance restricting homes in a particular zone to mobile homes occupied by the elderly. *Id.*, 456 A.2d at 448 (citing *Taxpayer's Ass'n of Weymouth Tp. v. Weymouth Tp.*, 80 N.J. 6, 364 A.2d 1016 (1976)).

In *In re Egg Harbor Associates*, 94 N.J. 358, 464 A.2d 115 (1983), the court upheld a condition attached to a development permit by a state environmental agency requiring the developer to set aside 10% of its residential units for low-income housing and 10% for moderate-income housing. The court found that the condition was not a taking of private property, applying the diminution in economic value tests. Upholding the constitutionality of the requirement, the court noted that the agency based its derivation of the 20% set-aside on the following:

- the percentage refects only a small share of the expected households in the region that would require assistance;
- other local governments mandate that a required percent of planned unit developments be set aside, ranging from 15-25%;
- the state (New Jersey) Supreme Court requires developers challenging exclusionary ordinances to set aside 20% of the units for low or moderate income families;
- 50% of the regional housing needs are for households earning less than $15,000.

EXACTIONS: THE NOLLAN AND DOLAN TESTS

The two major Supreme Court precedents relating to exactions are *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994). In *Nollan*, the Supreme Court held that an an exaction that does not bear an "essential nexus" to the type of demands created by a development is a taking. In that case, the permitting authority attached a condition to construction of a beachfront house which required the dedication of an access easement along the beach in order to preserve visual access. The Supreme Court, in the *Nollan* decision, has put municipalities on notice that drafting and implementing regulatory conditions in the development approval process that effectuate acquisition of title or the interference with possession can result in a finding that private property has been taken for public use requiring the payment of just compensation. In this case, a permit condition was invalidated because it "fail[ed] to further the end advanced" where there was no relationship between the stated objectives of ensuring visual access to the beach and preventing psychological access barriers, and the "requirement that people already on the beaches be able to walk across the Nollan's property.

The Supreme Court in *Dolan* added a "rough proportionality" requirement to the equation, requiring that: (1) there is an "essential nexus" present that satisfies *Nollan*; (2) the city has demonstrated "rough proportionality" between the harm caused by the new land use and the benefit obtained by the condition; and (3) the city has established the constitutionality of its condition by making an "individualized determination" that the conditions satisfy the proportionality requirement. The *Dolan* case involved exactions for sidewalks and floodplain areas as a condition to the expansion of an existing hardware store. The Supreme Court found that the proposed expansion created a

need for these facilities, but that the impact of the expansion on those facilities had not been quantified.

The *Nollan* and *Dolan* decisions have been applied to linkage programs and other housing-related programs such as housing preservation requirements. These will be discussed in greater detail under "Linkage & Fee-Based Programs" and "Housing Preservation Ordinances," *infra.* However, it is questionable whether the *Nollan* and *Dolan* tests apply to inclusionary zoning.

Some inclusionary zoning requirements can be viewed as use restrictions, because the landowner has the option of retaining full ownership of the affordable dwelling units. Accordingly, they may be viewed as use restrictions rather than as exactions. The court in *Dolan* distinguished the situation there from the land use controls in economic takings cases such as *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) and *Agins v. Tiburon*, 447 U. S. 255, 260 (1980). "First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city." In those situations, the risk of **regulatory leveraging** is absent. Regulatory leveraging involves the abuse of permitting powers to extract unusual concessions from developers which exceed their nexus or proportionate impacts.

Accordingly, most cases have confined *Dolan* to dedication exactions and individualized fee exactions. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, ___ U.S. ___, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999), the United States Supreme Court held that the rough proportionality test of *Dolan* was inapposite where the landowner's Fifth Amendment takings challenge was based not on excessive exactions but on denial of development. In so finding the Court acknowledged that "we 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." *Id.* at 1635.

If inclusionary zoning is not viewed as an exaction, the regulations are tested by the 3-part analysis established by the United States Supreme Court in *Penn Central Transp. Co. v. New York City*, , 438 U.S. 104 (1978). Under this analyis, the court engages in an ad hoc, factual inquiry in which it assesses: (1) the character of the regulation; (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. "A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e. g., *United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* However, because all such analyses are ad hoc in nature, it is difficult to assess at the outset whether a regulation will produce a taking with regard to specific property.

NEGOTIATED AGREEMENTS DO NOT IMPLICATE TAKINGS ANALYSIS

Local governments can embody housing obligations in a development agreement without violating constitutional standards - even where no nexus is established. *City of New York v. 17 Vista Associates*, 580 N.Y.S.2d 963 (Sup. 1991)(city could enforce promissory note for payment of money into housing trust fund as consideration for exemption from housing demolition moratorium later declared unconstitutional); *Leroy Land v. Tahoe Regional Planning Agency*, 939 F.2d 696 (9th Cir. 1991)(environmental exaction). In other words, where constitutional limitations would prevent an exaction, whether due to nexus or proportionality, the landowner may nevertheless proffer the improvement voluntarily. If constitutional rights are knowingly waived, the landowner becomes bound by the contract and cannot later raise a takings claim.

North Carolina's vested rights statute provides a useful framework for negotiating mitigation conditions. Under the statute, the local government approves a "site-specific development plan" (SSDP), which is typically a form of discretionary approval such as a PUD or a conditional use permit. The developer obtains vested rights for a period of three years, and becomes subject to the terms of the plan.

Accordingly, the state's site specific development plan legislation can be used as a basis to negotiate housing conditions without implicating the takings restrictions in *Nollan* and *Dolan*. In return, the local government relinquishes the ability to impose new or different standards at a later point in the life of the development or the development approval process.

SITE-SPECIFIC EXACTIONS

Courts in most states have long accepted the validity of using case-specific exactions to require developers to assist in providing roads, utilities, parks, and other public infrastructure. "It is within the police power of the state to impose on a developer the burden of providing reasonable improvements to public facilities made necessary by a development as a condition of approval of that development." *Beaver Meadows v. Board of County Commissioners*, 709 P.2d 928 (Colo. 1985)(citing *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668, 671-74 (Colo. 1981); *King's Mill Homeowners Ass'n v. City of Westminster*, 192 Colo. 305, 311-12, 557 P.2d 1186, 1191 (1976)).

Courts have also approved the site-specific exaction of contributions to affordable housing needs so long as adequate standards are contained in the state or local enabling ordinances. *Blagden Alley Ass'n v. District of Columbia Zoning Comm'n*, 590 A.2d 139 (D.C. App. 1991)(approving practice of offsite housing exactions but remanded for findings); *Nunziato v. Planning Board*, 225 N.J. Super. 124, 541 A.2d 1105 (1988)(invalidating $500 per dwelling unit contribution to affordable housing program exacted as a condition of variance approval); *Alexander's Dept. Stores of New Jersey v. Borough of Paramus* 243 N.J. Super. 157, 578 A.2d 1241 (1990), *cert. denied*, 125 N.J. 100, 592 A.2d 1168 (1991)(rejecting neighboring landowners' challenge to affordable housing contribution on standing grounds); *see Hochberg v. Zoning Comm'n*, 24 Conn.App. 526, 589 A.2d 889 (1991)(conditions to special use permit requiring that 5% of all units be sold for less than $100,000 and another 10% for less than $150,000, and requiring 10-year deed restrictions, unauthorized by local zoning ordinance).

HOUSING PRESERVATION AND RENT CONTROL ANALOGIES

Housing preservation and rent control programs are distinguishable from housing mitigation programs. The former typically apply to existing development and directly controls the returns of developers from existing units, while the latter apply only to new developments. While these programs are very different, they raise similar takings issues because they affect the economic returns that landowners may receive from housing development. Accordingly, they both raise economic takings issues.

Housing preservation programs prevent private developers from destroying housing units or converting affordable housing to other uses, while rent control establishes a ceiling on rents for housing. Housing preservation ordinances include ordinances which condition the demolition or replacement of certain housing types on the replacement of such housing elsewhere, the payment of a fee in lieu of such replacement, or the payment of relocation assistance to existing tenants. The conditions are generally tied to demolition licenses (e.g. Seattle, San Francisco, Hartford) or demolition/conversion moratoria (e.g. New York). Some local governments have attempted to slow

the diminution in rental housing supplies by regulating condominium conversions through the special use permit or subdivision approval process. *See, e.g., Orange West, Ltd. v. City of Winter Garden*, 528 So.2d 84 (Fla. App. 5 Dist. 1988); *City of Miami Beach v. Rocio Corp.*, 404 So.2d 1066 (Fla. App. 3 Dist.), *rev. denied*, 408 So.2d 1092 (Fla. 1981); *City of Miami Beach v. Arlen King Cole Ass'n*, 302 So.2d 777 (Fla. App. 3 Dist. 1974); *Bennett M. Lifter, Inc. v. Metro Dade County*, 482 So.2d 479 (Fla. App. 3 Dist. 1986); Fla Stat. §§ 718.604-718.622, 719.604-719.622 (Roth Act); see also *Ewing v. City of Carmel-by-the-Sea*, 234 Cal.App.3d 1579, 286 Cal.Rptr. 382 (1991). *See also* Fla. Stat. Ann. § 723.083 (West 1988)(prohibiting rezonings or other official actions resulting in removal or relocation of mobile home owners residing in a mobile home park unless adequate mobile home parks or other facilities exist for relocation). Another example is a single-room occupancy (SRO) program, which combines SRO demolition moratoria with relaxed construction standards and below-market interest loans to SRO developers. See *SROs: A Poor Stepchild Comes of Age*, ZONING NEWS (Aug. 1990), at 1-3; Werner & Bryson, *A Guide for the Preservation and Maintenance of Single Room Occupancy (SRO) Housing*, 15 CLEARINGHOUSE REVIEW 999 (Apr. 1982).

Some rezonings have been challenged on constitutional grounds or under state legislation requiring environmental impact statements due to their contribution to gentrification and displacement of existing residents. *Rodriguez v. Henderson*, 217 Ill.App.3d 1024, 160 Ill.Dec. 878, 578 N.E.2d 57 (1991)(rezoning from R to C classification to allow construction of "work/live" units challenged by neighbors on grounds that would increase taxes and rents, thereby causing displacement); *Neville v. Koch*, 173 A.D.2d 323, 575 N.Y.S.2d 463 (1991)(rezoning from manufacturing to high-density commercial and residential classification adequately considered effect on displacement); see also *Housing Justice Campaign v. Koch*, 164 A.D.2d 656, 565 N.Y.S.2d 472 (1991)(10-Year Housing Plan for $5.1B over 10 years to produce, preserve and upgrade 252,000 vacant and occupied housing units for low and moderate income persons not subject to EIR).

Reasonable fees on the conversion of single-room occupancy buildings and other forms of low-income housing to market rate dwellings or nonresidential uses have been upheld by the courts. *Compare Kalikow 78/79 Co. v. State*, 174 A.D.2d 7, 577 N.Y.S.2d 624 (A.D. 1 Div. 1992)(state law governing demolition of multi-family housing requiring, *inter alia*, replacement of 20% more units upon demolition and allowing 8½% rate of return not unconstitutional under *Seawall Associates* decision, *infra*); *Terminal Plaza v. City & County of San Francisco*, 177 Cal.App.3d 892, 223 Cal.Rptr. 379 (App. 1986)(upholding in lieu fee charged as a condition of converting single-room occupancy buildings to commercial or market rate users); *Bullock v. City and County of San Francisco*, 221 Cal.App.3d 1072, 271 Cal.Rptr. 44 (Cal.App. 1 Dist. 1990)(moratorium on conversion of SRO units to hotel conditioned on payment of tenant relocation assistance fee constitutional but preempted by state legislation); *Kalaydjian v. City of Los Angeles*, 149 Cal.App.3d 690, 197 Cal.Rptr. 149 (1983)(upholding tenant relocation fee imposed as condition of condominium conversion).

Several housing preservation ordinances have been stricken on constitutional and *ultra vires* grounds. *Seawall Associates v. City of New York*, 544 N.Y.S.2d 542, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989)(moratorium on demolition of SRO housing a taking of private property); *Golden Gate Hotel Ass'n v. City and County of San Francisco*, 864 F.Supp. 917 (N.D. Cal. 1993), *vacated*, 18 F.3d 1482 (9th Cir. 1994)(residential hotel conversion ordinance unconstitutional); *Guimont v. Clark*, 854 P.2d 1 (Wash. 1993)(mobile home relocation ordinance unconstitutional). In Seattle, a housing preservation ordinance (HPO) required developers seeking to demolish low-income housing to obtain a housing demolition license, which could be granted only if relocation assistance was provided to the tenants and if a specified percentage of the housing was replaced. As an alternative to providing replacement housing, developers were allowed to contribute to a housing replacement fund. The HPO survived scrutiny under a facial takings analysis, but has been stricken on *ultra vires* and constitutional grounds. *San Telmo Associates v. City of Seattle*, 108 Wash.2d 20, 735 P.2d 673 (1987)(housing preservation ordinance and in-lieu fee prohibited by state anti-impact fee legislation); *R/L Associates, Inc. v. City of*

Seattle, 113 Wash.2d 402, 780 P.2d 838 (1989)(tenant assistance provisions imposed as a condition to conversation of low-income housing units inconsistent with state statute); *Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1, 829 P.2d 765 (1992)(assessment of a $218,000 fee for the development of a $670,000 property was unduly oppressive and a violation of substantive due process); *Robinson v. City of Seattle*, 119 Wash.2d 34, 830 P.2d 318 (1992)(substantive due process).

In *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), the court upheld a tenant relocation assistance ordinance. The court utilized the "traditional regulatory takings analysis of *Agins v. City of Tiburon*" finding the *Dolan* test inapplicable. Id. at 806. "*Dolan* applies only to as-applied takings challenges, not to facial takings challenges. Second, *Dolan* does not address when a taking as occurred, instead, it addresses only how close a fit the exaction (which would otherwise constitute a taking) must have to the harms caused by development." at 811.

While inclusionary zoning does not typically involve rent control, rent control cases are analogous for takings analysis because they involve a situation where the landowner retains ownership of a housing property, but is restricted as to the economic return that may be realized. Government regulation of the rental relationship does not constitute a physical taking. *Federal Home Loan Mortgage Corp. v. New York State Division of Housing and Community*, ___ F.3d ___ (2nd Cir. 1996)(citing *Yee v. City of Escondido*, 503 U.S. 519 (1992)). The law does not force a use that is neither planned nor desired. Instead, it regulates the terms under which the owner may use the property as previously planned.

Rent control is widely used in areas where rapid growth in market-rate or upscale residential units has driven the price of rental housing beyond the reach of low or moderate income tenants.[4] In many states, including Colorado, rent controls are prohibited (CRS § 38-12-301). Rent controls involve the establishment of a maximum rental price that may be charged by a landlord to a tenant, usually through an administrative process calling for annual rental adjustments by a local rent control board. Because rent controls directly affect the rate of return associated with residential land uses, they are susceptible to challenge on takings and due process grounds. However, rent controls have recently survived several facial challenges before a conservative United States Supreme Court.

In *Yee v. City of Escondido*, 503 U. S. 519, 112 S.Ct. 1522 (1992), the Supreme Court ruled that a rent control ordinance applicable to manufactured home parks did not amount to a permanent physical occupation simply because the regulation, when combined with state laws requiring landlords to offer leases of unlimited duration, effectively transferred increases in property values from the landlord to the tenant. This ruling reverses several district court decisions holding that such controls effectuated a permanent physical occupation, which are almost always compensable under the Takings Clause. *See, e.g., Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993)(substantive due process challenge to mobile home rent control ordinance dismissed because legislature is entitled to great deference when reviewing Aeconomic legislation.)

In *Pennell v. City of San Jose*, 485 U.S. 8 (1988), the Supreme Court dismissed a challenge to a rent control ordinance authorizing local rent control boards to consider tenant hardship in authorizing annual rent increases, thereby upholding the facial validity of the ordinance.

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[4] *See, e.g., Pennell v. City of San Jose*, 485 U.S. 9, 108 S.Ct. 849 (1988), *affirming* 42 Cal.3d 365, 228 Cal.Rptr. 726, 721 P.2d 1111 (1986); *Fisher v. City of Berkely*, 37 Cal.3d 644, 209 Cal.Rptr. 682, 693 P.2d 261, *aff'd*, 475 U.S. 260 (1986); *Nash v. City of Santa Monica*, 37 Cal.3d 97, 207 Cal.Rptr. 285, 688 P.2d 894, *app. diss'd*, 470 U.S. 1046 (1985); *Birkenfield v. City of Berkely*, 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001 (1976).

A recent California rent control case also distinguishes regulations restricting economic returns from exactions. *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993 (Cal.), *cert. denied*, 119 S.Ct. 1804 (1999). In upholding rent control law against inverse condemnation challenge, the court held that the heightened scrutiny of *Nolan/Dolan* was not applicable. "[T]he standard of review for generally applicable rent control laws must be at least as deferential as for generally applicable zoning laws and other legislative land use controls. Thus the party challenging rent control must show that it constitutes an arbitrary regulation of property rights." at 1001 (quoting *Dolan*, at 391 fn.8). Broadening the scope of permissible regulation even further the court held that "there is no constitutional requirement that the inquiry into whether the legislation substantially serves legitimate goals must be limited to stated goals." at 1004.

At least one recent rent control case contradicts this analysis. In *Manocherian v. Lennox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), the court addressed statute requiring renewal leases for nonprivate hospitals who subleased units to hospital employees. In holding that an amendment to the State's rent stabilization law did not substantially advance a legitimate state interest, the court applied *Nollan/Dolan*. The court further refused to apply the distinction between regulation and exactions to retreat from the *Nollan/Dolan* analysis. "It is well established that even if only a single element of an owner=s bundle of property rights is extinguished, there has been a regulatory taking" at 485 (citing *Seawall Assocs. v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989) and *Hodel v. Irving*, 481 U.S. 704 (1981)). However, this case (which drew a strong dissent) involved some very unique facts pursuant to which the primary beneficiary of the regulation was not the target beneficiaries, but rather the landlords. See also *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991)("Vacancy control ordinance, restricting increases in rent for new tenants of mobile home parks, in conjunction with other State and City rent control laws which required park owners to rent pads to the purchasers of the coaches and renew pad agreements created a taking of property, on grounds that (1) a possessory interest had been transferred from owners to tenants; (2) the interest consisted of the right to occupy the property in perpetuity while paying only a fraction of what it was worth in rent; and (3) the interest had an established value and was transferable in an established market."); *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997)(rent control ordinance limiting the increase in ground rent due the owner of the land under the condominium units does not substantially further the goal of creating affordable housing and creates a taking, where The absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium, means that the Ordinance will not substantially further its goal of creating affordable owner-occupied housing.)

POWER TO DENY IMPLIES POWER TO PERMIT MITIGATION

The *Nollan v. California Coastal Commission* decision hints that the denial of development approval does not raise the difficult issues presented by oppressive conditions. However, the ability to deny development approval due to a given set of circumstances, such as the lack of affordable housing, typically authorizes the jurisdictions to permit the developer to mitigate that condition in order to gain approval. Accordingly, if the police powers carries with it the ability to deny development approval – as with moratoria – the local government can lift the restriction if the condition is resolved.

Temporary restrictions on certain types of development may be used effectively to correct imbalances in the provision of low- and moderate-income housing and to curb land speculation. Moratoria also establish the basis for housing mitigation requirements. If the local government has the authority to deny development approval, it typically enjoys the authority to condition approval on the resolution of the conditions that resulted in denial. In this instance, the Town could establish a

"level of service" for new development that times and sequences development in tandem with a capital improvements program for affordable housing.

In *Tocco v. New Jersey Council on Affordable Housing*, 242 N.J.Super. 218, 576 A.2d 328 (Super. Ct., App. Div.), *cert. denied*, 172 N.J. 403, 585 A.2d 401 (1990), *cert. denied*, 111 S.Ct. 1389 (1991), an eighteen-month moratorium on the development of any parcel of land exceeding two or more acres was upheld against a challenge that it constituted a "temporary taking" of land without just compensation in violation of the Fifth Amendment. The moratorium was imposed by the Council on Affordable Housing in order to correct certain deficiencies (the deficiencies are not spelled out in the opinion) in a local regional housing element and fair share plan.[5] The plaintiff conceded that validity of the public purpose of the ordinance, relying only on the effect of the moratorium on the use of his property in claiming that it amounted to a taking. Noting that moratoria are not confiscatory in violation of the Fifth Amendment if in effect for a "reasonable time period", the court held that the eighteenth-month moratorium was not excessive. *Id.* at 330-31 (citing *Littman v. Gimello*, 115 N.J. 154, 557 A.2d 314 (1989); *Wilson v. Long Branch*, 27 N.J. 360, 142 A.2d 837 (1958), *cert. denied*, 358 U.S. 873 (1958); *Orleans Builders & Developers v. Byrne*, 186 N.J.Super. 432, 453 A.2d 200 (App.Div. 1982); *Meadowland Reg. etc. v. Hackensack, etc.*, 119 N.J.Super. 572, 293 A.2d 192 (App. Div. 1972); *Washington Market Enterprises v. Trenton*, 68 N.J. 107, 343 A.2d 408 (1975)).

LEGISLATIVE RESPONSES.

In addition to California, New Jersey and Virginia, several states have adopted state legislation authorizing, in general terms, local governments to adopt "inclusionary" zoning ordinances. *See, e.g.*, 1991 Connecticut Laws, P.A. 91-204, S.H.B. No. 7118; FLORIDA STAT. ANN. § 163.3202(3); MARYLAND ANN. CODE § 12.01 (Supp. 1991).

California GOV'T CODE § 65915 requires density bonuses and other regulatory incentives for developers who set aside a portion of the housing units within a project for low-income persons.[6] The legislation applies where a developer sets aside (1) 20% of total dwelling units for low-income households (60% of area median income); (2) 10% of total dwelling units for very-low-income households (50% of area median income); or (3) 50% of total dwelling units for elderly persons. The burden is on the housing developer to demonstrate that the regulatory incentives are needed to make the housing units economically feasible. § 65915(e). Regulatory incentives include:

- A *density bonus* of 25% over the otherwise maximum residential density (§ 65915(f)); and
- *Additional regulatory incentives* such as (1) a reduction in site development/zoning code standards such as setback requirements, square footage requirements, and parking

[5] COAH was created by the New Jersey legislature by the state's Fair Housing Act, NJSA §§ 52:27D-301 *et seq.* The moratorium was imposed pursuant to an administrative regulation authorizing local governments to "take appropriate measures that may be essential to the satisfaction of the municipality's obligation to provide for its fair share of its region's present and prospective need for low- and moderate-income housing." NJAC § 5:91-11.1.

[6] The legislation also requires regulatory incentives for developments providing other social amenities such as (1) housing within one-half mile of a mass transit guideway station (§ 65913.5); (2) the provision of child care facilities (§ 65917.5).

> requirements; (2) mixed use zoning approval; (3) other incentives, such as the waiver of fees or dedication requirements. § 65915(h).

Government Code § 65915(c) requires that cities granting density bonuses for the provision of lower- or low-income housing "ensure continued affordability" of the "lower income density bonus units" for the following time period:

> ". . . 30 years or a longer period of time if required by the construction or mortgage financing assistance program, mortgage insurance program, or rental subsidy program."

Compare § 65916 (West 1988)(cities must "ensure continued availability" for "low- and moderate-income units" where the city directly subsidizes construction).

In addition to a housing appeals procedure, Connecticut now authorizes inclusionary zoning and density bonus ordinances. Conn.Gen.Stat. § 8-2g, "passed by the legislature in 1988, authorizes a zoning commission to provide by regulation for density bonuses to promote construction of affordable housing. It also authorizes a municipality to enter into a contract with a developer to provide for such housing which contract must contain certain specific provisions. Upon the adoption of such regulations the statute outlines a procedure which ultimately leads to the appointment of a municipal agency to implement the affordable housing program and to oversee the sale or rental of the units in accordance with approved criteria. *Kaufman v. City of Danbury Zoning Commission*, 1993 WL 316792 (Conn. Super.).

P.A. 91-204 (Conn.Gen.Stat. § 8-2i) defines inclusionary zoning as follows:

> "Inclusionary zoning. (a) As used in this section, inclusionary zoning means any zoning regulation, requirement or condition of development imposed by ordinance, regulation or pursuant to any special permit, special exception or subdivision plan which promotes the development of affordable housing to persons and families of low and moderate income, including, but not limited to, (1) the setting aside of a reasonable number of housing units for long-term retention as affordable housing through deed restrictions or other means; (2) the use of density bonuses or (3) in lieu of or in addition to such other requirements into a housing trust fund to be used for constructing, rehabilitating or repairing housing affordable to persons or families of low and moderate income. (b) Notwithstanding the provisions of any special act, any municipality having zoning authority pursuant to this chapter or any special act or having planning authority pursuant to chapter 126 may, by regulation of the body exercising such zoning authority, implement inclusionary zoning regulations, requirements or conditions."

The inclusionary zoning legislation may be used to enforce compliance with the requirements of state housing appeals procedures. "Since the effective date of the statute (October 1, 1991), zoning commissions in this state now have the express authority to implement inclusionary zoning requirements or conditions. And so, if an affordable housing application omits to include a system of guarantees satisfactory to the commission it is free to draw upon its new statutory power to initiate whatever conditions were appropriate for this purpose. As between the applicant and the commission the legislature is entirely silent concerning the applicant's duty to offer assurances but it has spoken emphatically with regard to a zoning authority's power to initiate such conditions through its legislative power." *Kaufman, supra*, 1993 WL 316792, at 6.

While an early decision invalidated an inclusionary zoning ordinance on *ultra vires* grounds, *Board of Supervisors of Fairfax County v. DeGroff Enterprises*, 214 Va. 235, 198 S.E.2d 600 (1973), Virginia now authorizes inclusionary zoning and the designation of geographic areas for the promotion of affordable housing. The legislation allows local governments to grant density bonuses in exchange for the inclusion of affordable housing units in proposed developments. VIRGINIA CODE ANN. §§ 15.1-491.8, -491.9 (1991). Certain local governments are empowered to implement an "affordable housing dwelling unit program" in which density bonuses may be given in exchange for the provision of moderate income housing. VA. STAT. ANN. § 15.1-491.8 (1991). The inclusionary program requirements may be applied to applicants for rezoning; special exceptions; or site plans or subdivisions exceeding fifty dwellings at densities exceeding one unit per acre, and which are served by central sewer. *Id.* § 15.1-491.9(B)(2). Developers must receive (1) a 20% increase in density in exchange for providing 12.5% of total approved single-family attached or detached units as affordable housing; or (2) a 10% increase in density for "nonelevator" multi-family dwelling units at a proposed height of four stories or less, in exchange for providing 6.5% of total dwelling units as affordable housing. Local housing authorities may be given an exclusive right to purchase or lease set-aside sales units and to control resale and re-lease prices for a period of fifty years. Set-aside price limitations must allow developers to recover construction costs and other allowances, as determined by the inclusionary zoning ordinance, exclusive of land costs or other costs not authorized by the ordinance. The ordinance may require the concurrent marketing of market-rate and set-aside units. Set-aside units must be processed within 280 days.

ENFORCING INCLUSIONARY ZONING OBLIGATIONS.

Income restrictions under inclusionary housing programs are generally enforced through the use of *deed restrictions*. While deed restrictions may be challenged as an unlawful restraint on alienation, one commentator opines that the preemptive right, statutory requirement and rule of reasonableness exceptions to the rule against restraints on alienation would apply to deed restrictions in this context, so long as the restrictions are appropriately drafted. Bozung, *A Positive Response to Growth Control Plans: The Orange County Inclusionary Housing Program*, 9 PEPPERDINE L. REV. 819 (1982), at 841-42. The preemptive right exception applies where, instead of imposing a disabling restraint, the grantee is given a right to purchase the property. *Id.* The statutory requirement exception authorizes restraints required by state legislation. *Id.* The reasonableness "exception" requires that restraints must be limited to a reasonable period of time. *Id.* at 842; Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing* 8 HASTINGS CONST. L. QTLY. 1015 (1976), at 1034. Consequently, most deed restrictions in inclusionary housing programs contain a "right of first refusal" requiring the occupant to offer the unit to the local government within a specified period of time prior to selling the unit.[7] The California density bonus statute, which requires local governments to "ensure [the] continued affordability" of units in projects benefiting from density bonuses, provides an example of authority to utilize deed restrictions for this purpose. Mallach, *supra*, note 2, at 144; Government Code § 65915(c).

[7] A. MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES 142 (Rutgers 1984), notes that these periods generally range from 10 years to perpetuity. The Palo Alto, California program includes deed restrictions "lasting 59 years, which period started anew with each transaction." *Id.* Mallach opines that "[t]he likelihood of any one homeowner remaining in the unit for more than 59 years is remote enough for this provision to be considered a *de facto* perpetual control." *Id.* The San Francisco linkage ordinance uses a renewal feature coupled with a twenty-year promissory note.

Several recent statutes expressly authorize the use of "affordable housing covenants" designed to allow local governments or non-profit entities to directly or indirectly control the resale price of residential dwelling units. 1991 Maine Laws, ch. 373 (to be codified at 33 MAINE REV. STAT. ANN., ch. 6, §§ 121-126); 1991 Rhode Island Laws, Ch. 91-237. In Maine, the covenants may be used to:

- control resale prices;
- control the amount of equity appreciation;
- control improvements to real estate;
- control the class of persons to whom a dwelling may be sold, so long as there is no discrimination on the basis of race, color, sex, physical or mental handicap, religion, ancestry or national origin;
- grant a right of first refusal or option to purchase to qualified holders;
- maintain the property as residential real estate;
- limit the type of construction or materials that may be used in the improvements; or
- prohibit, limit or require acts enhancing property value or affordability.

The Maine legislation expressly addresses common law constraints on the use of easements or covenants *in gross* by specifying that the covenants are enforceable even where:

- they are not appurtenant to an interest in real property;
- the interest is assignable to another holder;
- they are not recognized by common law principles;
- negative burdens are imposed;
- affirmative obligations are imposed on the burdened estate;
- the benefits or burdens do not touch or concern real property;
- there is no privity of estate or contract;
- the covenant does not run to successors or assigns of the original parties;
- the covenant would be deemed an unreasonable restraint on alienation under the common law; or
- the rule against perpetuities would be violated.

Other examples of enforcement mechanisms include:

- Development agreements or other contractual arrangements (e.g., an annexation agreement)
- Conditions attached to regulatory approval

- Promissory notes secured by a deed of trust
- State/federal program restrictions where the inclusionary development uses government subsidies or tax credits

THE "GOOD FAITH" REQUIREMENT.

The use of inclusionary zoning or linkage programs essentially ties development approval to the adequacy of available affordable housing to accommodate new growth. Where local governments tie the rate of growth to carrying capacity standards, several important constitutional principles apply.

The Use of Carrying Capacity Standards Cannot be Used to Mask Ulterior Exclusionary Motives. The denial of development approval on an ad-hoc basis premised on the inadequacy of public facilities can be invalidated where used as an artifice to exclude low- or moderate-income persons from a jurisdiction. *Dailey v. City of Lawton, Okla.*, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970)(denial of multi-family zoning for low-income housing sponsor based on inadequacy of public facilities invalid and discriminatory); *Urban League of Essex County v. Mahwah Tp.*, 207 N.J. Super. 169, 504 A.2d 66, 79-81 (1984); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108, 114 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971)(moratorium on rezoning and subdivision approvals due to asserted lack of sewer capacity invalidated where there was evidence of racial discrimination and lack of effort to resolve existing facility deficiencies).

Other Resources Must be Applied to Remedy Existing Housing Deficiencies. Where local governments condition development approval to the adequacy of public facilities, good faith attempts to remedy existing housing deficiencies through other funding sources must be shown. *Stoney-Brook Development Corp. v. Town of Fremont*, 474 A.2d 561 (N.H. 1984); *Conway v. Town of Stratham*, 414 A.2d 539 (N.H. 1980); *Westwood Forest Estates, Inc. v. Village of South Nyack*, 244 N.E.2d 700 (N.Y. 1969), *Q.C. Construction v. Gallo*, 649 F.Supp. 1331 (D. R.I. 1986); *Associated Homebuilders, Inc. v. City of Livermore*, 557 A.2d 473 (Cal. 1976) (J. Mosk, dissenting). As a corollary, where jurisdictions are making real and substantial attempts to remedy public facility or housing deficiencies and to accommodate new growth through the planning process, courts will assume their good faith. *See, e.g., Golden v. Planning Board of the Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, *app. diss'd*, 409 U.S. 1003 (1972); *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*, 400 F.Supp. 1369 (D. Md. 1975); *Beck v. Town of Raymond*, 394 A.2d 847 (N.H. 1978); *Rancourt v. Town of Barnstead*, 523 A.2d 55 (N.H. 1986); *Westwood Forest Estates, Inc. v. Village of South Nyack*, 244 N.E.2d 700 (N.Y. 1969); *Belle Harbor Realty v. Kerr*, 323 N.E.2d 697 (N.Y. 1974). This same principle applies where development approval is conditioned on the provision of affordable housing, such as in a mandatory set-aside or linkage program. *See, e.g., Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989).

CONCLUSION

The authority to establish housing mitigation and inclusionary zoning requirements appears to be within the purview of established land use precedents. However, several factors should be taken into consideration when developing the program.

The first two factors relate to exaction or fee-based programs. First, exaction or fee-based programs should be grounded in a study which documents that new development creates a need for housing. Second, a study should document the magnitude of the impacts created by new development. This may be accomplished by a sensitivity analysis which traces fluctuations in housing prices and households in the region to new market-rate and non-residential development. It is not clear whether these requirements would apply to an inclusionary zoning ordinance which does not require payment of a fee, but rather allows it as an alternative.

Third, if an inclusionary zoning requirement is imposed, the requirement must be reasonable. The Town could choose to perform an exactions-based study, or to rely on ranges typical in other jurisdictions with similar requirements. Further, until the North Carolina Supreme Court rules otherwise, the program should avoid restricting increases in rental prices.