INCLUSIONARY ZONING: CHICAGO AND THE 2015 AFFORDABLE REQUIREMENTS ORDINANCE

Jonathon J. Andersh[*]

2016 MICH. ST. L. REV. 853

ABSTRACT

With the cost of housing rising in urban areas, cities have utilized inclusionary programs to increase the supply of affordable housing. However, certain features of inclusionary programs are subject to takings challenges. In 2015, the California Supreme Court upheld an inclusionary program in San Jose. The case was a takings challenge to the program's mandatory construction requirements. Under the program, San Jose mandated that all new developments of more than twenty units include affordable units. San Jose required that 15% of a development's units be sold at prices affordable to low- or moderate-income income individuals. The California Court upheld the program on the basis that the requirements mitigated the effects of development. More importantly, the California Court determined that the requirements furthered the constitutionally legitimate purpose of increasing the number of affordable units in response to the city's needs.

Similarly, the city of Chicago has enacted an inclusionary zoning program titled the Affordable Requirements Ordinance. Originally passed in 2003, the program was amended in 2007 and, most recently, in 2015. The Affordable Requirements Ordinance has not remained free from legal challenges, as the Home Builders Association of Greater Chicago recently filed suit challenging the 2007 iteration. The crux of the challenge is a requirement that a

---

* Senior Managing Editor, *Michigan State Law Review*; J.D. 2017, Michigan State University College of Law; B.A. 2014, DePaul University. The author would like to thank Professor Charles J. Ten Brink for his time and guidance throughout the Note-writing process. The author also thanks Marie Rauschenberger, Herman D. Hofman, and the entirety of the *Michigan State Law Review* for their time and effort spent in reviewing and editing this Note. This Note would not have been possible without the passion and dedication of numerous teachers along the way that stressed the importance and value of writing. Lastly, the author thanks his parents for their unfaltering love and support and for emphasizing the value of education.

developer pay fees to the city's affordable housing fund in order to secure a change in zoning and subsequent building permit. Like the case in California, the Chicago case argues that the program's requirements amount to a taking. Despite the challenge to the 2007 program, Chicago increased the program's requirements by amending the program in 2015. The 2015 changes to the Ordinance now require that developers seeking to build in certain locations must construct affordable units. The 2015 changes include the mandatory construction requirement along with increased fees. As a result, the 2015 changes to the Affordable Requirements Ordinance expose the city to a Takings Clause challenge.

Rather than struggling with developers over the constitutionality of mandatory construction requirements, municipalities can pass new taxes and relax existing zoning restrictions to bolster the affordable housing market. By tweaking set-backs, floor area ratios, and usage separations, a municipality can reduce the cost of construction. As a result, developers may construct units at a greater density, which in turn means an increase in the total number of units. With more units in a desirable location, the price of each unit drops allowing for the socio-economic diversity inclusionary programs desire. Additionally, by relaxing use restrictions, municipalities allow neighborhoods to develop so that housing is within walking distance to schools, workplaces, and shopping. Overall, alternatives to mandatory construction requirements create affordable units because it becomes economical for a developer to do so, not because they are required to do so.

TABLE OF CONTENTS

INTRODUCTION 855
I. INCLUSIONARY ZONING AS A TOOL FOR PROMOTING AFFORDABLE HOUSING 857
A. *Mount Laurel* and Inclusionary Zoning as a Solution to Exclusionary Zoning 858
1. *How Inclusionary Zoning Works* 862
2. *Purposes and Goals of Inclusionary Zoning* 864
B. Criticisms of Inclusionary Zoning Programs 866
1. *Burden on Development and the Housing Market* 867
2. *Unconstitutional Takings and Associated Legal Challenges* 870
C. Inclusionary Zoning and Takings Challenges 878

1. *A Challenge to Chicago's Affordable Requirements Ordinance* 878
2. *Avoiding Takings Challenges* 880
3. *The Free Land Market and New Urbanism* 883
II. CHICAGO'S AFFORDABLE REQUIREMENTS ORDINANCE 885
A. Development Projects Subject to the ARO 887
B. Changes to Mandatory Set-Aside Requirements 890
C. Changes to In-Lieu Fees 892
III. AVOIDING A TAKINGS CHALLENGE TO MANDATORY MINIMUM SET-ASIDE REQUIREMENTS 894
A. Takings and Mandatory Set-Aside Requirements 895
B. Affordable Housing Tax Instead of Mandatory Set-Aside Construction Requirements 901
C. Effects of New Urbanism and Deregulation 903
CONCLUSION 905

INTRODUCTION

In June of 2015, the California Supreme Court upheld the City of San Jose's inclusionary zoning[1] program after it was challenged as an unconstitutional taking.[2] The California Court reasoned that, rather than being an exaction of property,[3] the zoning ordinance fell within the municipality's broad discretion to regulate the use of real property to serve legitimate interests of the community as a whole.[4] Because the California Court decided that the set-aside requirements

1. For the purpose of this Note, "inclusionary zoning" will relate to a zoning ordinance that features voluntary incentives or mandatory requirements aimed at encouraging developers to provide monetary payments or a percentage of residential units at a sale price or rent affordable to low-income individuals. *See* Marc T. Smith, Charles J. Delaney & Thomas Liou, *Inclusionary Housing Programs: Issues and Outcomes*, 25 REAL EST. L.J. 155, 155 (1996).

2. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 1006 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016); *see also* Maura Dolan, *Developers Can Be Required to Include Affordable Housing, California High Court Rules*, L.A. TIMES (June 15, 2015), http://www.latimes.com/local/lanow/la-me-ln-affordable-housing-20150615-story.html [https://perma.cc/T27A-JDS5].

3. *See id.* at 991 ("[S]uch a requirement does not constitute an exaction for purposes of the *Nollan*/*Dolan* line of decisions and does not trigger application of the unconstitutional conditions doctrine.").

4. *See id.* (reasoning that the ordinance was not an exaction, but that it was an exercise of the general, broad discretion to regulate property in order "to serve the legitimate interests of the general public and the community at large").

were not exactions[5] for the purpose of the Takings Clause, it did not subject the ordinance to the established just-compensation analysis provided in cases like *Nollan v. California Coastal Commission*[6] and *Koontz v. St. Johns River Water Management District*.[7] Instead, the California Court upheld the inclusionary zoning set-asides.[8]

On August 27, 2015, the Home Builders Association of Greater Chicago (HBAGC) filed a lawsuit in Cook County Circuit Court that challenged the constitutionality of the City of Chicago's inclusionary zoning program.[9] The HBAGC lawsuit brings into question the constitutionality of the Chicago Affordable Requirements Ordinance.[10] However, the lawsuit also raises questions regarding the program's effectiveness.[11] California's ruling in *California Building Industry Ass'n* was driven by the state's widespread adoption of inclusionary zoning programs in response to affordable housing shortages.[12] In contrast, the state of Illinois and the City of Chicago face a different scenario because the Midwest has not been a test market for inclusionary zoning.[13] As a result, the HBAGC lawsuit

5. *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 181 (2006) (defining "exactions" as conditions to land use approval that may often demand that a developer make on-site and off-site improvements, land dedications, or monetary payments to a municipality).

6. 483 U.S. 825, 834, 835 (1987).

7. 133 S. Ct. 2586, 2597 (2013).

8. *See Cal. Bldg. Indus. Ass'n*, 351 P.3d at 996 (holding that conditioning the grant of a building permit upon a developer's agreement to offer for sale 15 percent of its on-site units at affordable prices was not an exaction for purposes of the Takings Clause).

9. *See* Ryan Ori, *Home Builders Sue to Overturn Chicago Affordable Housing Ordinance*, CRAIN'S CHI. BUS. (Aug. 27, 2015), http://www.chicagobusiness.com/realestate/20150827/CRED03/150829844/home-builders-sue-to-overturn-chicago-affordable-housing-ordinance [https://perma.cc/GRN8-W4SA].

10. *See* Complaint for Declaratory Judgment at 1, Home Builders Ass'n of Greater Chi. v. City of Chicago, No. 15-cv-8268 (N.D. Ill. Aug. 27, 2015).

11. *See id.* at 7 (arguing that new development does not increase the need for or decrease the supply of affordable housing, which consequently means the ordinance has no proportionality to new development).

12. *See Cal. Bldg. Indus. Ass'n*, 351 P.3d at 978.

13. *See* Benjamin Powell & Edward Stringham, *"The Economics of Inclusionary Zoning Reclaimed": How Effective Are Price Controls?*, 33 FLA. ST. U. L. REV. 471, 472 (2005) (explaining that the areas with the worst affordability problems are typically clustered on the East and West coasts; specifically with twenty of the twenty-five of the least affordable metropolitan areas located in California).

against the City of Chicago faces a battle similar to that in *California Home Builders Ass'n*.[14]

The combination of a deregulated land market and a system of flat regulatory taxation provides an alternative solution to municipality-instituted inclusionary zoning programs.[15] If the goal of the City of Chicago is to create new affordable housing, then it must eliminate mandatory set-aside requirements that are subject to costly constitutional takings challenges.[16] Instead, the City could meet its goal by relying on the in-lieu fees that have already generated $53 million toward the construction of affordable units.[17]

Part I of this Note discusses the development of the practice of inclusionary zoning by examining its history, purposes, and the diverging viewpoints on its effectiveness. Part II discusses the City of Chicago's Affordable Requirements Ordinance (ARO) and the changes that the City made applicable in October 2015. Finally, Part III analyzes whether the Chicago ARO is effective in comparison to a deregulated land market and flat regulatory tax. Part III traces inclusionary zoning's marginal successes in Chicago and examines the potential for growth and socio-economic diversity stemming from revenue generated by taxes and relaxed zoning restrictions. By examining the potential for concurrent economic growth and diversity, this Note demonstrates that mandatory, developer-constructed affordable housing is not a solution to Chicago's affordable housing shortage.

I. INCLUSIONARY ZONING AS A TOOL FOR PROMOTING AFFORDABLE HOUSING

Inclusionary zoning is a phrase that relates to a series of zoning ordinances featuring incentives or requirements aimed at encouraging developers of residential real estate to build affordable housing.[18] While supporters of inclusionary zoning advocate its

14. *See Cal. Bldg. Indus. Ass'n*, 351 P.3d at 991 (reasoning that the legitimate interests of the community as a whole were a sufficient basis to uphold the inclusionary zoning ordinance).

15. *See infra* Part III.

16. *See* Ori, *supra* note 9.

17. Mary Ellen Podmolik, *Aldermen OK Stricter Affordable Housing Law*, CHI. TRIB. (Mar. 18, 2015, 3:17 PM), http://www.chicagotribune.com/business/ct-housing-law-0319-biz-20150318-story.html (noting the original ordinance passed in 2003 and updated in 2007 created only 189 on-site units and $53 million in in-lieu fees).

18. *See* Smith, Delaney & Liou, *supra* note 1, at 155.

ability to encourage multiple parties to address the lack of affordable housing,[19] the practical reality is that inclusionary zoning shifts the cost of providing affordable housing from the municipality to private developers.[20] It is also possible that private developers pass the increased cost to consumers, which in turn exacerbates the affordability crisis.[21] Further, developers challenge the legality of inclusionary zoning programs by arguing that the ordinances affect a taking without just compensation.[22] As a result, in order to avoid costly legal challenges and meet the goal of increasing the supply of affordable housing, municipalities can abandon mandatory-construction requirements and adopt programs with incentives or a flat tax on development.[23]

A. *Mount Laurel* and Inclusionary Zoning as a Solution to Exclusionary Zoning

The beginning of the rise of inclusionary zoning stems from two New Jersey Supreme Court cases commonly referred to as *Mount Laurel I* and *Mount Laurel II*.[24] Mount Laurel Township in New Jersey was a municipality without zoning regulations aimed at creating low-cost or subsidized housing.[25] The majority of Mount Laurel's existing residential property was zoned for single-family detached dwellings on lots at least 9,375 square feet in size.[26] Each of Mount Laurel's single-family homes needed to meet a minimum of 900 to 1,100 square feet under the regulation.[27] For the township's remaining 4,600 undeveloped acres, the zoning ordinance was much

19. *See* Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 HOFSTRA L. REV. 539, 564 (1995) (contending that inclusionary zoning programs offer "a viable alternative to housing which is 100% publicly financed").

20. *See* Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the* Mount Laurel *Cases*, 70 NEB. L. REV. 186, 204 (1991) (explaining the potential political opposition for programs costing local tax money).

21. *See* Padilla, *supra* note 19, at 572.

22. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 977-78 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016).

23. *See infra* Subsection I.C.1.

24. *See* Berger, *supra* note 20, at 188, 197.

25. *See* WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 320 (1985).

26. *See* S. Burlington Cty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713, 719 (N.J. 1975).

27. *Id.* ("While it only required a minimum floor area of 900 square feet for a one-story dwelling, the minimum lot size was 11,000 square feet . . . .").

more stringent.[28] In the undeveloped zone, the minimum lot size was 20,000 square feet, or about one-half acre.[29] The minimum house size allowed in the undeveloped zone was 1,110 square feet for a one-story home and 1,300 square feet for a two-story home.[30] Further, the township did not allow the construction of attached townhouses, apartments, or mobile homes anywhere within the township.[31] The combination of minimum lot and home sizes functioned to effectively exclude low-income individuals from living in the community,[32] as the requirements led to more expensive construction and housing.[33]

Despite the ordinance's requirements, a group of developers sought to work with the municipal administration to utilize a regulation technique known as "planned unit development."[34] Through this technique, the developers sought to provide housing to a growing community by working with the municipality to pre-plan a community with varying density and a mixture of permitted uses.[35] In effect, the planned-unit development was to create miniature towns in previously unused agricultural land adjacent to growing urban areas.[36] Despite the developer's goals of creating housing to meet the demand of Mount Laurel's growing population, the units were out of reach for low-income individuals.[37]

---

28. *Id.* at 720 (explaining that the remaining undeveloped land had a minimum lot size requirement of 20,000 square feet).

29. *See id.*

30. *See id.* at 719-20.

31. *Id.* at 719 ("Attached townhouses, apartments (except on farms for agricultural workers) and mobile homes are not allowed anywhere in the township under the general ordinance.").

32. *See id.* (The New Jersey Court noted that the ordinance "while not as restrictive as those in many similar municipalities, nonetheless realistically allow only homes within the financial reach of persons of at least middle income").

33. *See id.* at 729; *see also id.* at 719 ("The result has been quite intensive development of these sections, but at a low density. The dwellings are substantial; the average value in 1971 was $32,500 and is undoubtedly much higher today.").

34. *Id.* at 720 (defining planned unit development as a scheme where "type, density and placement of land uses and buildings, instead of being detailed and confined to specified districts by local legislation in advance, is determined by contract, or 'deal,' as to each development between the developer and the municipal administrative authority").

35. *See id.* at 720-21 (detailing that the project planned on constructing 10,000 sale and rental housing units of various types over the course of a period of years).

36. *See id.* at 719-20.

37. *Id.* at 721 ("While multi-family housing in the form of rental garden, medium rise and high rise apartments and attached townhouses is for the first time

While Mount Laurel acknowledged the need for moderate-income housing, the township responded by approving a resolution requiring construction consistent with all zoning, planning, and building ordinances.[38] Effectively, the township recognized the need for affordable housing, but it did not address the costs associated with the requirement that housing be constructed as single-family homes on 20,000 square foot lots.[39] As a result, the New Jersey Supreme Court made it clear that municipalities have an obligation to craft regulations in a way that makes a wide variety of housing options possible.[40] New Jersey's Supreme Court pulled this obligation from the language of the state constitution's guarantee of equal protection and substantive due process.[41] Therefore, the Court imposed on New Jersey municipalities an obligation to provide access to "an appropriate variety and choice of housing, including, of course, low and moderate cost housing."[42] However, in the closing lines of *Mount Laurel I*, the Court made it clear that "[c]ourts do not build housing nor do municipalities."[43] Perhaps foreshadowing the impact of such language, Justice Pashman's concurrence argued that

---

provided for . . . it is not designed to accommodate and is beyond the financial reach of low and moderate income families, especially those with young children. The aim is quite the contrary; as with single-family homes in the older conventional subdivisions, only persons of medium and upper income are sought as residents.").

38. *See id.* at 722.

39. *See id.*

40. *See id.* at 724 ("We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing."); *see also id.* at 728 ("It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.").

41. *See id.* at 725; *see also* N.J. CONST. art. I, para. 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.").

42. *Mount Laurel I*, 336 A.2d at 728 ("[T]he presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.").

43. *Id.* at 734 ("That function is performed by private builders, various kinds of associations, or, for public housing, by special agencies created for that purpose at various levels of government.").

the Court should have gone farther to curb "deeply ingrained" exclusionary practices.[44]

Even though *Mount Laurel I* ordered the Township to rezone and include the requisite low-income housing,[45] eight years later in *Mount Laurel II* the New Jersey Supreme Court revisited its original decision.[46] The Court was forced[47] to revisit the issue because nothing in New Jersey municipalities changed due to ongoing local political opposition.[48] The Court in *Mount Laurel II* held that—at the very least—municipalities were required to remove municipally created barriers to the construction of lower-income housing.[49] After requiring that municipalities take affirmative measures to create affordable units, the Court retracted some of its rhetoric in *Mount Laurel I*.[50] The Court acknowledged that, without inducement, private development was not going to solve the problem of affordable housing.[51] Instead, the Court decided that two types of affirmative measures would ensure that developers would not choose to build more profitable single-family homes rather than lower-

---

44. *See id.* at 736 (Pashman, J., concurring) ("The fact that the abuses of municipal zoning power are now widespread and derive from attitudes and premises deeply ingrained in the suburban planning and zoning processes requires that the Court . . . lay down broad guidelines for judicial review of municipal zoning decisions which implicate these abuses.").

45. *See id.* at 731-32 (majority opinion).

46. *See* S. Burlington Cty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 456 A.2d 390, 409 (N.J. 1983).

47. *See Mount Laurel II*, 456 A.2d at 410 ("We have learned from experience, however, that unless a strong judicial hand is used, *Mount Laurel* will not result in housing, but in paper, process, witnesses, trials and appeals."); *see also* FISCHEL, *supra* note 25, at 329.

48. *See* Charles J. Ten Brink, *Gayborhoods: Intersections of Land Use Regulation, Sexual Minorities, and the Creative Class*, 28 GA. ST. U. L. REV. 789, 806 (2012) ("Finding that the municipalities of New Jersey had done virtually nothing in the interim, it legislated a solution from the bench, in effect establishing the New Jersey courts as the final authority for zoning decisions.").

49. *See Mount Laurel II*, 456 A.2d at 441 (holding that municipalities were required to remove zoning and subdivision restrictions that are not necessary to protect health and safety in an effort to meet the municipality's fair share requirements under New Jersey law).

50. *See id.* at 442 ("It was never intended in *Mount Laurel I* that this awesome constitutional obligation, designed to give the poor a fair chance for housing, be satisfied by meaningless amendments to zoning or other ordinances.").

51. *See id.* ("Satisfaction of the *Mount Laurel* doctrine cannot depend on the inclination of developers to help the poor.").

income housing.[52] First, the Court decided that a municipality might encourage or require a developer's use of state or federal housing subsidies.[53] Second, and more importantly, the Court introduced the idea that a municipality might provide incentives or requirements that private developers set aside a portion of a development for lower-income housing.[54] As a result, the Court in *Mount Laurel II* laid the foundations of inclusionary zoning by substituting exclusionary ordinances with programs aligned with the goals of *Mount Laurel I*.[55]

1. *How Inclusionary Zoning Works*

After the pair of *Mount Laurel* decisions, municipalities began searching for ways to craft zoning ordinances that created a variety of housing for individuals across income levels.[56] One solution was inclusionary zoning.[57] Inclusionary zoning is the use of municipal zoning ordinances in a way that requires a developer of a new or renovated housing development to set aside a certain fraction of units for occupancy by individuals of moderate or low income.[58] Under an inclusionary zoning program, potential purchasers or renters of these units must qualify by meeting an appropriate income level detailed in the municipal ordinance.[59] As a result, an inclusionary zoning program is a tool that shifts the government's burden of providing

52. *See id.* at 443 (reasoning that if there is no inducement for a builder to build low-income housing if single-family dwellings are more profitable then there is nothing that makes *Mount Laurel I*'s good intentions realistic).

53. *See id.* (determining that one affirmative measure for making affordable housing realistic would be to encourage the use of available state or federal housing subsidies).

54. *See id.* (explaining that in order to make the opportunity for lower-income housing more realistic, a municipality could "provid[e] incentives for or requir[e] private developers to set aside a portion of their developments for lower income housing").

55. *See id.* at 444 ("We do, however, expect municipal officials in appropriate cases to do more than pass land use regulations conforming to *Mount Laurel I*. Where appropriate, municipalities should provide a realistic opportunity for housing through other municipal action inextricably related to land use regulations.").

56. *See* FISCHEL, *supra* note 25, at 327-28 (explaining that inclusionary zoning is one device the municipalities developed in order to comply with decisions like *Mount Laurel*).

57. *See id.*

58. *See* Robert C. Ellickson, *The Irony of Inclusionary Zoning*, 54 S. CAL. L. REV. 1167, 1169 (1981).

59. *See* Padilla, *supra* note 19, at 556.

affordable housing to private developers.[60] In municipalities with inclusionary zoning programs, private developers must meet requirements contained in the ordinance as a cost of doing business.[61]

Most often, municipal ordinances with inclusionary zoning programs operate a system combining set-aside requirements and taxes or fees.[62] Set-aside requirements compel a developer of residential property to set aside a set percentage of units in a development at a sale price[63] or rental rate that is affordable to low- or moderate-income households.[64] The eventual owner or tenant of a unit created through inclusionary zoning programs is typically not allowed to resell the unit without living there for a specified period of time.[65] Instead, an ordinance will contain a provision that allows the owner to recover the cost of improvements and an increase consistent with inflation.[66] In addition to set-aside requirements, inclusionary zoning programs may include an ordinance concerning tax incentives and development fees.[67]

Each inclusionary zoning program can be characterized as one of two types: mandatory set-asides or voluntary development incentives.[68] Mandatory set-asides require a private developer to provide a fixed percentage of affordable units either with or without

---

60. *Id.* at 568 ("Inclusionary housing is one solution which shifts the burden of providing affordable housing from federal and state government to local governments and developers. In addition, it has the potential of providing a wider base of support for affordable housing by forcing private developers, public agencies, and non-profit entities, among others, to work together.").

61. *See* FISCHEL, *supra* note 25, at 328.

62. *See* Padilla, *supra* note 19, at 553 (explaining that there are typically multiple ways a developer is able to satisfy an inclusionary requirement, such as constructing the required units or paying a fee directly to the municipal government).

63. *See* Powell & Stringham, *supra* note 13, at 474-75 (explaining that while ordinances vary, such a regulation typically requires a certain percentage of units to be affordable to low-income families earning anywhere from 51%-80% of the median income).

64. *See* Smith, Delaney & Liou, *supra* note 1, at 155.

65. *See* Berger, *supra* note 20, at 206 ("If dwellings were sold to individuals at below-market prices in such a way that they were free to resell the unit at market, they would get an undeserved windfall gain and the unit would no longer be available to lower income families.").

66. *See id.* ("The typical resale control allows the owner to recoup the original cost, plus cost of improvements, plus an increase represented by the percentage which the Consumer Price Index or other inflation measure has grown since purchase.").

67. *See* Padilla, *supra* note 19, at 552-53.

68. *See* Smith, Delaney & Liou, *supra* note 1, at 155.

some form of "compensation" from the municipality.[69] Mandatory programs function in a way that the developer's compliance with the set-aside is a condition to the approval of a project during the planning stage.[70] A common feature of mandatory programs is an in-lieu fee that a developer may pay the municipality rather than construct the unit.[71] In-lieu fees provide a measure of leniency to developers, but the fees can also function as a tax on new housing development.[72]

In contrast, voluntary inclusionary programs allow a developer to set aside a certain number of units in exchange for incentives ranging from relaxed density restrictions[73] to tax credits and tax-exempt bond financing.[74] Attaching inclusionary provisions to applications for rezoning is a practice that combines both mandatory set-aside and voluntary programs.[75] Under such programs, a municipal agency may expect the developer applying for a permit to incorporate plans for affordable housing units in its proposal.[76]

2. *Purposes and Goals of Inclusionary Zoning*

Perhaps the foremost goal of an inclusionary zoning program is to promote construction of affordable housing in areas where

69. *See id.* at 156 (explaining that mandatory set-asides require a developer to provide affordable units either with or without any compensatory benefits).

70. *See* Padilla, *supra* note 19, at 552 (explaining that the percentage of inclusionary units required depends on various factors including whether the unit will be a rental unit or for sale, and whether the unit is intended for very low-, low-, or moderate-income households).

71. *See* C. TYLER MULLIGAN & JAMES L. JOYCE, INCLUSIONARY ZONING: A GUIDE TO ORDINANCES AND THE LAW 71-72 (Sch. of Gov't at the Univ. of N.C. at Chapel Hill ed., 2010) ("Typically, the amount of the payment-in-lieu is calculated by reference to the cost to the developer or to the local government to create equivalent units, or by reference to the difference in cost between a market-rate unit and an affordable unit.").

72. *See* Ellickson, *supra* note 58, at 1188 ("A tax is imposed both when the developer pays cash as an in-lieu fee, and when he is forced to provide inclusionary units at a financial loss.").

73. *See* Smith, Delaney & Liou, *supra* note 1, at 162 (explaining that density bonuses allow more housing units per unit of land, which reduces the land and site development costs by spreading costs over more units).

74. *See* Padilla, *supra* note 19, at 552-53 (describing incentives under voluntary programs to be various tools such as subsidies, development fee credits, streamlined permit processing, and waiver of leniency in enforcement of development standards).

75. *See* MULLIGAN & JOYCE, *supra* note 71, at 28-29.

76. *See id.* at 29.

property prices are so high that lower-income individuals are effectively prevented from living there.[77] As a result, inclusionary zoning is not only the literal opposite of exclusionary zoning,[78] but it is one solution to ensure that communities promote housing construction across a spectrum of income levels.[79] Inclusionary programs are one way in which municipalities can encourage multiple parties ranging from private developers, nonprofit groups, and the municipality itself to address the lack of affordable housing.[80]

Additionally, a side benefit of an inclusionary zoning program is that the program can promote a socioeconomic mix of residents in select geographic areas.[81] While the individual requirements of programs vary, a common feature found in inclusionary programs requires developers to construct affordable units alongside higher-priced units.[82] The theory underlying a location requirement is that inclusion of affordable units in higher-priced neighborhoods will distribute the benefits of a given neighborhood across social strata.[83] One such benefit is enhanced job accessibility for low-income individuals.[84] Ideally, an inclusionary zoning plan would allow low-

77. *See* Padilla, *supra* note 19, at 564 ("The biggest strength of inclusionary zoning is that it produces sorely needed low- and moderate-income housing.").

78. *See* Ellickson, *supra* note 58, at 1202 ("The fact that inclusionists mainly seek to integrate new subdivisions and buildings suggests that they are actually motivated by *exclusionary* purposes.").

79. *See* Padilla, *supra* note 19, at 565 (explaining that socio-economic integration is a goal of inclusionary zoning programs that has its basis in past court decisions) (citing S. Burlington Cty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 456 A.2d 390 (N.J. 1983); S. Burlington Cty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713 (N.J. 1975)).

80. *See id.* at 568 ("In addition, it has the potential of providing a wider base of support for affordable housing by forcing private developers, public agencies, and non-profit entities, among others, to work together.").

81. *See* MULLIGAN & JOYCE, *supra* note 71, at 1 ("The goal of inclusionary zoning is not solely to produce affordable units; inclusionary zoning is undertaken to ensure that new residential developments contain housing with an appropriate mix of affordability that reflects the income ranges of persons living and working in the community.").

82. *See* Padilla, *supra* note 19, at 566 ("Most inclusionary housing programs require that inclusionary units be dispersed throughout a new development, rather than clustered together.").

83. *See id.* ("If affordable housing is more evenly distributed among market priced units, it can give lower economic classes access to better educational opportunities, discourage economic segregations, and avoid concentration of affordable housing in already blighted sections of cities and counties.").

84. *See* HERBERT M. FRANKLIN ET AL., IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS 52 (Arthur J. Levin ed., 1974) (explaining that one theory behind inclusionary zoning programs is opening up

income workers to live closer to jobs in a higher-income neighborhood and avoid a costly commute.[85] While the overall goals of producing affordable housing and diverse communities are beneficial and desirable,[86] an inclusionary program places burdens on development disproportional to its benefits.[87]

B. Criticisms of Inclusionary Zoning Programs

Despite the range of goals propounded by inclusionary zoning programs, the main underlying goal is the eradication of unfair exclusionary zoning practices.[88] As municipalities began to create inclusionary zoning programs in response to *Mount Laurel I* and *Mount Laurel II*, issues besides exclusionary practices arose.[89] First, inclusionary zoning programs by their nature shift the cost of providing affordable housing to private developers.[90] Second, by placing the burden on developers, municipalities attempting to create affordable housing expose themselves to complex legal challenges.[91] As a result, a more effective way to eradicate exclusionary zoning is to rid municipal codes of exclusionary language, not create complex and burdensome solutions.[92]

---

housing opportunities so that lower-income workers would be able to gain access to the job opportunities provided by the location).

85. *See id.* at 53 ("[T]his reasoning asserts that a recognition of the actual needs of business and local government should enter into the planning for future growth by assuring that the potential workforce should be able to reach the work place conveniently.").

86. *See* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 14 (Vintage Books 1992) (1961) ("This ubiquitous principle is the need of cities for a most intricate and close-grained diversity of uses that give each other constant mutual support, both economically and socially.").

87. *See generally* Ellickson, *supra* note 58; Berger, *supra* note 20.

88. *See* Padilla, *supra* note 19, at 543 (reiterating that while *Mount Laurel I* & *II* do not guarantee affordable housing, the cases "remove[d] a hurdle by providing that municipalities in growth areas have a constitutional obligation to provide a realistic opportunity for development of housing for low- and moderate-income families in their regions through land use regulations").

89. *See* FISCHEL, *supra* note 25, at 328 (explaining inclusionary zoning programs have resulted in issues with taxes, legal attacks, and the discouragement of overall residential development).

90. *See* Ellickson, *supra* note 58, at 1176 ("Under most inclusionary ordinances, the costs of inclusion are nominally borne by the developer.").

91. *See infra* Subsection I.B.2.

92. *See* Powell & Stringham, *supra* note 13, at 493 ("The one clear policy that reverses the effects of exclusionary zoning is the abolition of exclusionary ordinances.").

1. *Burden on Development and the Housing Market*

Underlying *Mount Laurel I*'s utilization of using zoning ordinances as remedies to provide affordable housing[93] is the reality that inclusionary zoning programs shift costs from the government to private developers.[94] Behind the very core of an inclusionary zoning program is the desire of a municipality to achieve construction of new affordable housing with a minimal burden placed on the government.[95] Consequently, a developer forced to incur the cost of constructing affordable units or paying in-lieu fees may pass the cost to owners of undeveloped land or market-rate consumers.[96]

Essentially, the burden placed on developers by a municipality is shifted to the owner of undeveloped land[97] or residential consumer.[98] While affordable units are ultimately created in some high-cost areas, such burden shifting raises the overall costs of residential housing and exacerbates the overall affordability issue.[99]

---

93. *See* S. Burlington Cty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 724 (N.J. 1975) ("We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing.").

94. *See* Berger, *supra* note 20, at 204 ("The use of the mandatory set-aside rather than some of the other possible devices is partially explainable by the obvious fact that the former does not cost municipalities one red cent of tax money.").

95. *See id.*

96. *See* Padilla, *supra* note 19, at 572 (arguing the developers can pass costs backward to landowners by paying less for land subject to inclusionary regulations or pass the costs forward to the market-rate buyer and renters).

97. *See* Ellickson, *supra* note 58, at 1206 ("The burdens of inclusionary efforts, by contrast, fall largely on potential homebuyers and on owners of undeveloped land."); *see also* Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 128 (1970) ("[O]wning land in a zoned community over a period of time can be a hazardous investment. . . . [T]he community will make changes in the zoning ordinance that the courts are unlikely to upset . . . each of which has an effect on value.").

98. *See* Gerrit-Jan Knaap, Antonio Bento & Scott Lowe, *Housing Market Impacts of Inclusionary Zoning*, NAT'L CTR. FOR SMART GROWTH RESEARCH & EDUC. 1-2 (Feb. 2008), http://smartgrowth.umd.edu/assets/documents/research/knaapbentolowe_2008.pdf [https://perma.cc/NS56-WJYC].

99. *See* Smith, Delaney & Liou, *supra* note 1, at 160 (explaining that if there is not the possibility of substitute housing or the regulations cannot be escaped, a price increase may result that affects prices in existing housing markets); *see also* Scott Beyer, *Inclusionary Zoning Is Rent Control 2.0*, FORBES (May 27, 2015), http://www.forbes.com/sites/scottbeyer/2015/05/27/inclusionary-zoning-is-rent-control-2-0 [https://perma.cc/4GMV-RKJN]; Tom Means & Edward P. Stringham, *Unintended or Intended Consequences? The Effect of Below-Market Housing Mandates on Housing Markets in California*, 30 J. PUB. FIN. & PUB. CHOICE 39, 41 (2012) (finding that

Not only are newly constructed units inherently more costly, but the higher costs of new property also lead owners of existing property to raise prices accordingly.[100] With fewer newly constructed units available to the general public, there is less turnover, which exacerbates the shortage of existing housing available at an affordable price.[101] As a result, the very goal of increasing housing affordability for members of the community is hurt by the residual rising costs of existing property.[102]

Depending on the characteristics of the affected community, developers may be able to shift to other parties some of the burden of construction or paying in-lieu fees.[103] Although developers may shift the costs to the prior landowner or residential consumer, passing costs is only possible in unique markets where strong demand exists.[104] Only where consumers value attributes of a location such as its schools, employment opportunities, and infrastructure, will the demand be great enough for developers to increase costs.[105] Thus, if the community does not have characteristics that are unique and desirable, then it will be difficult for developers to recuperate the increased costs of new, affordable construction.[106]

California inclusionary programs "between 1990 and 2000, cities that imposed below-market housing mandates drove up housing prices by 20 percent and ended up with 7 percent fewer homes").

100. *See supra* note 97 and accompanying text.

101. *See* FISCHEL, *supra* note 25, at 329; Ellickson, *supra* note 58, at 1185-87 (introducing the concept of "filtering" as a possible, organic economic solution that inclusionary programs ignore and supplant).

102. *See* Ellickson, *supra* note 58, at 1203 (discussing the possibility that placing the costs on developers will eventually place costs on consumers of both new and existing property, which will in turn affect those originally meant to benefit from the program).

103. *See* Padilla, *supra* note 19, at 575 ("[T]he economics of a given housing market and the premium attached to certain communities will determine whether, and to what extent, a developer can pass inclusionary housing costs on to market rate buyers.").

104. *See* ALAN MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES 48 (1984).

105. *See* Smith, Delaney & Liou, *supra* note 1, at 160 (offering three characteristics that shape the elasticity of demand in a particular area: (1) the availability of substitute housing, (2) whether a community is unique in its attractiveness, and (3) if the community is part of a larger region); *see also* Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 77 (1996) ("[W]hen the community has special resources, access or charm, the developer will be able to pass on almost the entire cost of the inclusionary rules.").

106. *See* Padilla, *supra* note 19, at 575.

Lastly, the implementation of an inclusionary program can be exclusionary in its effect.[107] In certain areas where housing prices are high, there is the real possibility that high prices reflect an economic exclusivity desired by the residents.[108] Further, those residents who can afford housing in exclusive areas may see the inclusion of affordable units as a drawback of new construction.[109] Facially, an inclusionary program's only aim is the integration of *new* construction, which shows that municipalities create programs that protect the interests of current homeowners.[110] As a result, residents in exclusive areas have the power to influence supply and demand by limiting the availability of both new and existing units.[111] The only possibility for salvaging the original intention of inclusionary programs stems from the reality that residents and landowners have little political strength in elections.[112] Therefore, for inclusionary programs to accomplish the goal of socioeconomic integration, a requirement that units be constructed within tight geographic limitations must exist.[113] Without restricting the location of affordable units, the developer would be free to place low-income units away from exclusive neighborhoods.[114]

---

107. *See supra* note 99 and accompanying text.

108. *See* Smith, Delaney & Liou, *supra* note 1, at 165 (discussing the realization that some areas are priced exclusively high because the residents prefer living in an area with a homogenous income level).

109. *See* Padilla, *supra* note 19, at 544-45 (detailing the "Not in My Back Yard" (NIMBY) efforts of those in higher-income communities to limit socio-economic changes).

110. *See* Ellickson, *supra* note 58, at 1207 ("The fact that inclusionary zoning programs seek to integrate mainly *new* buildings and subdivisions is a persuasive clue that the programs have been framed with the interests of current homeowners principally in mind.").

111. *See* Smith, Delaney & Liou, *supra* note 1, at 165 ("The end result is that demand for new housing may be choked off, resulting in no new units, either market-priced or below-market, being provided.").

112. *See* Ellickson, *supra* note 58, at 1206 (discussing the burdens of inclusionary programs fall mostly on owners of undeveloped land because consumer groups for residential homeowners are impossible to organize and landowners "have little or no voting strength in local elections").

113. *See infra* Part II (discussing the changes to Chicago's Affordable Housing ordinance including a requirement that affordable units be constructed within a certain distance from the new development).

114. *See* FISCHEL, *supra* note 25, at 328 ("Most inclusionary zoning requires that new housing involve closely mixed high- and low-income units. This both dampens the demand for high-income units, which is part of the tax on the developer, and ensures that low-income units will not be in close proximity to existing neighborhoods.").

2. *Unconstitutional Takings and Associated Legal Challenges*

Inclusionary zoning first began in 1971 in Fairfax County, Virginia[115] and the legality of its practices was questioned from the beginning.[116] The constitutional authorization to enact such zoning laws stems from the police power.[117] The police power justifies government action if the action promotes and preserves public health, safety, and welfare.[118] However, the power granted to the municipality through the state[119] is limited by the Fifth Amendment of the United States Constitution, which prohibits the taking of private property without just compensation.[120] The United States Supreme Court has not answered the issue of whether mandatory set-aside requirements or in-lieu fees are constitutionally compensable takings of property.[121]

As a result, a mandatory program requiring a developer to surrender ownership of a percentage of affordable units may be a taking of property for which the owner must be compensated.[122] A facial challenge to a regulation challenged as a taking will be

115. *See* Ellickson, *supra* note 58, at 1169; *see also* Smith, Delaney & Liou, *supra* note 1, at 156 (describing an ordinance that required developers of more than fifty multi-family units to provide no less than 6% low-income and nine 9% moderate-income units).

116. *See* Smith, Delaney & Liou, *supra* note 1, at 156 (noting that the Fairfax Virginia ordinance was invalidated as a taking of property without just compensation in 1973).

117. *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) ("[I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.").

118. *See id.*

119. U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

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

121. *See* Berger, *supra* note 20, at 188 (discussing the possibility that there is a question of the constitutionality of tactics employed by inclusionary programs); *see also* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 1006 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016).

122. *See* MULLIGAN & JOYCE, *supra* note 71, at 28 ("[A] mandatory program may be viewed by some as effecting a taking of property for which the owner must be compensated. As a matter of law, however, such a finding in court is highly unlikely unless a developer is required to surrender ownership of affordable units produced.").

evaluated according to the test set forth in *Penn Central Transportation Co. v. New York City*.[123] A reviewing court must first consider the economic impact of the regulation to the extent that it interfered with investment-backed expectations.[124] The court must then consider the character of the regulation in light of its economic impact.[125]

Penn Central forms the basis of the analysis of a regulatory takings challenge, and the Supreme Court has narrowed its focus related to land use regulations through subsequent precedent.[126] In *Nollan v. California Coastal Commission*, the Court held that there must be a nexus between a land-use regulation enacted under the police power and the social harm the regulation is designed to alleviate.[127] In *Nollan*, the plaintiffs sought to purchase a beachfront property a quarter-mile away from a public beach.[128] As part of the sale of the property, the plaintiffs planned to demolish the existing small rental house and replace it with a three-bedroom home similar to the surrounding neighborhood.[129] In order to obtain a construction permit, the plaintiffs submitted an application to the California Coastal Commission.[130] In response, the Commission stated that the permit would be granted subject to the condition that a public easement be placed along a portion of the property for access to the public beach.[131] Essentially, the issue addressed by the Court in *Nollan* was whether the Commission was able to condition the building permit on the creation of a public easement to ensure access to the public beach.[132]

---

123. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (outlining that the basis for such a challenge is the economic impact of the regulation and the extent to which regulation has interfered with investment-backed expectations).

124. *See id.*

125. *See id.* at 124-25.

126. *See id.* at 124; *see also, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); *see also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

127. 483 U.S. 825, 834 (1987) ("[L]and-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980))).

128. *See id.* at 827-28.

129. *See id.*

130. *See id.* at 828.

131. *See id.*

132. *See id.* at 830-31.

Before addressing the heart of the issue, the Court in *Nollan* made it clear that if the easement for access to the public beach was imposed outside the permit process, it would unquestionably be a taking.[133] In narrowing the scope of a takings challenge, the Court reiterated that a regulation is not a taking so long as it "substantially advances legitimate state interests."[134] However, subsequent Supreme Court precedent has removed the "substantially advances" language from a challenge to a zoning ordinance as a taking.[135] Rather, the Court in *Nollan* began its takings analysis by considering whether the Commission could have denied the building permit independent of the zoning ordinance.[136] Ultimately, the Court decided that a municipality's regulation of private property must relate to a particular objective, not just because an individual is seeking some sort of permission from the government.[137] In reaching the conclusion that the Commission's condition was a compensable taking, the Court announced a two-part framework by which to analyze a condition placed on a building permit.[138]

First, a nexus must exist between a "legitimate state interest" and the condition requested by the municipality.[139] Second, a reviewing court must determine the required degree of connection between the condition and the projected impact of the proposed

133. *See id.* at 831 ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.").

134. *See id.* at 834 (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), *abrogated by* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 548 (2005)).

135. *See Lingle*, 544 U.S. at 548 (overruling the substantial evidence test promulgated by *Agins*, 447 U.S. at 260, in favor of language from *Nollan* and *Dolan*).

136. *See Nollan*, 483 U.S. at 835 (explaining that the issue in the regulatory takings challenge was whether the zoning commission would "unquestionably" be able to deny a permit outright outside the challenged ordinance).

137. *See id.* at 841; *see also* Berger, *supra* note 20, at 208 (stating that *Nollan* "serves the important function of demanding that governmental impingements on private property not be used as a subterfuge to extract from the individual some valuable right which the government could not ordinarily take without paying compensation for it, just because the individual happens to be seeking some permission from the government at the time").

138. *See Nollan*, 483 U.S. at 841, 837.

139. *See id.* at 837 (determining that if "the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition" then it is the same as an outright taking of the applicant's property).

development or construction.[140] The Court ultimately determined that, while the public interest in having access to the public beach would be served by an easement across the plaintiff's property, the proposed construction did not cause a lack of access.[141] Because the proposed construction did not restrict physical access to the public beach, the plaintiffs could not be compelled to contribute to the Commission's desire for a public walkway.[142] As a result, the Court determined a municipality must pay for an exaction rather than place a condition on a permit requiring an owner to give a portion of the property.[143] In conclusion, a municipal zoning ordinance that places a condition on building permits must survive the narrow scrutiny of *Nollan*'s two-part analysis.[144]

Five years later, the Court held in *Lucas v. South Carolina Coastal Council* that a land use regulation is a compensable taking if it denies a landowner all economically viable land use.[145] If a court determines that a landowner retains some value in the land, then the court must balance the public and private interest affected by the regulation.[146] While not meant to be an all-inclusive list, a court should consider the degree of harm to public lands and resources, adjacent private property, the social value of the claimant's activities and their suitability to the location in question, and the relative ease

---

140. *See id.* ("In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" (quoting J.E.D. Assocs. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981))).

141. *See id.* at 838 (explaining that the Commission attempted to justify the condition on the basis that "access" meant that the plaintiffs' new construction would interfere with visual access to the beach, which would in turn create a "psychological barrier" to the public beach).

142. *See id.* at 841 ("The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization.").

143. *See id.* at 841-42.

144. *See* Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) (explaining that a reviewing court "must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city" before examining the degree of connection between the exaction and projected impact of the proposed construction (quoting *Nollan*, 483 U.S. at 837)).

145. 505 U.S. 1003, 1019 (1992) ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.").

146. *See id.* at 1030.

with which the harm can be avoided through action by the claimant and the government.[147]

Building upon the precedent in *Nollan* and *Lucas*, the Court decided in *Dolan v. City of Tigard* that a "rough proportionality" test was necessary in analyzing the public interest affected by the proposed development.[148] In *Dolan*, the plaintiff sought to redevelop a lot in the municipality's central business district on which her current business was already located.[149] When Dolan applied for a permit, the municipality granted the application on the condition that she dedicate a portion of her property within a floodplain as part of a public greenway and drainage system.[150] In addition, the permit was conditioned on a fifteen-foot strip of land being dedicated as public land for a pedestrian and bicycle pathway.[151] After an appeal to the municipality's zoning commission, the Oregon Supreme Court ultimately found an essential nexus between the pedestrian pathway, the storm drainage dedications, and Dolan's proposed development of the site.[152] However, Dolan petitioned the United States Supreme Court to clarify *Nollan*'s required degree of connection between a municipality's exaction and the proposed development's projected impact.[153]

After reiterating the two-part analysis from *Nollan*, the Court reasoned that the area exacted from a permit applicant must be "roughly proportional" to the needs created by the development.[154] Through its proportionality test, the Court came to the conclusion that a municipality must make an individualized determination that

147. *See id.* at 1030-31 (The Court reasoned that a total takings question would ordinarily entail an "analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property . . . the social value of the claimant's activities and their suitability to the locality in question . . . and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government").

148. *See Dolan*, 512 U.S. at 391.

149. *See id.* at 379.

150. *See id.* at 378-80 (explaining that the municipality had enacted a master drainage plan as part of its community development code that suggested the floodplain of a local creek be free from structures and remain a green space in order to minimize flood damage).

151. *See id.* at 380.

152. *See id.* at 381-83.

153. *See id.* at 377 ("We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Commission* . . . of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.") (internal citations omitted).

154. *See id.* at 391.

the exaction is related both to the nature and extent of the impact of the proposed development.[155] When applied to Dolan's case, the Court determined that flood prevention and reducing traffic congestion by use of pedestrian walkways were legitimate public interests under *Nollan*.[156] However, the municipality never made it clear why the green space and walkway needed to be set aside as public land in order to fulfill its interests.[157] Further, the Court reasoned that by making the exacted areas public, Dolan would lose one of the most fundamental property rights, the right to exclude.[158] In deciding in favor of Dolan, the Court found no reasonable relationship between the municipality's needs and the proposed new development.[159] Despite a municipality's desire to improve its overall condition, the Court reiterated that such a goal could not be attained by taking property without compensation.[160] Ultimately, while a municipality has the power to solve issues related to development, the Court restated that the Fifth Amendment limits such power.[161]

Recently, the Supreme Court in *Koontz v. St. John's River Water Management District* held that monetary exactions must also satisfy the requirements of *Nollan* and *Dolan*.[162] In *Koontz*, a developer planned to develop a parcel of property composed of wetlands regulated by Florida's Water Resources Act.[163] In applying for the requisite building permits, the developer offered to preserve eleven acres of a 14.9-acre tract in order to mitigate any environmental effects development would have on the wetland.[164] In response, the Water Management District offered two scenarios by

155. *Id.* ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

156. *See id.* at 387.

157. *See id.* at 393.

158. *See id.* ("[The] right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979))).

159. *See id.* at 394-95 ("We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.").

160. *See id.* at 396 ("A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (quoting Penn. Coal v. Mahon, 260 U.S. 393, 416 (1922))).

161. *See id.*

162. 133 S. Ct. 2586, 2599 (2013) ("[S]o-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.").

163. *See id.* at 2591-92.

164. *See id.* at 2592.

which the developer could receive a permit.[165] The developer could either develop only one acre and preserve the remaining 13.9 acres, or the developer could personally hire contractors to make improvements to state-owned land located miles away from the property at issue.[166] In response to the developer's appeal, the Florida Supreme Court held that a monetary demand does not give rise to a claim under *Nollan* and *Dolan*.[167]

To resolve the split among lower courts,[168] the Supreme Court recognized that placing a condition on a building permit was similar to the "unconstitutional conditions doctrine."[169] The Court found that *Nollan* and *Dolan* were two specific applications of the unconstitutional-conditions doctrine.[170] Further, the Court found these cases to protect a property owner's Fifth Amendment right to just compensation for property taken while applying for a land-use permit.[171] The Court reasoned that owners applying for land-use permits are especially vulnerable to the coercion that the unconstitutional-conditions doctrine is meant to prevent because the municipality enjoys broad discretion in denying a permit.[172] Because the building permit is likely to be worth far more to the developer than the property the municipality offers to take, the Court found an inherently high level of coercion.[173] As a result, the Court reasoned that certain conditions would allow a municipality to escape *Nollan* and *Dolan* by simply phrasing the demand for property as a condition to permit approval.[174] In refusing to grant such power to

165. *See id.* at 2593.

166. *See id.*

167. *See id.*

168. *See id.* at 2594 ("The majority acknowledged a division of authority over whether a demand for money can give rise to a claim under *Nollan* and *Dolan*, and sided with those courts that have said it cannot.").

169. *See id.* (explaining that the unconstitutional-conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up").

170. *See id.* (citing Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 547 (2005)).

171. *See id.*

172. *See id.*

173. *See id.* ("By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntary giving up property for which the Fifth Amendment would otherwise require just compensation.").

174. *See id.* at 2595 ("[I]t would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval.").

conditions placed on building permits, the Court extended the unconstitutional-conditions doctrine so that a municipality is unable to use land-use permitting as a means of taking property without compensation.[175]

However, the Court did not completely bar a municipality's ability to attach conditions to the issuance of a building permit.[176] So long as a municipality offers one alternative scenario complying with *Nollan* and *Dolan*, there is no infringement of the developer's right to receive just compensation for the property to be exacted.[177] Further, the Court recognized that such a valid alternative scenario might include a monetary payment.[178] By contrasting the options to surrender physical property with paying an amount equal to the exaction's value, the Court upheld monetary exactions as an equivalent to other forms of land-use exactions.[179] Despite the constitutionality of monetary exactions, the Court made it clear that such a condition must still meet the *Nollan* and *Dolan* requirements.[180] Thus, the Court's interpretation of *Nollan* and *Dolan* in *Koontz* left open the question of whether a municipality can impose inclusionary zoning conditions on a developer before securing a building permit.[181]

---

175. *See id.* at 2596 ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.").

176. *See id.* at 2598 (clarifying that a condition may be constitutional so long as there is at least one alternative that would satisfy *Nollan* and *Dolan*).

177. *See id.*

178. *See id.* at 2599 (holding that "'monetary exactions' must satisfy the nexus and rough proportionality requirements").

179. *See id.* ("Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value.").

180. *See id.* at 2600 (deciding that the specific facts of the case constituted a *per se* taking of the developer's property similar to a standard easement because paying for improvement to state-owned land would simply be a transfer of monetary property without any connection to the plans the developer has for its property).

181. *See* Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence – An Evolutionary Approach*, 57 TENN. L. REV. 577, 579 (1990) (explaining that the language of *Nollan* "might be read as a use of takings doctrine to restrain any land use regulation, whether physically invasive or not, from imposing conditions on development that are unrelated to problems that the development itself creates").

C. Inclusionary Zoning and Takings Challenges

One court that has addressed the vagueness of *Nollan* and *Dolan* in relation to inclusionary zoning is the California Supreme Court.[182] *California Building Industry Ass'n v. City of San Jose* was decided on June 15, 2015, and the California Court held that a regulation requiring a developer to sell 15% of its on-site units at a reduced cost was not a taking.[183] The California Court dismissed the argument that the inclusionary ordinance was valid only if it was reasonably related to a proposed new development's adverse impact on the city's affordable housing problem.[184] Similarly, on August 27, 2015, the Home Builders Association of Greater Chicago filed a lawsuit against the City of Chicago.[185] The Chicago suit alleges that the City's Affordable Requirements Ordinance amounts to a regulatory taking of private property without just compensation.[186] The pending Chicago lawsuit is another case demonstrating that inclusionary zoning programs are susceptible to costly legal challenges.[187]

1. *A Challenge to Chicago's Affordable Requirements Ordinance*

The basis of the challenge in Chicago is that the Takings Clause of the Fifth Amendment exists to prevent the government from forcing one party to bear a burden that should be "borne by the public as a whole."[188] In particular, a developer is challenging an inclusionary zoning ordinance, the Affordable Requirements Ordinance (ARO), which requires developers to sell or rent a

182. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 989-90 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016).

183. *Id.* at 991 ("Rather than being an exaction, the ordinance falls within what we have already described as municipalities' general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large.").

184. *Id.* at 978-79.

185. Complaint for Declaratory Judgment, Home Builders Ass'n of Greater Chi. v. City of Chicago, No. 15-cv-8268 (N.D. Ill. Aug. 27, 2015).

186. *See id.*

187. *See supra* Subsection I.B.2.

188. *See* Plaintiffs' Response to Defendant's 12(b)(6) Motion to Dismiss at 1, Home Builders Ass'n of Greater Chi. v. City of Chicago, No. 15-cv-8268 (N.D. Ill. Dec. 3, 2015) (citing Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960))).

percentage of residential units at an "affordable price" determined by the city.[189] Alternatively, under the 2007 version of the ordinance, developers could pay the city a $100,000 fee per unit.[190] Either of the two requirements applies when a developer seeks to receive certain zoning changes from the city.[191] Essentially, the requirements to construct a percentage of affordable units or pay the in-lieu fees are conditions precedent to a developer securing a building permit and a change in the location's zoning.[192]

After paying in-lieu fees totaling $200,000 in order to secure a building permit and a change in zoning, the developer challenged the ARO on the basis that it constituted an unconstitutional taking.[193] The developer argued that, even if the City enacted the ARO because of the strong public need for more affordable housing, the City could not meet its goal by taking property without paying for it.[194] In response, the City argued that the ordinance did not amount to a taking of the developer's property because the ordinance only imposed restrictions on how a property is used, which does not trigger the takings tests.[195] Instead, the City argued that it did not restrict a right held by the developer because the developer never possessed the right to build a large residential structure on a lot zoned for commercial use.[196] As a result, the City's defense centered on *Yee v. City of Escondido*, which held that a municipality can regulate the use of property to the extent that the owner is not singled

189. *See* CHI., ILL., MUN. CODE ch. 2-45, § 110 (2007), http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il [https://perma.cc/38PF-6WPS].

190. *See id.*

191. *See id.*

192. *See id.* (explaining that the Affordable Requirements Ordinance applies to a property owner developing a residential housing project when the city "(i) approves the rezoning of a lot to permit a higher floor area ratio . . . ; (ii) approves the rezoning of a lot from a zoning district that does not allow household living . . . ; [or] (iii) approves the rezoning of a lot from a zoning district that does not allow household living uses on the ground floor").

193. *See* Plaintiff's Response to Defendant's 12(b)(6) Motion Dismiss, *supra* note 188, at 1.

194. *See id.* ("Even if the City had established a strong public need for more affordable housing, '[a] strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'" (quoting Dolan v. City of Tigard, 512 U.S. 374, 396 (1994))).

195. *See* City's Motion to Dismiss Plaintiff's Complaint at 2, Home Builders Ass'n of Greater Chi. v. City of Chicago, No. 15-cv-8268 (N.D. Ill. Nov. 3, 2015).

196. *See id.*

out to bear a burden that should belong to the public as a whole.[197] Under this line of reasoning, the City would be free to regulate the maximum rent charged once the developer completed the project.[198] Further, under state court precedent like *California Building Industry Ass'n v. City of San Jose*, regulation may not amount to a taking if a developer is required to sell units at a predetermined, affordable price.[199] However, the United States Supreme Court has yet to address the issue of whether mandatory set-aside requirements amount to an unconstitutional taking.[200] As a result, to avoid costly legal challenges and still meet the goal of expanding the inventory of affordable housing, municipalities must utilize incentives and novel planning techniques.[201]

2. *Avoiding Takings Challenges*

At the base of the issue, municipalities seeking to avoid takings challenges must provide developers with a form of compensation in exchange for the required affordable units.[202] In order to survive a takings challenge, a municipality must provide a developer with a form of compensation allowing a project to break even rather than lose money.[203] However, reaching an agreeable form of nonmonetary compensation equal to a developer's possible financial loss is difficult because it relies on each site's unique development plan and

197. *See* Yee v. City of Escondido, 503 U.S. 519, 522-23 (1992) ("[W]here the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.").

198. *See* City's Memorandum in Support of Its Motion to Dismiss Plaintiff's Complaint at 7, Home Builders Ass'n of Greater Chi. v. City of Chicago, No. 15-cv-8268 (N.D. Ill. Nov. 3, 2015).

199. *See id.* at 8.

200. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 1006 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016).

201. *See infra* Subsection I.C.2.

202. *See* Padilla, *supra* note 19, at 589 (explaining that regulatory takings may be upheld "so long as the particular challenged program provided adequate incentives to allow a developer to earn reasonable profits").

203. *See id.* at 598-99 (predicting that a regulatory takings challenge may be successful if a developer cannot break even, or even loses money, even though the balancing tests weigh in favor of the public interest served by an inclusionary program).

location.[204] As a result, a municipality can work traditional zoning incentives such as density bonuses into an inclusionary zoning program in order to provide compensation.[205] Alternatively, removing a mandatory set-aside provision and replacing it with in-lieu fees or construction taxes may provide a municipality with a stronger position if faced with a takings challenge.[206] Since *Nollan* and *Dolan* only require that a municipality provide one alternative that meets the "nexus and rough proportionality standards," monetary payments provide a stable source of income to meet affordable housing goals.[207]

One form of compensation offered in exchange for the use of developer resources is a density bonus.[208] A density bonus allows a developer to provide more residential units per square foot than typically allowed under a particular zone's requirements.[209] Theoretically, a density bonus would allow a developer to build more units on a particular lot, which would in turn increase revenue.[210] Any costs associated with an inclusionary zoning ordinance would be recuperated by the increase in sale price or rent from additional units.[211] However, relying on density bonuses as a form of compensation requires that a municipality and its planner have extensive knowledge of the developer's plan and economic

---

204. *See id.* at 598 ("[Financial impact] is hard to measure in the abstract without knowing the specific details of an ordinance and the actual financial impact on a development project.").

205. Ellickson, *supra* note 58, at 1180 ("By coupling a density bonus to its inclusionary requirements, a government can reduce the construction industry's political opposition to the inclusionary program, and can help rebut a developer's contention that an inclusionary requirement is an unconstitutional taking of property.").

206. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2599 (2013) (reasoning that in-lieu fees are "utterly commonplace" and function as an alternative to a developer turning over physical possession of a portion of property).

207. *See id.; see also* Rosenberg, *supra* note 5, at 182 (describing the increasing commonality of local municipalities requiring builders, landowners, land developers, and consumers to pay "development cash impact fees" to fund public programs necessary because of new construction).

208. *See* Ellickson, *supra* note 58, at 1180.

209. *See* Smith, Delaney & Liou, *supra* note 1, at 162.

210. *See id.*

211. *See* MARYA MORRIS, INCENTIVE ZONING: MEETING URBAN DESIGN AND AFFORDABLE HOUSING OBJECTIVES 12 (2000) (describing a return-on-investment approach to incentives that assumes planners administering bonuses will "calibrate the bonus so that return on investment is higher than it would be otherwise, or, at a minimum, that the return on investment is the same as it would be without the bonus system").

projections, which may not be readily available during the permitting process.[212]

While not a form of compensation, construction taxes passed by a legislative body and enforced by the municipality's zoning commission as a condition to securing a building permit would circumvent a takings challenge altogether.[213] A major hurdle to regulatory taxes is that a tax needs to be passed by the legislature, not the body enforcing the ordinance.[214] Further, if challenged in court as an unconstitutional taking, the taxes and fees must meet the standards provided in *Nollan* and *Dolan*.[215] As a result, the payments must be reasonable in relation to a problem caused by the development.[216] Despite the challenges of implementing fee structures and taxation schemes, if done correctly, monetary payments from developers could be amassed in a fund for affordable housing.[217] Such a fund would provide a municipality with the capacity to purchase, construct, and rent affordable units in any neighborhood with available property.[218]

---

212. *See id.* (explaining that using the density bonus model requires economic projections to be made well in advance of actual construction).

213. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2601 (2013) (stating that the United States Supreme Court has "repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax"); *see also* Brown v. Legal Found. of Wash., 538 U.S. 216, 232 (2003) (reasoning that a state's seizure of interest on client funds held in escrow was a taking that could have been avoided had the state imposed a special tax that would have raised the very same revenue).

214. *See* William W. Merrill III & Robert K. Lincoln, *Linkage Fees and Fair Share Regulations: Law and Method*, 25 URB. LAW. 223, 225-26 (1993) (explaining that local government must have the authority under state law to adopt taxes tied to an affordable housing program).

215. *See id.* at 282.

216. *See* San Remo Hotel L.P. v. City & Cty. of San Francisco, 41 P.3d 87, 107 (Cal. 2002) (reasoning that changing a building from low-income residential to a hotel resulted in a loss of housing, which in turn justified the imposition of monetary fees).

217. *See* Ellickson, *supra* note 58, at 1183 (describing the use of funds in order to finance affordable housing in the same neighborhood from which the fee was derived).

218. *See id.*

3. *The Free Land Market and New Urbanism*

For decades, private developers have shouldered cost increases necessary to comply with zoning restrictions.[219] A 2001 survey conducted by the Urban Land Institute asked developers about the impact of zoning on their ability to construct high-density residential properties.[220] The study found that 85.4% of private developers surveyed agreed that the supply of dense urban developments was inadequate to meet demand.[221] Additionally, 78.2% of those same developers cited government regulation as a barrier to urban development.[222] As the survey shows, developers of urban land must continually stay on top of land-use restrictions governing new residential development projects.[223]

One of the most common examples of a municipality with deregulated zoning restrictions is Houston, Texas.[224] In the absence of formal zoning restrictions, Houston's housing market has kept up with demand for affordable housing because restrictive regulations have been removed.[225] The relative success of a city like Houston demonstrates that, without government intervention, the market itself will compel development of affordable units.[226]

---

219. *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 682 (1973) [hereinafter *Alternatives to Zoning*] ("Land development in urban areas is one of the most regulated human activities in the United States . . . public regulation of urban land has increased sharply in incidence and severity, but dissatisfaction with the physical appearance and living arrangements in American cities continues to grow.").

220. *See* Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 263-64 (2006) (describing the Urban Land Institute and the impacts of its survey).

221. *See id.* at 263.

222. *See id.*

223. *See Alternatives to Zoning*, *supra* note 219, at 697-98 ("The existence of zoning means that builders, land speculators, civil engineers, architects, financial institutions, lawyers, and others involved in land development must maintain libraries of local land use regulations and spend time studying them.").

224. *See* Siegan, *supra* note 97, at 128 (describing Houston's lack of zoning regulations and the growth the city has sustained in the absence).

225. *See id.* (emphasizing the possibility that tenants of Houston, a city with no zoning regulations, have been able to afford new apartments that might have been otherwise unaffordable if Houston had been zoned in a traditional manner).

226. *See id.*

Additionally, a concept derived from New Urbanism[227] called Traditional Neighborhood Developments (TNDs) provides an example of how relaxing traditional zoning restrictions might promote the same socioeconomic diversity desired by inclusionary zoning programs.[228] New Urbanism is a planning philosophy that seeks to promote diversity in urban settings through orderly systems that do not affect the freedom to develop.[229] TNDs are urban neighborhoods with walkable streets that contain housing within walking distance of schools, workplaces, and shopping.[230] However, to create TNDs, much of the current zoning ordinances valuing space and separation of uses would need to be removed or amended.[231] While traditional zoning requirements regulate the location, size, and aesthetic of a building, New Urbanist ideals require heightened levels of density that drive the creation of mixed-income neighborhoods containing essential amenities within a walkable distance.[232]

By removing restrictions on land-use types and density of urban areas, New Urbanist ideals create property that is cheaper to develop because a developer is free to build more with less space.[233] Nevertheless, deregulating land-use and zoning programs is not free from challenges, as a major criticism of deregulation is that cities will revert to the slum-like conditions that active zoning regulation was originally intended to correct.[234] Despite fears that urban areas will return to the decaying and unsanitary American cities that exploded while the country industrialized, modern zoning ordinances favoring separation of uses, single-family lots, and set-backs have

---

227. New Urbanism is a planning theory focused on neighborhoods, rather than housing tracts, as the basic structure of a city or town. *See* JONATHAN BARNETT, *Introduction: New Urbanism and Codes*, *in* CODIFYING NEW URBANISM: HOW TO REFORM MUNICIPAL LAND DEVELOPMENT REGULATIONS 5 (2004).

228. *See* Lewyn, *supra* note 220, at 259.

229. *See* EMILY TALEN, NEW URBANISM & AMERICAN PLANNING: THE CONFLICT OF CULTURES 1 (2005) (describing New Urbanism's attempt to combine traditions of planning to create complex and comprehensive urban environments).

230. *See* Lewyn, *supra* note 220, at 259.

231. *See* JOEL RUSSELL, *New Urbanist Essentials*, *in* CODIFYING NEW URBANISM, *supra* note 227, at 12.

232. *See id.* at 12-13 ("This emphasis on walkability should inform many parts of the ordinance, from mixed-use zones to residential densities to standards for maximum block size, street width, and street connectivity.").

233. *See* Lewyn, *supra* note 220, at 259-60.

234. *See* Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179, 235 (1995).

added nothing to ease housing prices.[235] Property development continues to be expensive.[236]

Altogether, while the goal of inclusionary zoning programs is to provide an increase in the number of affordable units, a burden is placed on property developers and the market.[237] Despite the goal of inclusionary programs, certain zoning components raise complex issues as to whether the programs effectuate an unconstitutional taking.[238] However, alternatives to mandatory set-aside programs exist, which may survive a regulatory takings challenge.[239] Nevertheless, municipalities like the city of Chicago have increased efforts to provide affordable housing through the use of mandatory set-aside provisions.[240]

II. CHICAGO'S AFFORDABLE REQUIREMENTS ORDINANCE

In 2003, Chicago passed the original iteration of its Affordable Requirements Ordinance, which was later amended in 2007.[241] Since the ARO was created, it has spurred developers to create only 189 on-site units, which equates to about sixteen units per year.[242] However, in the same time span, the ARO has generated $53 million in in-lieu fees paid to the Chicago Housing Authority.[243] According to the Housing Authority, Chicago used the fees both as rent subsidies and capital to underwrite the construction of 2,500 apartment units.[244]

On March 18, 2015, the Chicago City Council passed[245] changes to the ARO with overwhelming support.[246] Chicago passed

235. *See* Lewyn, *supra* note 220, at 277-78.

236. *See id.*

237. *See supra* Subsection I.B.1.

238. *See supra* Subsection I.B.2.

239. *See supra* Subsection I.C.2.

240. *See infra* Part II.

241. *See* Harold S. Dembo & Kristin A. Nordman, *New Chicago Affordable Housing Ordinance Means Greater Costs for Developers*, NAT'L L. REV. (May 21, 2015), http://www.natlawreview.com/article/new-chicago-affordable-housing-ordinance-means-greater-costs-developers [https://perma.cc/56E3-D958].

242. *See* Podmolik, *supra* note 17.

243. *See id.*

244. *See id.* ("The fees were used, in the form of rent subsidies, to help underwrite 2,500 apartment units, according to the city.").

245. *See* Fran Spielman, *City Council Approves Affordable-Housing Ordinance*, CHI. SUN TIMES (Mar. 18, 2015, 5:17 PM), http://chicago.suntimes.com/chicago-politics/7/71/452041/city-council-approves-affordable-housing-ordinance [https://perma.cc/D2DL-LRJV].

the 2015 changes in response to a report prepared by the Commissioner of the Department of Planning & Development at Mayor Rahm Emanuel's request.[247] Chicago's housing supply suffered a large amount of pressure that crested in 2008 after foreclosures drove down home values and halted market-rate construction.[248] While the overall housing market in Chicago has started to emerge from this slump, the growth has been localized to downtown areas like the Loop and a handful of North Side neighborhoods.[249]

The Institute for Housing Studies at DePaul University[250] found that from 2010 to 2014, the projected average residential construction rate for the City of Chicago would be about 1,800 units per year.[251] However, the study concluded that most units would be set at prices affordable only to middle- and upper-income residents.[252] Further stressing the need for the construction of affordable units, Chicago's Five-Year Housing Plan included data from the American Community Survey.[253] The data showed that demand for affordable units exceeded supply by about 118,000 households in 2011.[254] One tool proposed in the Five-Year Housing Plan was a change to the ARO, so that Chicago might generate affordable units within the market-rate developments appearing downtown and on the North Side.[255] Chicago's Five-Year Housing

246. *See* Podmolik, *supra* note 17 (noting that no Chicago aldermen opposed the measure).

247. *See* Rahm Emanuel & Andrew J. Mooney, *Bouncing Back: Five-Year Housing Plan 2014-2018*, CITY OF CHI. DEP'T OF PLANNING & DEV. (Feb. 2014), http://www.cityofchicago.org/content/dam/city/depts/dcd/general/housing/Chicago_Housing_Plan_Web_Final.pdf [https://perma.cc/2S2Q-Q5D4].

248. *See id.* § 1.

249. *See id.*

250. Inst. for Hous. Studies, *Overview of the Chicago Housing Market: Background Data for Chicago's 2014-2018 Housing Plan*, DEPAUL UNIV. (2013), https://www.housingstudies.org/media/filer_public/2013/10/01/ihs_2013_overview_of_chicago_housing_market.pdf [https://perma.cc/22JY-FUWQ].

251. *See* Emanuel & Mooney, *supra* note 247, § 4 ("In the central city, new rental production from 2010 to 2014 is expected to average about 1,800 units per year, mostly at prices affordable only to middle- and upper-income tenants.").

252. *See id.*

253. *See id.*

254. *See id.* ("[V]ery little new rental housing is being built, even though demand for affordable units exceeded supply by about 118,000 households in 2011, according to American Community Survey data.").

255. *See id.* § 2.7 ("[S]ome active programs might be revised to better target scarce resources.").

Plan concluded that revising the ARO would help "the City create and sustain mixed-income communities."[256]

The Chicago City Council decided that changes to the ARO would take effect in October 2015.[257] The City Council delayed the measures for 180 days because developers warned that the changes would adversely affect construction if new, stiff fees were imposed.[258] As a result, Chicago created a system of graduated fee increases that will not go into full effect for at least an entire year.[259]

A. Development Projects Subject to the ARO

In its most basic form, the Chicago ARO applies to residential development projects containing ten or more residential units plus at least one other requirement.[260] The ARO applies to a residential development project if it is a new construction, "substantial rehabilitation,"[261] or conversion of a rental unit to a condominium.[262] To ensure compliance, the City does not issue a building permit for a project until the developer meets the ARO's requirements.[263]

Additional instances where the ARO would apply are development projects receiving either a change in zoning that permits a higher floor-area ratio,[264] a change from nonresidential to

256. *See id.* ("The Affordable Requirements Ordinance, which could be refined to generate more affordable units in market-rate developments, helping the City create and sustain mixed-income communities.").

257. *See* Podmolik, *supra* note 17.

258. *See id.*

259. *See id.*

260. *See* Dembo & Nordman, *supra* note 241; CHI., ILL., MUN. CODE ch. 2-45, § 115(B) (2015) ("'Residential housing project' means one or more buildings that collectively contain ten or more new or additional housing units on one or more parcels or lots under common ownership or control, including contiguous parcels.").

261. *See* CHI., ILL., MUN. CODE ch. 2-45, § 115(B) (2015) ("'Substantial rehabilitation' means the reconstruction, enlargement, installation, repair, alteration, improvement or renovation of a building, structure or portion thereof requiring a permit issued by the city, provided the cost of the substantial rehabilitation must be $75,000 or more per housing unit.").

262. *See id.* ("A 'residential housing project' may be developed in one or more phases and may consist of new construction, substantial rehabilitation, or the conversion of rental housing to condominiums.").

263. *See id.* § 115(K) (requiring that a builder pay an amount equal to the in-lieu fees or execute an affordable housing agreement before securing a building permit for a residential project subject to the ARO).

264. *See* Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget,"* 62 CASE W. RES. L. REV. 81, 83 n.3 (2011) (defining floor area

residential, or residential uses on ground floors where residential use was previously not allowed.[265] If the development project includes land purchased from the City of Chicago or if it receives financial assistance from the city, then the ARO will apply.[266] Lastly, and perhaps most important to the overall impact of the housing market in Chicago, the ARO will apply to any development project part of a planned development in a downtown zoning district.[267] Altogether, forty-nine of Chicago's seventy-seven zoned community areas[268] are subject to the most stringent requirements of the ARO.[269]

Overall, the ARO created and defined three zones of the city that represent the housing markets and each zone's priorities.[270] The three zones are labeled downtown, higher-income, and low-moderate income.[271] While the downtown zone is tied to a geographic location, higher-income areas are those where 50% or more of the households earn more than 60% of the Chicago median income.[272] Lower-moderate income is defined as an area of the city where more than 50% of households earn less than 60% of the Chicago median income, or where the poverty rate is greater than 25%.[273] Each ARO zone, regardless of income level, corresponds to a geographic region of the city.[274] Chicago has provided a map for prospective developers detailing the location and classification of each zone in the 2015

---

ratio as a measurement of the floor area of a building in relationship to the area it covers on the underlying lot).

265. *See* Dembo & Nordman, *supra* note 241.

266. *See* CHI., ILL., MUN. CODE ch. 2-45, § 115(C) (2015).

267. *See id.* § 115(D).

268. *See* 2015 ARO Zones Map, (Oct. 13, 2015), http://www.cityofchicago.org/content/dam/city/depts/dcd/general/housing/2015_ARO_Zone_Map_JULY_28_2015.pdf [https://perma.cc/QA23-GGWS].

269. *See* Chi., Ill., 2015 Affordable Requirements Ordinance Rules & Regulations § 4.2 (Aug. 7, 2015) [hereinafter 2015 ARO Rules & Regulations], http://www.cityofchicago.org/content/dam/city/depts/dcd/general/housing/ARO_Rules_8_7_2015.pdf [https://perma.cc/5QV7-4M57].

270. *See id.* art. 3.

271. *See id.*

272. *See id.* ("Higher Income: 50% of households or more earn more than 60% of the Chicago median income in two of the last three years for which data is available; AND Low Poverty: The poverty rate is less than or equal to 25% in two of the last three years for which data is available.").

273. *See id.* ("Lower Income: More than 50% of households earn less than 60% of the Chicago median income in two of the last three years for which data is available; OR High Poverty: The poverty rate is greater than 25% in two of the last three years for which data is available.").

274. *See id.*

ARO Rules & Regulations.[275] The table below, created by the City, explains in greater detail how developers will satisfy each ARO zone's requirement:[276]

Options to meet the ARO	**Low-Moderate Income Areas: Rental and For-Sale**	**Higher Income Areas: Rental and For-Sale**	**Downtown: Rental**	**Downtown: For-Sale**
Construct required units on-site and pay no in-lieu fee	X	X	X	X
Place at least 1/4 of the required 10% affordable units (20% if the City provides financial assistance) on-site and pay a fee-in-lieu per any remaining units	X $50,000 in-lieu fee	X $125,000 in-lieu fee	X $175,000 in-lieu fee	X $175,000 in-lieu fee
ARO Transit-Served Location bonus	X	X	X	X
Lease or Sell Units to the CHA or other authorized agency and receive a $25,000 In-Lieu Fee		X	X	X
Off-Site Option: within two miles and in a higher income area		X	X	
Off-Site Option: anywhere				X
No on-site units – with $225,000 in-lieu premium				X

275. *See* 2015 ARO Zones Map, *supra* note 268.

276. *See* 2015 ARO Enhancements Summary, http://www.cityofchicago.org/content/dam/city/depts/dcd/general/housing/ARO_Enhancements_Summary.pdf [https://perma.cc/B9AQ-ERRT].

As each zone becomes more restrictive, developers have increasingly limited choices in regard to satisfying the ARO's requirements.[277] Additionally, as each zone becomes more exclusive, developers face the combination of higher in-lieu fees and mandatory set-aside construction.[278]

B. Changes to Mandatory Set-Aside Requirements

The 2015 revisions to the ARO require private developers to provide either on-site or off-site affordable housing in addition to optional in-lieu fees.[279] Under the original ordinance, developers could comply entirely by paying only the in-lieu fees.[280] With the 2015 revision, Chicago is seeking to drastically increase the number of affordable units created directly by private developers.[281]

In order to comply with the 2015 ARO, private developers seeking permits to build new residential units must construct 2.5% of their affordable units either on-site or off-site within two miles of the building.[282] Additionally, if the developer seeks to construct offsite, then the City requires that the off-site units have the same number of bedrooms as those required on-site.[283] However, the 2015 ARO contains provisions demonstrating that the City will be flexible in assessing developers' proposals.[284] For example, one subsection

277. *See id.*

278. *See id.*

279. *See* Dembo & Nordman, *supra* note 241; *see, e.g.*, CHI., ILL., MUN. CODE ch. 2-45, § 115(F)(3) (2015) ("In the downtown districts and in planned developments with an underlying downtown district zoning classification, a developer of rental units subject to the provisions of subsection (C) must provide at least 25% of the required affordable rental units on-site or off-site.").

280. *See* CHI., ILL., MUN. CODE ch. 2-45, § 110(d)(1) (2007) ("A developer subject to the provisions of subsections (b) or (c), may establish affordable housing by one or more of the following: (i) the development of affordable housing units as part of the residential housing project; (ii) payment of a fee in lieu of the development of affordable housing units; or (iii) any combination thereof.").

281. *See supra* note 242 and accompanying text (describing that from 2003 to 2007 the Chicago ARO managed to generate only 189 on-site developer-created units).

282. *See* 2015 ARO Rules & Regulations, *supra* note 269, § 4.2; CHI., ILL., MUN. CODE ch. 2-45, § 115(F)(3) (2015) ("If the developer elects to provide affordable rental units off-site, the off-site affordable rental units must be located within a two-mile radius from the residential housing project and in a downtown district or higher income area.").

283. *See* 2015 ARO Rules & Regulations, *supra* note 269, § 6.2.3.

284. *See id.* § 6.2.1 ("Developers are encouraged to be creative in meeting their off-site obligation. In addition to creating *more* units than would be possible

states that the City will allow the square footage of the off-site units to differ from the on-site units pending the City's approval of the overall proposal.[285] Below is a table provided by the City, which outlines the number of both on-site and off-site units a private developer is responsible for building under the 2015 ARO:[286]

On-site units are 2.5% of total units			
Total units in project	**Total affordable units required**	**On-site affordable units required**	**On-site TSL units required**
10-14	1	0	1
15-19	2	0	1
20-24	2	1	1
25-29	3	1	1
30-34	3	1	2
35-44	4	1	2
45-49	5	1	2
50-54	5	1	3
55-59	6	1	3
60-64	6	2	3
65-69	7	2	3
70-74	7	2	4
75-84	8	2	4
85-89	9	2	4
90-94	9	2	5
95-99	10	2	5
100-104	10	3	5
105-109	11	3	5

If a private developer chooses[287] to comply with the mandatory set-aside by constructing units either on-site or off-site, then it may

on-site, the expectation is that the off-site units could be larger and potentially more affordable than their on-site counterparts.").

285. *See id.* § 6.2.3.

286. *See id.* § 4.2.

287. Under the 2015 ARO, the developer does have a choice concerning how to meet the ARO's requirements after securing a building permit. However, the ARO contains harsh penalties for those developers failing to comply with the ARO upon completion of a project. *See, e.g.*, CHI., ILL., MUN. CODE ch. 2-45, § 115(N)(1) (2015) ("Failure by the developer to pay the required fee in lieu, or provide the on-site or off-site affordable units required by this section, or sell or rent such

choose who handles the units at the close of construction.[288] A private developer may sell or lease the affordable units to the Chicago Housing Authority or another authorized agency.[289] If the developer chooses this option before a building permit is issued, then the unit is subject to a thirty-year term or a thirty-year deed restriction limiting those eligible to inhabit the unit.[290] Further, if a developer chooses to sell or lease at least a quarter of the total affordable units to the Chicago Housing Authority or another authorized agency, then the remaining in-lieu fees will be reduced by $25,000 per remaining unit.[291] As a result, a private developer working under the 2015 ARO has a strong incentive to turn control over to the city.[292] Such an incentive and reduction in fees is a unique provision of the 2015 ARO that will likely have an impact in determining whether the mandatory construction requirements are an unconstitutional taking.[293]

C. Changes to In-Lieu Fees

The most noticeable changes Chicago made to the ARO in 2015 include incremental increases to the schedule of in-lieu fees.[294] For the first year, fees range from $115,000 to $140,000 for each

---

affordable units in accordance with the requirements of this section, shall be a violation of this section punishable by a fine in an amount equal to two times the payment of fees in lieu required in subsection (F) and, in the case of a residential real estate developer licensed pursuant to Chapter 4-40 of the Municipal Code or any successor chapter, the revocation of the developer's residential real estate developer license.").

288. *See id.* § 6.1.

289. *See id.* (explaining that the criteria for an authorized agency is set by the city); *see* CHI., ILL., MUN. CODE ch. 2-45, § 115(Q) (2015) ("Affordable units required to be provided pursuant to this section may be sold or leased to an authorized agency . . . ."); *see also id.* ch. 2-45, § 115(B) ("'Authorized agency' means the Chicago Housing Authority, the Chicago Low-Income Housing Trust Fund, or another non-profit agency acceptable to the city . . . or another housing assistance program approved by the city.").

290. *See* 2015 ARO Rules & Regulations, *supra* note 269, § 6.1

291. *See id.* ("If a developer sells or leases at least 2.5 of the total units (1/4 of the required affordable units) to the CHA or another Authorized Agency, the remaining in-lieu fees will be reduced by $25,000 per remaining required affordable unit.").

292. *See id.*

293. *See supra* Subsection I.B.2.

294. *See* 2015 ARO Rules & Regulations, *supra* note 269, § 4.3.

affordable unit required.[295] After the first year, fees increase to $150,000 to $175,000.[296]

Below is a table demonstrating the fee increases schedule for the remainder of 2015 under the revised ARO.[297] The monetary value represents the cost per unit of each affordable unit not constructed by the developer, which will fall into at least 7.5% of total units for most Chicago development plans.[298] The table is identical to the summary of fees as it appears in the Rules & Regulations provided by Chicago:[299]

ARO Zone	Initial In-lieu Fee (Effective October 13, 2015)	Final In-lieu Fee (Effective April 16, 2016)	Initial Authorized Agency In-Lieu Fee (Effective October 13, 2015)	Final Authorized Agency In-Lieu Fee (Effective April 16, 2016)	Initial In-Lieu Premium (Effective October 13, 2015)	Final In-Lieu Premium (Effective April 16, 2016)
Low-Moderate Income	$50,000	$50,000	n/a	n/a	n/a	n/a
Higher Income	$125,000	$125,000	$100,000	$100,000	n/a	n/a
Downtown rental	$140,000	$175,000	$115,000	$150,000	n/a	n/a
Downtown for sale	$140,000	$175,000	$115,000	$150,000	$160,000	$225,000

However, the 2015 changes to the ARO provide a credit against an already mandatory density requirement.[300] Development projects that meet the requirements of the ARO can apply the in-lieu

295. *See* Podmolik, *supra* note 17 ("A developer could satisfy the rest of its requirement by paying smaller fees of $115,000 to $140,000 in the first year of the ordinance and $150,000 to $175,000 thereafter.").

296. *See id.*

297. *See* 2015 ARO Rules & Regulations § 4.3.

298. *See id.*

299. *See id.*

300. *See id.* art. 2.

fees against the payments associated with obtaining a density bonus.[301] While the developer is still paying fees associated with the ARO, the credit toward the density regulation is a form of compensation with an impact in determining whether the changes amount to an unconstitutional taking.[302]

In combination, the 2015 changes to the ARO the Chicago City Council passed strengthen its effort to increase the supply of affordable housing.[303] In order to meet this goal, Chicago has imposed mandatory set-aside construction on private developers.[304] Additionally, private developers are subject to a substantial increase to in-lieu fees.[305] Altogether, the changes complicate and raise the cost[306] of private development while simultaneously leaving Chicago exposed to a costly legal challenge.[307] As a result, the 2015 changes to the ARO will not ensure that the City will meet its goal of increasing the supply of affordable housing.[308]

III. AVOIDING A TAKINGS CHALLENGE TO MANDATORY MINIMUM SET-ASIDE REQUIREMENTS

The complexity of Chicago's new ARO—its variable percentage and fee-shifting scheme—only further complicates Chicago's development and planning system.[309] With a more complicated system involving more parties and a greater cost of development, private entities will realize smaller profits on

301. *See id.*; *see also* CHI., ILL., MUN. CODE ch. 17-4, § 1004(C) (2016) ("Cash payments shall be made to the City of Chicago Affordable Housing Opportunity Fund to satisfy the requirements of this bonus. Any payments collected under this Sec. 17-4-1004-C shall be used and disbursed in accordance with subsection (G) of Sec. 2-45-115. Floor area bonuses will be based on a financial contribution that reflects the value of land within the surrounding area, based on the following formula: Cost of 1 square foot of floor area = 80% x median cost of land per buildable square foot.").

302. *See supra* Section I.C.

303. *See supra* Part II.

304. *See supra* Section II.B.

305. *See supra* Section II.C.

306. *See* Emanuel & Mooney, *supra* note 247, § 4 (recognizing that "[t]he primary barriers to reinvestment in existing rental units and development of new ones are lack of ready financing [and] costs of rehab and construction"); *see also id.* § 4.5 ("A barrier to new-housing development as well as substantial rehabilitation is the high cost of development, which can easily top $350,000 per unit.").

307. *See infra* Part III.

308. *See infra* Part III; *see also supra* note 256 and accompanying text.

309. *See supra* Part II.

residential property.[310] For example,[311] the Home Builders Association of Greater Chicago (HBAGC) filed suit against the City of Chicago alleging that the ARO creates a taking of private property without just compensation.[312] Further, the pending Chicago lawsuit is another case in a string of challenges to zoning programs that demonstrates inclusionary zoning programs are susceptible to costly legal challenges.[313]

With the 2015 changes to the ARO containing a mandatory set-aside requirement and strong incentives to turn the units over to the City, Chicago has exposed itself to a complex takings challenge.[314] Because of the nature of takings jurisprudence and the pending challenge to the constitutionality of inclusionary zoning programs,[315] the 2015 changes to the ARO may be invalidated.[316] Instead of continuing to pursue inclusionary zoning programs with spotty performance histories, municipalities can create a greater number of affordable units by instituting a flat regulatory tax on all new construction and relaxing existing zoning ordinances.[317] Affordable housing can be generated by way of deregulated market rather than deliberate, complex ordinances that burden rather than encourage development.[318] As a result, Chicago can meet its goal of increasing the affordable housing supply by reducing construction costs the City has already recognized as prohibitive.[319]

A. Takings and Mandatory Set-Aside Requirements

The most pressing issue with the 2015 Amendments to Chicago's ARO is the inclusion of a mandatory, on-site set-aside of affordable units in certain zones.[320] The Supreme Court has yet to

---

310. *See supra* Part II.

311. *See supra* Subsection I.C.1.

312. *See* Complaint for Declaratory Judgment, Home Builders Ass'n of Greater Chi. v. City of Chicago, No. 15-cv-8268 (N.D. Ill. Aug. 27, 2015).

313. *See supra* Part I.

314. *See infra* Section III.A.

315. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016).

316. *See infra* Section III.A.

317. *See supra* Subsection I.C.2.

318. *See infra* Sections III.A-C.

319. *See* Emanuel & Mooney, *supra* note 247, § 4.5 ("A barrier to new-housing development as well as substantial rehabilitation is the high cost of development, which can easily top $350,000 per unit.").

320. *See* 2015 ARO Rules & Regulations § 4.2.

address an ordinance requiring construction of units on-site as a condition to securing a zoning change and building permit.[321] Additionally, the HBAGC lawsuit will not address the issue because it is a challenge to the 2007 version of the ARO.[322] As a result, continuing with an inclusionary zoning program that requires mandatory construction of units for sale or rent at below market prices is ripe for a takings challenge under the *Nollan* and *Dolan* line of cases.[323]

First, it must be determined whether the 2015 ARO's mandatory construction provisions meet *Nollan*'s first prong requiring a nexus between the land-use regulation and the benefit being conferred on the landowner through the permit.[324] As demonstrated by the program's history, the ARO was enacted to meet a shortage of affordable housing throughout Chicago.[325] It is also likely that a nexus exists between the mandatory construction requirements and the act of building affordable units.[326] However, like the easement sought in *Nollan*, requiring a developer to set aside units for low-price sale or rent through a long-term deed would be a taking outside the permitting process.[327] Further, the benefit conferred on the landowner in securing a change to the zoning and building permit,[328] does not justify requiring a developer to construct affordable units.[329] Rather, because a developer is seeking to independently construct more residential housing, Chicago is

---

321. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 1002 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016) (deciding a facial challenge to a statute requiring a set percentage of affordable units as opposed to a challenge to an action conditioning a building permit on the set-asides).

322. *See* Plaintiff's Response to Defendant's 12(b)(6) Motion to Dismiss at 1, Home Builders Ass'n of Greater Chi. v. City of Chicago, No. 15-cv-8268 (N.D. Ill. Dec. 3, 2015).

323. *See supra* Subsection I.C.2.

324. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) ("In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" (quoting J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981))).

325. *See* Emanuel & Mooney, *supra* note 247.

326. *See Nollan*, 483 U.S. at 837.

327. *See id.* at 830-32.

328. *See* CHI., ILL., MUN. CODE ch. 2-45, § 115(B) (2015) (subjecting rezoning to permit a change in floor-area ratio from non-residential to residential use and rezoning to allow residential uses on ground floors where previously prohibited to the requirements of the ARO).

329. *See Nollan*, 483 U.S. at 837-38.

mandating that a percentage be made affordable.[330] Just like the easement sought in *Nollan*, the 2015 ARO's mandatory set-asides serve a valid government purpose—providing an increase in affordable housing—without payment of compensation.[331]

A reviewing court would proceed to *Nollan*'s second prong and determine the required degree of connection between the condition and the impact of the proposed construction.[332] Under this prong, it is unclear whether the changes in residential zoning—allowing residential units to be built on the ground level, in mixed commercial areas, or with a higher floor-area ratio—impacts Chicago's goal of increasing affordable housing.[333] Nevertheless, imposing additional construction costs on developers seeking to increase the number of residential units is counterintuitive to increasing the supply of housing—affordable or otherwise.[334] Further, there is no link between the construction of new residential units and the supply of affordable units; rather, older units in existence become more affordable in comparison to new construction.[335] While *Nollan*'s second prong might require a means-end analysis that was overruled in *Lingle*, the test in *Nollan* exposes the mandatory set-asides to a takings challenge.[336]

Second, *Dolan*'s "rough proportionality" test clarifies the requirements of *Nollan*'s second prong.[337] The test requires that the

---

330. *See id.* at 837 ("[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.").

331. *See id.*

332. *See id.* at 837-38 ("In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" (quoting J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981))).

333. *See supra* note 192 and accompanying text.

334. *See supra* Subsection I.B.1.

335. Ellickson, *supra* note 58, at 1185-87 (introducing the concept of "filtering" as a possible, organic economic solution that inclusionary programs ignore and supplant).

336. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 548 (2005) (overruling the substantial evidence test promulgated by *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), in favor of language from *Nollan* and *Dolan*).

337. *See* Dolan v. City of Tigard, 512 U.S. 374, 377 (1994) ("We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm'n* of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.") (internal citations omitted).

exaction—the ARO's mandatory set-aside units—be roughly proportional to the needs created by the development.[338] Further, roughly proportional can be also thought of "reasonably related."[339] Thus, in a takings challenge, Chicago would have to demonstrate that the ARO's zones and accompanying percentages are reasonably related to the impact a development will have on the shortage of affordable housing.[340] Essentially, Chicago must demonstrate that requiring developers seeking building permits for a downtown zone to create 2.5% of the affordable units on-site is reasonably related to the project's impact on affordable housing.[341] Because the mandatory set-aside requirements function through a predetermined map, it would be challenging for Chicago to demonstrate that it makes an "individualized determination" when placing the condition on each permit request.[342] While a "mathematical calculation" is not required, Chicago will struggle to demonstrate without studies and statistical proof that new market-rate construction creates a shortage of affordable housing.[343] While a municipality has the power to solve development-related issues through zoning, the U.S. Supreme Court has made it clear that the Fifth Amendment limits such power.[344] As a result, the 2015 ARO's fixed percentage of required on-site and set-aside units are open to review under both *Dolan* and *Nollan*.[345]

Third, under *Koontz*, the 2015 ARO's in-lieu fees are monetary exactions that must also satisfy the tests in *Nollan* and *Dolan*.[346] Similar to the monetary exactions examined in *Koontz* that were an alternative to a physical exaction, the in-lieu fees in the 2007 version

338. *See id.* at 391.

339. *See id.* ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

340. *See id.*

341. *See id.*; 2015 ARO Rules & Regulations § 4.2.

342. *See Dolan*, 512 U.S. at 391 ("[T]he city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

343. *See id.*

344. *See id.* at 396 ("A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (quoting Penn. Coal v. Mahon, 260 U.S. 393, 416 (1922))).

345. *See id.*

346. *See* Koontz v. St. John's River Water Mgmt. Dist., 133 S. Ct. 2586, 2599 (2013) (requiring that monetary exactions satisfy the nexus and rough proportionality tests).

of the ARO were an alternative to set-aside requirements.[347] However, for certain downtown zones, the 2015 ARO does not provide in-lieu fees as an alternative.[348] Rather, in-lieu fees can only compose part of a developer's obligation under the 2015 ARO.[349] The Court's reasoning in *Koontz* relied on a municipality offering at least one scenario that complies with *Nollan* and *Dolan*.[350] Because the 2015 ARO requires a developer desiring to build downtown to either build all required set-aside units or build a fraction of the units and pay in-lieu fees, the alternative differs from that addressed in *Koontz*.[351] In application, the 2015 ARO does not provide a developer desiring to build downtown with a purely monetary exaction; rather, a percentage of the units must still be constructed in order to achieve compliance.[352] Therefore, the mandatory set-asides conflict with *Dolan*; and as a result, any partial in-lieu fees do not offer an alternative that passes the *Nollan* and *Dolan* tests unscathed.[353]

Finally, the 2015 ARO's incentives that may be considered compensation actually encourage developers to turn over units to Chicago.[354] One incentive in the 2015 ARO is that developers may sell or lease the affordable units to the Chicago Housing Authority—or an approved agency—in exchange for a $25,000 reduction in in-lieu fees.[355] As a result, there is a strong incentive for the developer, seeking a building permit for as little cost as possible, to turn control of completed affordable units over to the City.[356] In *Koontz*, the

347. *See* CHI., ILL., MUN. CODE ch. 2-45, § 110(d) (2007) ("A developer subject to the provisions of subsections (b) or (c), may establish affordable housing by one or more of the following: (i) the development of affordable housing units as part of the residential housing project; (ii) payment of a fee in lieu of the development of affordable housing units; or (iii) any combination thereof.").

348. *See id.* § 115(F)(3) (2015) ("In the downtown districts and in planned developments with an underlying downtown district zoning classification, a developer of rental units subject to the provisions of subsection (C) must provide at least 25% of the required affordable rental units on-site or off-site.").

349. *See id.*

350. *See Koontz*, 133 S. Ct. at 2598 (clarifying that a condition to a building permit may be constitutional so long as there is at least one alternative that would satisfy *Nollan* and *Dolan*).

351. *See* 2015 ARO Rules & Regulations art. 4.

352. *See* CHI., ILL., MUN. CODE ch. 2-45, § 115(F)(3) (2015).

353. *See Koontz*, 133 S. Ct. at 2598 ("[S]o long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition.").

354. *See* 2015 ARO Rules & Regulations § 6.1.

355. *See id.*

356. *See id.*

Supreme Court expressed concern that property owners applying for land-use permits are especially vulnerable to coercion, which the unconstitutional-conditions doctrine is meant to protect.[357] Because a municipality has a large amount of discretion in denying a permit request, the Court recognized that a developer seeking a valuable permit would be coerced into giving up property in exchange for the ability to build.[358]

Similarly, the 2015 ARO places a condition on a developer's request for change in zoning, which predicates the ultimate request for a building permit.[359] If Chicago simply required the developer to construct the units without imposing a condition on a building permit, the exaction would be a clear constitutional taking.[360] Since developers request changes in zoning and building permits as a way to increase the value of the property, Chicago has broad coercive power to take from developers.[361] The more a change in zoning and building permit is worth, the more a developer in Chicago would be willing to comply with the 2015 ARO's set-asides and in-lieu fees in order to build the planned residential structure.[362] With such an incentive to turn over constructed units to the Chicago Housing Authority built into the consideration of how a developer will pay for the exactions,[363] the City is coercing developers into building units and turning them over for compensation that amounts to little more than a discount on in-lieu fees that may not meet the *Nollan* and *Dolan* tests.[364] Therefore, the 2015 ARO, even with its incentives, does not provide developers with a non-coercive alternative.[365] The

357. *See Koontz*, 133 S. Ct. at 2594 ("[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take.").

358. *See id.*

359. *See* 2015 ARO Rules & Regulations § 5.1.

360. *See Koontz*, 133 S. Ct. at 2598 ("A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.").

361. *See id.* at 2594.

362. *See id.*

363. *See* CHI., ILL., MUN. CODE ch. 2-45, § 115(Q) (2015); *see also* 2015 ARO Rules & Regulations § 6.1 ("If a developer sells or leases at least 2.5 of the total units (1/4 of the required affordable units) to the CHA or another Authorized Agency, the remaining in-lieu fees will be reduced by $25,000 per remaining required affordable unit.").

364. *See Koontz*, 133 S. Ct. at 2594.

365. *See id.*

condition placed on building permits is a shortcut to meeting the goal of creating affordable housing at the expense of private developers.[366]

B. Affordable Housing Tax Instead of Mandatory Set-Aside Construction Requirements

In considering the legal challenges that inclusionary zoning programs generate, a regulatory tax scheme is a more efficient way for Chicago to achieve its goal of increasing the supply of affordable housing.[367] As a whole, regulatory taxes are an efficient fund-generating mechanism for Chicago that could be substituted for granting building permits conditional upon construction of affordable units.[368] Rather than denying permits and forcing compliance,[369] a flat affordable housing tax would allow developers to assess the costs of building an affordable unit or decide whether paying the tax makes more fiscal sense.[370] Further, an affordable housing tax would encourage developers to make decisions in real time and on an individual basis.[371] Such an individual decision suggests that a tax would be an alternative condition available during the permitting process under *Koontz*.[372]

Furthermore, the Supreme Court has treated the payment of money differently than exactions or dedications of physical property.[373] In her dissenting opinion in *Koontz*, Justice Kagan

---

366. *See* Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) ("A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (quoting Penn. Coal v. Mahon, 260 U.S. 393, 416 (1922))).

367. *See* Emanuel & Mooney, *supra* note 247.

368. *See Alternatives to Zoning*, *supra* note 219, at 686 ("Regulatory taxation and fines are more centralized approaches than nuisance law and private agreements.").

369. *See, e.g.*, CHI., ILL., MUN. CODE ch. 2-45, § 115(N)(1) (2015) ("Failure by the developer to pay the required fee in lieu, or provide the on-site or off-site affordable units required by this section, or sell or rent such affordable units in accordance with the requirements of this section, shall be a violation of this section punishable by a fine in an amount equal to two times the payment of fees in lieu required in subsection (F) and, in the case of a residential real estate developer licensed pursuant to Chapter 4-40 of the Municipal Code or any successor chapter, the revocation of the developer's residential real estate developer license.").

370. *See Alternatives to Zoning*, *supra* note 219, at 707.

371. *See id.*

372. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2598 (2013).

373. *See, e.g.*, *id.* at 2600 ("It is beyond dispute that 'taxes and user fees . . . are not "takings."' (quoting Brown v. Legal Found. of Wash., 538 U.S. 216, 243 n.2

suggested that when the government is merely imposing a general liability to pay money, the municipality is indifferent to how the affected party elects to comply.[374] To conclude that requiring a property developer to pay for restoration of off-site wetlands was not a taking, Justice Kagan relied on the premise that the payment existed independent of the permitting process.[375] Such a conclusion rested on the assumption that a law imposes an obligation to make the payment,[376] which in turn requires that a legislature enact a statute creating an affordable housing tax.[377] When viewed apart from the mandatory set-aside requirements, the Chicago City Council could recharacterize the 2015 ARO's in-lieu payment structure as an affordable housing tax that a developer must pay to build in certain zones.[378] If so, Chicago could correct the elements of the 2015 ARO most likely to draw a takings challenge—the mandatory set-aside requirements—by treating the in-lieu payments as an affordable housing development tax.[379] However, by taking this avenue, the City Council would need to pass the tax through its legislative process.

With the revenue from a flat affordable housing tax, the changes to Chicago's ARO would not frustrate the program's purpose.[380] Instead, the Chicago Housing Authority or a related body would have the revenue to purchase, construct, sell, or lease property

---

(2003) (Scalia, J., dissenting))); Yee v. City of Escondido, 503 U.S. 519, 528-29 (1992) (holding that states have broad power to regulate the rent levels a landlord may charge without automatically having to pay compensation).

374. *See Koontz*, 133 S. Ct. at 2605 (Kagan, J., dissenting) ("Five Members of the Court determined that the law did not effect a taking, distinguishing between the appropriation of a specific property interest and the imposition of an order to pay money.").

375. *See id.* at 2606 ("Because the government is merely imposing a 'general liability' to pay money, and therefore is 'indifferent as to how the regulated entity elects to comply or the property it uses to do so,' the order to repair wetlands, viewed independent of the permitting process, does not constitute a taking.") (internal citations omitted).

376. *See id.* (emphasizing that monetary payments should not be examined in light of *Nollan* and *Dolan*, but instead *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998) (holding that the government may impose monetary obligations without being subject to Takings Clause protections)).

377. *See supra* Subsection I.C.2.

378. *See* 2015 ARO Rules & Regulations § 4.3.

379. *See id.*

380. *See* CHI., ILL., MUN. CODE ch. 2-45, § 115(A) (2015) (stating that that the provision should "be liberally construed and applied to achieve its purpose, which is to expand access to housing for low-income and moderate-income households and to preserve the long-term affordability of such housing").

in any neighborhood of its choice.[381] While a flat tax does not guarantee that affordable units will be built within higher-priced areas, choosing a location for the units would be left to the City.[382] The 2015 changes to the ARO have already frustrated the purpose of constructing units directly in high-income neighborhoods because developers have the option to construct mandatory units off-site.[383] The choice to develop off-site affordable units up to two miles away from the proposed project effectively moves affordable housing away from the desired location.[384] As a result, Chicago has made a decision inconsistent with holding private developers responsible for the City's side goal of socioeconomic integration.[385] With an affordable housing tax in place of mandatory set-asides, the Chicago Housing Authority or a related body will have complete control to place affordable units anywhere in the city.[386] Such total control will in turn grant the City more freedom than the 2015 changes to the ARO.[387] Overall, with more authority to place affordable units in whatever area the City desires, Chicago will not be dependent on a private developer's choice of whether to build residential units in an exclusive area.[388] Notwithstanding, if Chicago sought an alternative to legal challenges and tax legislation, then it would be better served to relax existing zoning ordinances so that construction of affordable units is not a barrier to development.[389]

C. Effects of New Urbanism and Deregulation

By relaxing current zoning restrictions so that new units cost less than in-lieu fees reaching as high as $175,000, Chicago can render unnecessary the mandatory set-asides included in the 2015 changes to the ARO.[390] If, in 2001, the Urban Land Institute found that 78.2% of developers cited government regulation as a barrier to

381. *See supra* note 217 and accompanying text.
382. *See supra* note 218 and accompanying text.
383. *See* CHI., ILL., MUN. CODE ch. 2-45, § 115(F)(3) (2015) ("If the developer elects to provide affordable rental units off-site, the off-site affordable rental units must be located within a two-mile radius from the residential housing project and in a downtown district or higher income area.").
384. *See id.*
385. *See supra* note 228 and accompany text.
386. *See supra* note 217 and accompanying text.
387. *See* CHI., ILL., MUN. CODE ch. 2-45, § 115(F)(3) (2015).
388. *See id.*
389. *See infra* Subsection III.C.
390. *See* 2015 ARO Rules & Regulations § 4.2-.3.

urban development,[391] then complicating the process with more regulations is not a solution. Chicago itself recognized in its Five-Year Housing Plan that a major barrier to new housing development was the cost per unit.[392] By forcing developers of land in urban areas like Chicago to continually monitor zoning ordinances for changes in requirements and fees, complex programs divert resources away from building affordable residential housing.[393] Instead, deregulating land use and relaxing existing zoning ordinances will allow developers to keep up with the demand for affordable housing.[394]

If a municipality in an urban area focused on relaxing zoning restrictions like set-backs, floor-area ratios, and usage separation, then developers would be able to build more units in desirable locations.[395] Chicago has also recognized that such changes will reduce the cost per unit, which in turn will increase the supply of affordable housing without mandatory set-asides.[396] Lower prices follow the creation of more units, and the development of a mixed-income neighborhood becomes a possibility.[397] However, to create neighborhoods with greater socio-economic diversity, a municipality must shift its focus from traditional zoning restrictions concerned with the location, size, and aesthetic of a building.[398] Instead, a municipality must relax such restrictions to increase heightened levels of density, which results in more units in desired locations.[399] By relaxing ordinances barring residential and commercial uses from the same areas, municipalities allow development to transform a neighborhood into an area with housing within walking distance to schools, workplaces, and shopping.[400]

---

391. *See supra* Subsection I.C.3.

392. *See* Emanuel & Mooney, *supra* note 247, § 4.5 ("A barrier to new-housing development as well as substantial rehabilitation is the high cost of development, which can easily top $350,000 per unit.").

393. *See Alternatives to Zoning*, *supra* note 219, at 697-98 ("The existence of zoning means that builders, land speculators, civil engineers, architects, financial institutions, lawyers, and others involved in land development must maintain libraries of local land use regulations and spend time studying them.").

394. *See* Siegan, *supra* note 97, at 128.

395. *See* RUSSELL, *supra* note 231, at 12-13.

396. Emanuel & Mooney, *supra* note 247, § 5.1 ("Denser construction, smaller units and reduced parking requirements all contribute to less cost per unit, allowing affordability without use of subsidies.").

397. *See* Smith, Delaney & Liou, *supra* note 1, at 160.

398. *See* RUSSELL, *supra* note 231, at 12.

399. *See id.* at 12-13.

400. *See* Lewyn, *supra* note 220, at 259.

As a result, steep in-lieu fees and mandatory set-asides become unnecessary, as it is economical for developers to construct affordable units in desirable neighborhoods.[401] Further, without mandatory set-asides, takings challenges like the one to the Chicago ARO become moot.[402] Overall, an inclusionary zoning program can meet its goal of increasing the supply of affordable housing without imposing mandates that curb private development.[403]

CONCLUSION

With the *California Building Industry Ass'n* case upholding the constitutionality of mandatory set-aside requirements failing to be addressed by the Supreme Court,[404] an uncertain legal battle looms over regulatory takings and inclusionary zoning's use of mandatory set-asides. As demonstrated by the HBAGC lawsuit filed in August 2015, Chicago will see similar legal challenges in the future.[405] The 2015 revisions to the Affordable Requirements Ordinance that require construction of set-aside units on site *in addition* to voluntary in-lieu fees are susceptible to a complex takings challenge.[406] By focusing legislative efforts on taxation, municipalities can avoid takings challenges.[407] Finally, by relaxing existing zoning restrictions, Chicago and other municipalities with inclusionary programs can create affordable housing in dense urban areas.[408] As a result, developers will create affordable units because it is economical to do so, not because the municipality mandates the construction and surrender of affordable units.[409]

401. *See* RUSSELL, *supra* note 231, at 19.
402. *See supra* Subsection I.B.2.
403. *See supra* Subsection I.B.1.
404. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 1006 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016).
405. *See* Ori, *supra* note 9.
406. *See supra* Part II.
407. *See supra* Part III.
408. *See supra* Part III.
409. *See supra* Part III.