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Cities, Inclusion and Exactions

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ABSTRACT: Cities across the country are adopting mandatory inclusionary zoning. Yet, consensus about the appropriate constitutional standard to measure the propriety of mandatory inclusionary zoning has not been fully reached. Under one doctrinal lens, inclusionary zoning is a valid land use regulation adopted to ensure a proper balance of housing within the jurisdiction. Under another doctrinal lens, challengers seek to characterize inclusionary zoning as an exaction, a discretionary condition subject to a heightened standard of review addressing the specific negative impact caused by an individual project on the supply of affordable housing in a jurisdiction. Drawing from the experience of Baltimore, Maryland's inclusionary zoning ordinance, this Article considers the impact that the uncertainty in the law may have had on the type of inclusionary zoning ordinance adopted by the city. This Article argues that the conversation about inclusionary zoning, land use regulation, and exactions has been formulated in the context of imagery about development that leaves places like Baltimore out. The imagery in these narratives is of an individual landowner powerless in the face of government overreach. The reality is different in those places where land developers are not powerless and instead are often politically influential repeat players. Thus, the real problem presented may be not how to craft doctrine to prevent cities from asking too much of developers, but instead to craft doctrine that ensures cities do not give away too much.

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I. INTRODUCTION

The project of addressing the need for affordable housing in the United States presents an ongoing dilemma for local government: how to pay for the construction of affordable housing units; and how to find geographic locations to build such units without local opposition thwarting the projects, reconcentrating poverty, or perpetuating racial segregation. These endeavors are a work in progress, and inclusionary zoning has become an increasingly popular, but partial, solution.[1] Under an inclusionary zoning approach, a local government zoning or related housing law will either encourage or require a developer who proposes a new residential construction project to "set aside" a certain number of units for income-restricted sale or lease.[2] This

1. *See* Jenny Schuetz et al., *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, D.C. and Suburban Boston* 1 (Furman Ctr. for Real Estate & Urban Policy, Working Paper No. 08–02, 2008), http://furmancenter.org/files/publications/31flavorsofIZ9-9-08.pdf ("As housing costs have risen in the U.S. and federal subsidies for affordable housing programs have declined, inclusionary zoning . . . has become an increasingly popular local policy for producing low-income housing without direct public subsidy.").

2. *See generally* Robert Hickey et al., *Achieving Lasting Affordability Through Inclusionary Housing* (Lincoln Inst. of Land Policy, Working Paper No. 14RH1, 2014), http://www.lincolninst.edu/sites/default/files/pubfiles/achieving-lasting-affordability-through-inclusionary-housing-full.pdf (analyzing a set of twenty inclusionary housing programs).

approach encourages the private production of new affordable housing that is geographically and economically integrated.[3]

Although increasingly widespread, the propriety of inclusionary zoning under the U.S. constitutional doctrine that governs local land use and individual property rights is still somewhat unsettled; the way in which the rights and governmental exercise of authority are framed shapes different answers to whether an inclusionary zoning ordinance is valid.[4] This ambiguity presents two unresolved questions. The first question is whether private developers, by being asked to include units of low- to moderate-income housing in market-rate developments, are being asked to do something extraordinary that unfairly impinges on their property rights—especially when it is costly, either financially or in terms of the upscale image or message that a developer wants to sell.[5] The second question is whether developers are asked to do something both ordinary and consistent with land use regulation because inclusionary zoning promotes uses of land that improves the general welfare of the populace by ensuring housing types that meet the variety of residents' needs. Tailoring housing types to differing abilities to pay is particularly appropriate considering land use regulation's history of exclusionary zoning and its pernicious effect in facilitating segregation.[6]

For the most part, there have been relatively few successful challenges to inclusionary zoning ordinances.[7] This is likely so because developers have still found it lucrative to fulfill inclusionary zoning requirements and build profitable residential developments.[8] Some developers even consider it the right thing to do.[9] Also, local governments have mostly been careful in

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3. *Id.* at 1.

4. Tim Iglesias, *Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and Its Potential to Meet Affordable Housing Needs*, ZONING & PLAN. L. REP., Apr. 2013, at 1, 4 (arguing that the way the ordinance is framed, as an ordinary land use regulation or a permit with conditions, affects state courts' receptiveness to either uphold or strike down inclusionary zoning ordinances).

5. *See Is Inclusionary Housing the New Normal for High-Cost Places?*, HOW HOUSING MATTERS (Mar. 5, 2015), http://howhousingmatters.org/articles/is-inclusionary-housing-new-normal-high-cost-places ("Courts have overturned inclusionary zoning ordinances in some communities, ruling that they are illegal forms of rent control.").

6. *See* John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 91 (2014) ("Decades of scholarship—legal and sociological—outline how [zoning] policies left low-income families stranded in faltering cities whose abandonment by suburban homeowners-to-be at least left behind a large supply of low-cost housing.").

7. *See* Iglesias, *supra* note 4, at 7–9 (describing the various types of legal challenges to inclusionary zoning ordinances, few of which have been successful).

8. *See* Nicholas J. Brunick, *Inclusionary Housing: Proven Success in Large Cities*, ZONING PRAC., Oct. 2004, at 1, 3 (finding, in one city, that "[n]ew housing development continues to boom . . . and development projects remain lucrative, even with the affordable unit set-aside requirement").

9. *See* URBAN INST., EXPANDING HOUSING OPPORTUNITIES THROUGH INCLUSIONARY ZONING: LESSONS FROM TWO COUNTIES 18 (2012) ("Because [Moderately Priced Dwelling Units ("MPDU")] are required in nearly all developments and subdivisions in Montgomery County, developers think it is fair." (footnote omitted)); *see also id.* at 24 ("Some developers have even expressed pride in their involvement with the MPDU program. They agree that MPDUs are

designing these ordinances to avoid political upset, or worse—legal challenges.[10] As a result, either market-rate housing with inclusionary units has been profitably produced notwithstanding the inclusionary zoning requirements, or developers have been insulated from foregone rent or sale income by a combination of strong real estate markets and packages of cost offsets, such as density bonuses or other forms of subsidy.[11]

Despite the absence of challenges, the experience of a midsized city like Baltimore, Maryland shows a need to consider the extent to which takings law demands that developers must be subsidized to produce inclusionary housing units. Baltimore's mandatory inclusionary zoning ordinance was deliberately written to only apply if the city completely financially reimburses the developer for creating new affordable housing.[12] The assumption is that each developer is required to be made whole for every affordable unit that is created, sold, and rented at the city's behest.[13] The result has been an inclusionary ordinance that has produced very few affordable housing units.[14]

This Article uses Baltimore's ordinance to illustrate the impact that the unsettled questions quietly surrounding inclusionary zoning may have, in particular the uncertainty about whether and how the existing constitutional framework governing land use regulation applies to mandatory inclusionary zoning. The hybrid combination of Due Process, takings, and exactions doctrines that guides the analysis of this regulation means the constitutional inquiry is framed in terms of a rigid binary: whether, under Due Process and takings analysis that has traditionally been applied to zoning, inclusionary zoning is subject to the traditional deferential standard of judicial review that

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valuable and they enjoy the challenge of making development profitable and MPDUs compatible with the market-rate units.").

10. *See Is Inclusionary Housing Legal?*, INCLUSIONARY HOUSING, http://inclusionaryhousing.org/inclusionary-housing-explained/what-are-the-downsides/is-it-legal (last visited Apr. 23, 2017) ("Policymakers interested in adopting inclusionary housing policies must work closely with legal counsel to design a program that anticipates potential challenges under federal or state law.").

11. As one developer explained: "Oftentimes, in the location that we're building, the differential between market and set-aside doesn't really affect our bottom line . . . . Truthfully, it's almost beneficial to us because, oftentimes, to have that additional density is meaningful to us from a dollars perspective." Kim Slowey, *Affordable Housing on the Hot Seat: Changing Regulations 'Force Developers to be More Creative'*, CONSTRUCTION DIVE (Mar. 10, 2016), http://www.constructiondive.com/news/affordable-housing-on-the-hot-seat-changing-regulations-force-developers/415335. *But see* Nicholas Benson, Note, *A Tale of Two Cities: Examining the Success of Inclusionary Zoning Ordinances in Montgomery County, Maryland and Boulder, Colorado*, 13 J. GENDER RACE & JUST. 753, 771 (2010) (noting that Boulder, Colorado's mandatory inclusionary housing ordinance does not make density bonuses available to developers).

12. *See* BALT., MD. CODE art. 13, §§ 2B-1 to -72 (2016) (establishing the requirements of Baltimore's inclusionary housing program).

13. *See id.* § 2B-4(d), (f) ("This subtitle is not intended to impose additional financial burdens on a developer or a residential project. Rather, the intent of this subtitle is that the cost offsets and other incentives authorized under it will fully offset any financial impact resulting from the inclusionary requirements imposed.").

14. S*ee* Natalie Sherman, *Despite Rule, Few Affordable Units Created in New Developments*, BALT. SUN (Dec. 27, 2014, 11:45 AM), http://www.baltimoresun.com/news/maryland/sun-investigates/bs-bz-inclusionary-housing-20141227-story.html.

applies to exercises of the police power,[15] or whether a more probing standard of review should apply under exactions doctrine because a developer is being required to construct a type of unit that is rented or sold at a below-market rate as a condition of being allowed to build.[16] As a result of this binary, one set of legal doctrine defers mightily to local government while the other set protects developers whenever the perception is that a local government is overreaching.[17]

The original framework for land use regulation was conceived when zoning was considered a static affair of defining districts that prescribe land uses. Since then zoning has grappled with accounting for new understandings about the public–private interplay in getting development built as well as the benefits and costs of new development.[18] Not considered relevant to the analysis are other factors that affect the outcomes of development and broader normative questions about how much development should be considered to be already subsidized by the public—for example, an irrelevant factor is the broader impact of the tendency to build upscale, expensive housing.[19] The fundamental issue may instead be whether developers have been adequately required to account for the true cost that a project represents to the public in economic, political, and social terms.

In particular, exactions doctrine, the more restrictive end of the land use constitutional legal framework, is inappropriately conceptualized to take into account the realities and experiences of places that are unlike the locations where the doctrine was largely conceived and formulated.[20] Under exactions doctrine, a local government is prohibited from imposing conditions on landowners seeking permission to intensify the use of their land through development that are found not to relate directly to a specific impact of the

15. *See* Berman v. Parker, 348 U.S. 26, 31–33 (1954) (describing judicial deference to the police power).

16. *See* Iglesias, *supra* note 4, at 4 (discussing how the framing of the inclusionary zoning issue can affect the legal analysis).

17. *Id.* at 6–8; *see also* Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 730–31 (2007) (describing exactions as a "confusing line of takings decisions").

18. *See* Andrew Auchincloss Lundgren, *Beyond Zoning: Dynamic Land Use Planning in the Age of Sprawl*, 11 BUFF. ENVTL. L.J. 101, 137–38 (2004) ("Instead of a static, use-based planning medium—one which is based solely on the prerogative of the local governmental body—a . . . new strategy . . . must rather build upon its foundation and be capable of addressing the needs of developer, resident, neighborhood, and landscape. In short, the next step in land use planning will require a dynamism not seen in the previous regimes of nuisance and contract at common law, nor in the regulatory geometry of Euclidian zoning and its offspring."); *see also* ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS 332 (4th ed. 2013).

19. *See* Bethany Y. Li, *Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 FORDHAM L. REV. 1189, 1190–91 (2016) (explaining how luxury development leads to the negative impact of displacement of low-income residents and in places like New York City is leading to extreme or hypergentrification displacing middle-and-upper-income residents).

20. *See* Saskia Sassen, *The Global City: Introducing a Concept*, 11 BROWN J. WORLD AFF. 27, 27 (2005) (describing the fact that major cities, as opposed to nation-states, may be the most important regulators of economic activity).

proposed development.[21] As this Article demonstrates, exactions doctrine reflects a particular narrative that may not be applicable to different development settings. This is especially true for U.S. cities in crisis that are trying to find their footing in a postindustrial world, rely heavily on real estate development, and are very hospitable to real estate developers.[22] This is in sharp contrast to the exactions narrative arc, which accepts as true a story that overbearing governments take advantage of defenseless property owners.[23] As a result, exactions doctrine reflects exaggerated concerns about government overreach, even where developers have a privileged voice and receive ample direct and indirect government subsidies to get even modest improvement projects off the ground.[24]

This Article argues that the failure to fully describe the relationship between developers, local governments, and the general public has detrimentally decontextualized exactions doctrine. In many instances, developers try to improve the value of their real property by encouraging local governments to make investments in public goods and services. The general public is often completely unaware that developers are being subsidized in the process. Far from being victims of overbearing local governments, developers are politically savvy citizens who take advantage of public goods.[25] Also, the stories on which exactions doctrine is based ignore the not uncommon reality that local governments may respond meekly in the face of opposition. Therefore, adding the story of how a struggling city *actually* responds to developers may help to illuminate the inadequacies of the current framework for much-needed mandatory inclusionary zoning.

Within this context of ever-present direct and indirect subsidy, this Article focuses on an underappreciated question: How can local governments regulate the wide variety of development projects without giving away too

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21. *See* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 613 (2004) ("Exactions include mandatory dedications of land, fees required in lieu of dedication, and impact fees given by property owners in exchange for permits, zoning changes, and other regulatory clearances.").

22. *See* Randall K. Johnson, *How the United States Postal Service (USPS) Could Encourage More Local Economic Development*, 92 CHI.-KENT L. REV. (forthcoming 2017) (describing the economic difficulties that are faced by certain local governments in the United States, as well as one way that these cities in crisis could generate more revenue).

23. *See* Daniel P. Selmi, *Takings and Extortion*, 68 FLA. L. REV. 323, 336 (2016) ("Professor Gregory Alexander described the early exaction cases as a story of 'power and fear,' one about a 'perceived imbalance of power' between private landowners and government regulators. He suggested that courts were not generating takings law by a 'methodological or theoretical concern, but by the pictures that judges have in their heads about the participants in the public land-use planning arena.'" (footnote omitted) (quoting Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1752–53 (1988))).

24. *See* DAVID L. IMBROSCIO, RECONSTRUCTING CITY POLITICS: ALTERNATIVE ECONOMIC DEVELOPMENT AND URBAN REGIMES 10–12 (1997) (discussing the relationship between "local officials and land-based business interests," which varies from place to place but is systemic).

25. *See generally* Selmi, *supra* note 23 (arguing that the "extortion narrative" used to support the takings doctrine is not justified).

much—i.e., without oversubsidizing?[26] Part II discusses the goals and methods of inclusionary zoning ordinances and the range of ways to incentivize private sector production of affordable housing. Part III discusses the indeterminate positioning of mandatory inclusionary zoning between traditional land use regulation and exactions doctrine and argues that the traditional land use framework is still the most appropriate lens for inclusionary zoning. But this Article also argues that, even if an exactions framework is applied, the ways in which local governments bestow value on developers should be taken into account by courts. Under that circumstance, Part IV identifies a potential framework under an exactions analysis for evaluating mandatory inclusionary zoning ordinances.

II. INCLUSIONARY ZONING

A. *HOW ZONING SHAPED THE NEED FOR INCLUSIONARY ZONING*

Zoning, as the predominant form of land use regulation, has enjoyed broad deference from state and federal courts since its approval in *Village of Euclid v. Ambler Realty Co.*[27] The assumption at the heart of this approval was that, through zoning, government can regulate both compatibility—by keeping incompatible uses of land separate—and exclusion—for example, by keeping certain commercial ventures that may imperil a citizen's health separate from residential neighborhoods.[28] As history has demonstrated, however, incompatible uses have long been interpreted to include the types of activities taking place on a parcel of land, as well as the types of people who are allowed to engage in such activities.[29]

Thus, zoning has embedded within its framework the legal right for local governments to favor particular classes of land use through what was, in effect, a form of direct subsidization and disfavor others through exclusion. In other words, local governments protect the more expensive and higher-class single-family homes, which creates scarcity that adds economic value,[30] and, as a result, absorbs a hidden cost of excluding the more affordable and lower-class

26. *Cf.* William Fulton, *To Subsidize Development or Not?*, GOVERNING (Aug. 2016), http://www.governing.com/columns/urban-notebook/gov-economic-development-subsidize.html (describing the flawed decision-making calculus of certain locally elected officials).

27. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (holding that zoning is a valid exercise of the police power).

28. *See generally* Spur Indus. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (en banc) (describing two potentially incompatible uses, a cement plant and a residential neighborhood); Boomer v. Atl. Cement Co., 257 N.E.2d 870 (N.Y. 1970) (examining the uses of a feedlot and a residential neighborhood).

29. *See* BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA 4 (2009) (describing how "across the nation, most banks and savings and loans refused to make mortgage loans to African Americans, in part because of the policies of the Federal Housing Administration (FHA), which 'redlined'—that is, refused to insure mortgages—in neighborhoods that contained more than a smattering of black residents").

30. *See generally* ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT (2012) (examining different ways to look at neighborhoods as social structures).

multifamily housing.[31] This mostly overlooked regulatory right to exclude certain types of housing from a neighborhood silently undergirds the definition of ordinary land use regulations as good management of a local jurisdiction's land use for the general benefit of the public.[32] As such, the disadvantages that were imposed upon a segment of the local population and the distortions that arose[33] in terms of the housing types produced by this "free" market, were normalized and zoning has been recognized as an efficient, politically popular, and constitutional practice since 1926.[34]

A separate, yet related, endeavor has been how to encourage the production of additional units of housing by government and private industry.[35] In a series of experiments going back to the days of the public land grant program and during the Great Depression with the formation of the Home Owners' Loan Corporation ("HOLC"),[36] the federal government has largely shaped and facilitated (some would argue, created) a housing production machine by making financing available to Americans of modest

31. *See* Edward Glaeser et al., *How Large Lot Zoning and Other Town Regulations Are Driving Up Home Prices*, COMMONWEALTH (Jan. 1, 2006), http://commonwealthmagazine.org/uncategorized/how-large-lot-zoning-and-other-town-regulations-are-driving-up-home-prices ("While minimum lot size is one way of managing development, communities have adopted a wide range of other controls that limit growth. The most direct approach is a growth cap, which limits the number of new units that can be built during a given year; a variant is a phasing schedule that limits the pace of [unit] construction within a single subdivision. Such regulations have become more common in the last decade.").

32. *See* EDWARD C. BANFIELD & MORTON GRODZINS, GOVERNMENT AND HOUSING IN METROPOLITAN AREAS 71–92 (1958) (discussing the wisdom of economic segregation); Richard F. Babcock & Fred P. Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1048 (1963); Norman Williams, Jr., *Planning Law and Democratic Living*, 20 L. & CONTEMP. PROBS. 317, 343–48 (1955) (discussing the constitutionality of economic segregation).

33. *See generally* Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667 (2013) (discussing the local and regional impact of exclusionary zoning on the supply of affordable housing).

34. *See* GUY STUART, DISCRIMINATING RISK: THE U.S. MORTGAGE LENDING INDUSTRY IN THE TWENTIETH CENTURY 206 (2003); Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 911 ("This overall racialized landscape has been created through legal and extra-legal devices to shape geographical reality and limit behavior to racialized geographic patterns, such as racially restrictive covenants and government-sponsored racially exclusionary redlining. It has been maintained by land use and zoning rules that unquestioningly ratify the exclusion of multi-family housing to protect middle- and upper-class homeowners and [to] promote environmental racism through expulsive zoning, locating undeserving or hazardous uses in and near Black communities." (footnote omitted)).

35. *See* Josh Barro, *Affordable Housing That's Very Costly*, N.Y. TIMES: UPSHOT (June 7, 2014), https://www.nytimes.com/2014/06/08/upshot/affordable-housing-thats-very-costly.html (describing developers' reluctance to participate in a voluntary inclusionary zoning program).

36. *See* Alan S. Blinder, *From the New Deal, a Way Out of a Mess*, N.Y. TIMES: BUS. DAY (Feb. 24, 2008), http://www.nytimes.com/2008/02/24/business/24view.html ("The HOLC was established in June 1933 to help distressed families avert foreclosures by replacing mortgages that were in or near default with new ones that homeowners could afford. . . . Nearly one of every five mortgages in America became owned by the HOLC. Its total lending over its lifetime amounted to $3.5 billion . . . . The HOLC closed its books in 1951, or 15 years after its last 1936 mortgage was paid off, with a small profit.").

means,[37] making the mortgage interest tax deduction widely available,[38] providing subsidies for publicly- or privately-owned housing projects,[39] and later providing voucher subsidies that follow the individual rather than the project.[40] The recent trend away from publicly-financed housing projects has, in effect, privatized traditional housing subsidies. The government has done so in the low-income housing arena by awarding housing vouchers—i.e., a direct subsidy to a small subset of renters and tax deductions to all homeowners with mortgages.[41] In addition, the redlining and other market failures that were embedded in government's sponsoring and incentivizing housing production has left the United States with a legacy of racial and economic segregation that the nation still struggles with to this day.[42]

The geographic location of this privatized yet subsidized housing construction was shaped by ordinary land use regulation.[43] Thus, housing

37. Thomas W. Hanchett, *The Other "Subsidized Housing": Federal Aid to Suburbanization, 1940s–1960s*, *in* FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA 163, 171–73 (John F. Bauman et al. eds., 2000). *See generally* ROSALYN BAXANDALL & ELIZABETH EWEN, PICTURE WINDOWS: HOW THE SUBURBS HAPPENED (2000) (analyzing the history of suburbs); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985) (same).

38. *See* CONG. BUDGET OFFICE, THE DISTRIBUTION OF MAJOR TAX EXPENDITURES IN THE INDIVIDUAL INCOME TAX SYSTEM 17 (2013) (finding that the mortgage interest tax deduction primarily benefits the top fifth of income earners).

39. *See* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993, Pub. L. No. 102-389, 106 Stat. 1571 (1992) (creating the Hope VI Program "Homeownership and Opportunity for People Everywhere," which provided grant funding for public housing redevelopment); Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189–2208 (1986) (codified as amended in scattered sections of 26 U.S.C.) (creating the Low Income Housing Tax Credit ("LIHTC"), the current largest federal funding for low income housing development); Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 8, 88 Stat. 633, 662–66 (codified as amended at 42 U.S.C. § 1437f (2006)) (creating the Section 8 program now called the Housing Choice Voucher Program); Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (codified as amended in scattered sections of 42 U.S.C.). *See generally* United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1437–39 (2006)).

40. *See* David M.P. Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America*, *in* THE NEW SUBURBAN HISTORY 11, 14–20 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006) (finding that a project-focused approach to development was codified in a series of federal laws, so as to underwrite the suburbia that has come to be understood as a naturally-produced and market-driven phenomenon).

41. *See, e.g.*, Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 346–47 (2009) ("Tax subsidies also benefit higher-income taxpayers because only homeownership is encouraged—not housing more generally. . . . [T]ax policies for housing significantly benefit higher-income taxpayers. The overwhelming majority of low-income taxpayers who pay mortgage interest are not able to receive a tax benefit from homeownership."); Marjorie E. Kornhauser, *Cognitive Theory and the Delivery of Welfare Benefits*, 40 LOY. U. CHI. L.J. 253, 256 (2009) (discussing the cognitive reasons that tax deductions and credits are more psychologically appealing than direct welfare or benefits payments).

42. *See generally* DAVID M.P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA (2007); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

43. *See* William A. Fischel, *The Evolution of Homeownership*, 77 U. CHI. L. REV. 1503, 1514–15 (2010) (reviewing LEE ANNE FENNELL, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND

construction took two project-focused forms: (1) a suburban-style, independently-owned (while invisibly subsidized) form of housing that was constructed in the low-density areas outside of central cities; and (2) a rented form of the multifamily home, largely segregated by race and income, which was confined to central cities and stigmatized as the epitome of subsidized.[44] As a result, ordinary land use regulation has often restricted affordable housing opportunities to locations that are racialized "black" and resulted in an uneven distribution of public sector resources, access to wealth, stigmatized reputation, and constrained opportunities for social mobility.[45]

Other trends have converged to further revolutionize this project-focused approach to housing production. For example, affordable housing, while stigmatized and often opposed, is generally recognized as necessary to the creation of a robust housing market.[46] It has also become more accepted for government to use zoning to require or encourage private housing developers to build a mix of housing types that different segments of the population may access, in order to encourage local economic development.[47]

Among the results of this convergence is the creation of a land use regulatory innovation called inclusionary zoning.[48] Beginning with an experiment in 1974 in Montgomery County, Maryland,[49] inclusionary zoning has been used to increase the availability of affordable housing by requiring that developers provide below-market units in exchange for a range of

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PROPERTY LINES (2009)) (describing zoning's evolving exclusionary role in middle- and upper-income suburbs, beginning first as selectively exclusionary of among other things "were hostile to junkyards, heavy industry, high-rise apartments, low-income housing, and halfway houses" to becoming generally exclusionary as movements to "open the suburbs" gained momentum and the poor became increasingly mobile).

44. *See generally* PUBLIC HOUSING MYTHS: PERCEPTION, REALITY, AND SOCIAL POLICY (Nicholas Dagen Bloom et al. eds., 2015).

45. *See generally* LAWRENCE J. VALE, RECLAIMING PUBLIC HOUSING: A HALF CENTURY OF STRUGGLE IN THREE PUBLIC NEIGHBORHOODS (2002) (comparing three public housing projects in Boston).

46. *See generally* S. Leonard Syme & Miranda L. Ritterman, *The Importance of Community Development for Health and Well-Being*, COMMUNITY DEV. INVESTMENT REV., Dec. 2009, at 1 (discussing the importance of community development to individual well-being and economic health of a community); Lawrence J. Vale et al., *What Affordable Housing Should Afford: Housing for Resilient Cities*, CITYSCAPE: J. POL'Y DEV. & RES., 2014 No. 2, at 21 (arguing that affordable housing is essential to a resilient city).

47. Abigail Savitch-Lew, *Skeptics Say City's Environmental Studies Understate Damage from Development*, CITY LIMITS (Sept. 26, 2016), http://citylimits.org/2016/09/26/skeptics-say-citys-enviro-studies-understate-damage-from-development (finding that "many advocates deride the environmental review process and accuse it of shielding developers and city planning agencies from lawsuits while failing to protect neighborhoods from the negative effects of development").

48. *See generally* TIMOTHY S. HOLLISTER ET AL., NATIONAL SURVEY OF STATUTORY AUTHORITY AND PRACTICAL CONSIDERATIONS FOR THE IMPLEMENTATION OF INCLUSIONARY ZONING ORDINANCES 1 (2007) (surveying state inclusionary zoning enabling acts and suggestings ways to structure inclusionary zoning ordinances).

49. *See* Jen DeGregorio, *Baltimore's Affordable Housing Rules Follow Model in Montgomery County*, DAILY REC. (BALT.) (Dec. 8, 2006), http://www.highbeam.com/doc/1P2-8981541.html ("When the Baltimore City Council considers a bill requiring most developers to include affordable housing in new developments, it will not be navigating in uncharted waters. Montgomery County has had a similar law for 32 years . . . .").

different incentives.[50] Usually, this regulation is viewed in a positive light since it creates units at no direct public cost.[51]

B. THE MECHANICS OF INCLUSIONARY ZONING

Inclusionary zoning ordinances have proliferated across the United States in 27 states and the District of Columbia.[52] These laws are authorized by state zoning enabling statutes[53] and are increasingly adopted by jurisdictions both large and small.[54] These ordinances require that new housing developments contain a mix of units with different prices, amenities, and layouts.[55] In order to redress past exclusionary zoning and other government failures, the goal is both affordability and integration based on income.[56]

1. Mandatory or Voluntary

While inclusionary zoning ordinances can be mandatory or voluntary, the vast majority are required by law.[57] Scholars generally agree that the

50. *See* Danielle Sweeney, *Inclusionary Housing Fund Running on Empty, Advisory Board Told*, BALT. BREW (Oct. 22, 2014, 6:10 PM), https://www.baltimorebrew.com/2014/10/22/inclusionary-housing-fund-running-on-empty-advisory-board-told ("The [Baltimore City Mandatory Inclusionary Zoning Ordinance] was designed to place no financial burden on the developer or project by requiring the city to buy or rent units at market rate and make the units available to individuals who meet certain income requirements."); *see also* HEATHER L. SCHWARTZ ET AL., RAND CORP., IS INCLUSIONARY ZONING INCLUSIONARY? 23 (2012) ("Other common incentives include fee waivers, reductions in parking spaces required by zoning and building codes, and expedited permitting." (citation omitted)).

51. *See* Barro, *supra* note 35.

52. *See* Hickey et al., *supra* note 2, at 18.

53. *See, e.g.*, MD. CODE ANN., LAND USE § 7-401(a) (West 2012) (authorizing local legislative bodies to impose inclusionary zoning and award density bonuses to promote creation of housing affordable to persons of low and moderate income).

54. *See* Sherman, *supra* note 14 (discussing an inclusionary housing ordinance in the city of Baltimore). *See generally* URBAN INST., *supra* note 9 (providing an overview of inclusionary zoning in two counties).

55. *See* U.S. DEP'T OF HOUS. AND URBAN DEV., MIXED-INCOME HOUSING AND THE HOME PROGRAM 16 (2003) ("Developers must evaluate and identify the customer's housing needs in terms of ideal unit size, amenities, unit layout, and locational preference.").

56. *See* CLIFFORD WINSTON, AEI–BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 2–3 (2006) ("Government failure[s] . . . arise[] when government has created inefficiencies because it should not have intervened [in a particular market] in the first place or when [that government] could have solved a given problem . . . more efficiently . . . by generating greater net benefits." (emphasis omitted)).

57. *See* HOLLISTER ET AL., *supra* note 48, at 2. As of 2007, the authors,

> summarize the survey of state law as follows:
>
> - thirteen states have statutes or regulations that either expressly authorize inclusionary zoning (using the actual words "inclusionary zoning") or clearly imply such authority by granting broad powers to promote affordable housing (Connecticut, Florida, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Virginia);

mandatory ones are the most effective to produce affordable housing units.[58] The features of a typical inclusionary zoning ordinance break down as follows: The size of a project triggers the application of the ordinance; this trigger leads to the imposition of a set requirement of affordable units; and the developer complies with the requirement.[59]

2. Which Projects are Subject to Inclusionary Zoning?

The triggering size for inclusionary zoning can range from as few as two units to as many as two hundred.[60] According to a study conducted by the RAND Corporation, the triggering size of the project will vary based on the strength of the local housing market.[61] The more expensive the market, the less of an impact the requirement will have on the profitability of a development.[62] Markets with high real estate prices insulate developers from the relatively smaller costs of additional inclusionary units.[63]

- seven states have no express authorization for inclusionary zoning, but one or more major municipalities in the state law have adopted inclusionary zoning programs (California, Georgia, Idaho, Maine, New Mexico, New York, and Washington);
- two states (Texas and Oregon) prohibit inclusionary zoning by statute; and
- in 26 states, there is no express or implied authorization or prohibition, and authority to enact inclusionary zoning will depend on home rule powers, which vary widely, and the particular characteristics and facts of the proposed inclusionary zoning ordinance.

Id. (footnote omitted).

58. *See* SCHWARTZ ET AL., *supra* note 50, at 21 (describing the voluntary nature of inclusionary zoning as one of a number of program features that diminish the effectiveness of inclusionary zoning ordinances). "At least three studies have concluded that mandatory programs generally yield more units than voluntary programs." *Id.* at 23 (citing CAL. COAL. FOR RURAL HOUS. & NON-PROFIT HOUS. ASS'N OF N. CAL., INCLUSIONARY HOUSING IN CALIFORNIA: 30 YEARS OF INNOVATION (2003); Nicholas J. Brunick, *The Inclusionary Housing Debate: The Effectiveness of Mandatory Programs Over Voluntary Programs*, ZONING PRAC., Sept. 2004; Vinit Mukhija et al., *Can Inclusionary Zoning Be an Effective and Efficient Housing Policy? Evidence from Los Angeles and Orange Counties*, 32 J. URB. AFF. 229 (2010)).

59. *See, e.g.*, Inst. for Local Self Gov't, *Annotated Sample Inclusionary Zoning Ordinance*, *in* CALIFORNIA INCLUSIONARY HOUSING READER 121, 129 (2003), http://www.ca-ilg.org/sites/main/files/file-attachments/resources__California_Inclusionary_Housing_Reader.pdf.

60. *See* ONT. MINISTRY OF MUN. AFFAIRS AND HOUS., LONG-TERM AFFORDABLE HOUSING STRATEGY UPDATE: INCLUSIONARY ZONING CONSULTATION DISCUSSION GUIDE 7 (2016), http://www.mah.gov.on.ca/AssetFactory.aspx?did=14977 ("Threshold sizes vary across inclusionary zoning programs, with examples ranging from buildings with [2] units to 200 units and hectare size ranging from 2 to 10 hectares and more.").

61. *See* SCHWARTZ ET AL., *supra* note 50, at xi.

62. *See* Barro, *supra* note 35.

63. *See* SCHWARTZ ET AL., *supra* note 50, at 8.

3. The Financial Costs of Inclusionary Zoning—Incentives for Developers

The most frequently offered incentive is the density bonus.[64] Zoning ordinances typically restrict the height, the bulk, and the percentage of a parcel that can be occupied, which, in turn, ultimately restricts the number of buildable square feet.[65] A density bonus gives developers the legal right to build more square feet than would otherwise be permitted under the applicable zoning ordinance.[66]

Designing the appropriate density bonus has thus far been more art than science. It has become increasingly clear that allowing for taller or more sprawling developments can actually cost a jurisdiction more.[67] This is due to more intensive use of public goods and services.[68] These higher administrative costs, which are rarely acknowledged and fully accounted for by the government, may contribute to financial shortfalls and more borrowing by local governments.

Moreover, design choices often are made without taking into account the characteristics of specific development projects. In the Baltimore ordinance, for example, density bonuses are made available upon approval by the Board of Municipal Zoning Appeals, albeit with no set standards provided for approval or disapproval.[69] As one Baltimore City Council member ruefully noted, there might not have been much significance to prescribing such a review process because the Baltimore zoning ordinance typically provided uses of a right that gave a particular developer all of the density they need upfront.[70]

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64. *See* AM. PLANNING ASS'N, MODEL SMART LAND-DEVELOPMENT REGULATIONS: § 4.4 MODEL AFFORDABLE HOUSING DENSITY BONUS ORDINANCE 1 (2006), https://www.smartgrowthamerica.org/app/legacy/images/IH-model-ordinance-APA%20.pdf.

65. One example is Baltimore's Zoning Ordinance, which was enacted pursuant to Ordinance No. 1051 in 1971. *See Transform Baltimore*, CITIZENS PLAN. & HOUSING ASS'N, http://www.cphabaltimore.org/transformbaltimore (last visited Apr. 23, 2017).

66. *See* DANIEL R. MANDELKER, LAND USE LAW §§ 5.72–.76 (5th ed. 2003); *see also HIP Tool: Density Bonuses*, PUGET SOUND REGIONAL COUNCIL, https://www.psrc.org/density-bonuses (last visited Apr. 23, 2017) (defining "density bonus" as "a zoning tool that that permits developers to build more housing units, taller buildings, or more floor space than normally allowed, in exchange for provision of a defined public benefit, such as a specified number or percentage of affordable units included in the development").

67. *See* Helen F. Ladd, *Population Growth, Density and the Costs of Providing Public Services*, 29 URB. STUD. 273, 291–92 (1992) ("The increasing per capita spending as the density of counties rises above 250 people per square mile provides important additional evidence to counter the view . . . that higher density reduces public sector costs.").

68. *See generally* Kangoh Lee, *Voluntary Provision of Public Goods and Administrative Costs*, 34 PUB. FIN. REV. 195 (2006) (explaining how administrative costs affect the public and private provision of public goods); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986) (exploring judicial deference in public use cases).

69. *See generally* BALT., MD. CODE art. 13, § 2B (2016).

70. CITIZENS PLANNING & HOUS. ASS'N, INCLUSIONARY HOUSING FORUM REPORT 3 (2016) ("Councilman Henry explained that Baltimore's current inclusionary housing ordinance has produced very few units because a provision in the law designed to hold the developers financially harmless has been interpreted to mean that developers must be paid cash from the inclusionary

In addition to density bonuses and conventional cost offsets, such as direct subsidies, payment in lieu of taxes, or tax credits, some jurisdictions allow developers to construct affordable units offsite or allow the developer to pay an in lieu fee to the local government's affordable housing fund.[71] The theory is that the local government will use those funds to construct affordable units elsewhere.[72] Although it is difficult to articulate exactly what the legitimate reasons could be for this feature other than political expediency, this feature permits flexibility in terms of how to comply with the law, which is attractive to some developers.[73]

4. Social Preferences and Opt-Outs from Inclusionary Zoning

An underappreciated dimension of designing an inclusionary zoning ordinance is whether to include voluntary opt-out or in lieu of options. According to Tim Iglesias, a number of inclusionary zoning ordinances do not provide these options and, thus, are more easily understood to function as "'pure' land regulation" by requiring affordable housing units to be built as part of a market-rate development.[74] These inclusionary zoning ordinances are "pure," because they ensure residential integration (in direct counter to exclusionary zoning) while simultaneously producing additional units of affordable housing.[75] However, the politics of inclusionary zoning is such that most jurisdictions do not follow the pure *integrative* approach but instead provide some measure of flexibility with respect to this integrative policy goal, which allows developers to comply by paying in lieu fees for affordable housing located elsewhere.[76]

This means developers utilizing the flexibility device will likely cause affordable housing intended for white, high-opportunity areas to be moved into less central, nonwhite, low- or lower-opportunity areas because of less expensive land prices.[77] This offsite development occurs because developers

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housing offset fund if the affordable units are to be built. If there is no money in the fund, then the city issues a waiver, and the units are not constructed.").

71. *See* URBAN INST., *supra* note 9, at 49.

72. *See* Tim Iglesias, *Maximizing Inclusionary Zoning's Contributions to Both Affordable Housing and Residential Integration*, 54 WASHBURN L.J. 585, 590 (2015) (noting that in lieu fees may result in affordable housing units being produced because the land costs for sites where such affordable housing is likely to be built will be cheaper).

73. *Id.*

74. *See* Iglesias, *supra* note 72, at 590.

75. *See generally* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, & 903) (requiring localities to ensure that their housing and development programs actively promote integration).

76. *See* Sweeney, *supra* note 50.

77. *See* Michael Floryan, Comment, *Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning Practices*, 37 PEPP. L. REV. 1039, 1097–1104 (2010) (discussing the shortcomings of provisions offering developers offsite or in lieu options); *see also* M. Tanner Clagett, *If It's Not Mixed-Income, It Won't Be Transit-Oriented: Ensuring Our Future Developments Are Equitable & Promote Transit*, 41 TRANSP. L.J. 1, 20 (2014) (noting that although offsite or in lieu options may increase the overall number of available housing units for low-income families, "this

would simply prefer to write a check rather than find ways to build affordable housing that can coexist alongside market-rate housing.[78] It also occurs where developers prefer to avoid the inclusionary aspect of the mandate because of concerns about the "marketing effects of mixing poorer folks with wealthier ones."[79] Lastly, offsite construction may serve as an indirect way for local governments to avoid increased "administrative costs" in whiter, higher-income areas.[80]

5. Set-Asides and the Tipping Point

Inclusionary zoning ordinances also vary in terms of the required proportion of units that is to be set aside, built, or otherwise made available within a specific geographic location.[81] Other differences revolve around whether the affordable housing will be leased or sold, as well as the size and type of developments to be subject to this regulation.[82] An informal survey found that such ordinances, regardless of how they are structured by local governments, resulted in only a small number of new units, between 4% and 35% of the total stock being produced.[83]

6. How Long Will Inclusionary Housing Remain Affordable?

Another important aspect of inclusionary zoning is that, at least theoretically, it is a type of zoning regulation premised on assuring long-term

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approach does little for the purposes of mixed-income [Transit-Oriented Development] and would still likely require low-income families to bear greater transportation costs").

78. *See* Iglesias, *supra* note 72, at 591.

79. Douglas R. Porter, *The Promise and Practice of Inclusionary Zoning*, *in* GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? 212, 229 (Anthony Downs ed., 2004).

80. *Cf.* Catherine Rampell, *Who Says New York Is Not Affordable?*, N.Y. TIMES MAG. (Apr. 23, 2013), http://www.nytimes.com/2013/04/28/magazine/who-says-new-york-is-not-affordable.html ("According to a recent study by Jessie Handbury, an economist at the University of Pennsylvania's Wharton School, people in different income classes do indeed have markedly different purchasing habits. That may not be surprising, but once you account for these different preferences, it turns out that living in New York is actually a relative bargain for the wealthy. . . . There is, however, an ominous flip side to Handbury's findings. When you look at the cost of living for low-income people based on their tastes and preferences, New York's poor turn out to be even poorer than you think. . . . Real estate is most crushing for all but those lucky enough to get into subsidized housing. For the poor, it is impossible to unbundle [this] from all the perks that help drive up costs.").

81. SCHWARTZ ET AL., *supra* note 50, at 1–2.

82. *Id.*

83. *Id.* at 23 ("Set-aside percentages in California range from 4 to 35 percent of the total homes in a development . . . . Some programs require that developments . . . set aside as little as 10 percent of total homes . . . while some require that as much as 30 percent be set aside. The [inclusionary zoning] policies we studied applied to developments with as few as five homes or as many as 50 homes. A few programs required developments with fewer than five or ten homes to either provide one affordable unit or make an in-lieu payment. In Chicago, projects that obtain financial assistance from the city must set aside 20 percent of units as affordable, while projects not requiring city assistance must set aside 10 percent. The City of Irvine requires at least 15 percent of units in all developments with more than 50 units to be made affordable. Montgomery County requires all new subdivisions with 20 or more dwelling units to set aside between 12.5 and 15 percent of the units as affordable.").

affordability.[84] The units that are constructed are often comparatively modest with simpler, less expensive features, thus building long-term affordability through the dimensions and features of the actual unit itself.[85] Nevertheless, in high-cost markets, even modest, amenity-lean units could rent for higher rents. Therefore, the developer will often also be required to commit to long-term affordability by placing a deed restriction (a restrictive covenant enforceable against present and future owners of the land) that requires the units to remain at affordable levels for a certain length of time.[86] Typical affordability periods range from less than 20 years to as long as 99 years.[87]

7. Critical Assessments of Inclusionary Zoning

There is significant criticism in the literature that inclusionary zoning does not by itself produce nearly enough affordable housing units compared to the need; nor does it create true long-term affordability to address the deficit in affordable housing units.[88] There are also very real and substantial questions about whether producing inclusionary zoning units for the very or extremely low-income individual is actually economically feasible without significant financial subsidies.[89] These and other questions have been largely avoided since it has been more politically palatable that inclusionary zoning results only in providing affordable housing for moderate-income people who are not the very poor.[90]

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84. According to a Lincoln Land Institute study of 307 inclusionary zoning ordinances, "[a] sizeable share of inclusionary housing programs requires long-term affordability periods . . . [with e]ighty-four percent of homeownership inclusionary housing programs, and 80 percent of rental programs require units to remain affordable for *at least* 30 years; and [o]ne-third of inclusionary housing programs requir[ing] 99-year or perpetual affordability for rental and/or for-sale housing." Hickey et al., *supra* note 2, Executive Summary (emphasis added).

85. *Inclusionary Housing and Other Proactive Policies*, TC HOUSING POL'Y, http://www.tchousingpolicy.org/solutions/index.php?strWebAction=article_detail&intArticleID=195 (last visited Apr. 23, 2017) ("Many [inclusionary housing ordinances] . . . permit more modest interior design and finishing.").

86. Hickey et al., *supra* note 2, Executive Summary.

87. *See* SCHWARTZ ET AL., *supra* note 50, at 24 ("Some of the programs in our study set relatively short periods of affordability. For example, Denver's inclusionary housing ordinance requires for-sale units . . . be made affordable for 15 years. Chicago and Irvine have set the period of affordability . . . at 30 years.").

88. *See id.* at 7 ("[Inclusionary zoning] policies are intended to add to the supply of affordable housing, but they tend to produce small numbers of homes, potentially at substantial cost.").

89. *See, e.g.*, Toshio Meronek, *Affordable Housing in San Francisco Affordable Only for Upwardly Mobile*, AL JAZEERA AM. (Feb. 3, 2015, 5:00 AM), http://america.aljazeera.com/articles/2015/2/3/san-francisco-affordable-housing-is-unaffordable.html (stating that, in San Francisco, "activists argue that . . . [b]ecause lower- to middle-income people still can't afford this [inclusionary housing,] they say, cities are effectively subsidizing upper-middle-class people to move in and paving the way for gentrification").

90. *See, e.g.*, Alana Semuels, *The Artist Loft: Affordable Housing (for White People)*, ATLANTIC (May 19, 2016), http://www.theatlantic.com/business/archive/2016/05/affordable-housing-for-white-people/483444 ("Affordable housing sometimes has a bad reputation . . . . But there's another kind of affordable housing, built with tax credits and city loans, typified in a place like the A-Mill lofts . . . . But . . . the lofts are not accessible to most poor families. . . . Instead, they go

Regardless of whether the current approach best serves the interests of low-income individuals, developers subject to inclusionary zoning requirements have typically been required to include a minimum amount of affordable housing.[91] The idea is that developers are the proper party to create additional units because they are already engaged in residential construction, and, by introducing greater intensities of land use, their projects can and do contribute to higher costs for local governments and the general public, especially for many low-income renters.[92] Inclusionary zoning also represents a rejection of the trickle down, *housing filtering* approach to low-income housing provision, which is the questionable assumption that over time, higher-cost housing, as it ages, is abandoned by the more affluent and is gradually made affordable through the inability to charge premium prices for an inferior housing product.[93] The reality is that dilapidated housing is costly in terms of its health risks and attendant costs imposed on productivity and well-being. Also, it is incorrect to assume that older housing cannot be renovated or repaired because housing desirability is not just a function of the structure but is always combined with the desirability of the location.[94]

Within this context, it is unclear whether inclusionary zoning fully delivers on its promise. Recent studies, therefore, have tested the relationship between inclusionary zoning and public policy goals, at least in specific geographic areas.[95] Other research asks how inclusionary zoning is administered over time.[96] A third category of work asks if inclusionary zoning

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to mostly to white artists, who have incomes below the median for the area but above the average affordable-housing tenant.").

91. *See* ONT. MINISTRY OF MUN. AFFAIRS AND HOUS., *supra* note 60, at 6 ("Unit set-aside refers to the basic requirement that developers must meet for providing affordable housing units. This is typically expressed as a percentage of units in a building that must be affordable.").

92. *See, e.g.*, Greg B. Smith, *NYCHA Residents See Little Benefit from Gentrification in Their Neighborhoods, Report Shows*, N.Y. DAILY NEWS (Oct. 12, 2015, 2:30 AM), http://www.nydailynews.com/new-york/gentrification-doesn-poor-report-shows-article-1.2393396 ("NYCHA residents do not feel they are benefitting economically from the neighborhood's increasing development and are very concerned about affordability." (quoting SAMUEL DASTRUP ET AL., THE EFFECTS OF NEIGHBORHOOD CHANGE ON NEW YORK CITY HOUSING AUTHORITY RESIDENTS 77 (2015))).

93. *See* Ira S. Lowry, *Filtering and Housing Standards: A Conceptual Analysis*, 36 LAND ECON. 362, 363–64, 370 (1960) (discussing why the concept of housing filtering is dubious). *See generally* WILLIAM GRIGSBY ET AL., THE DYNAMICS OF NEIGHBORHOOD CHANGE AND DECLINE (1983) (suggesting that filtering more meaningfully takes place at the neighborhood level, rather than individual housing units).

94. *See* Rachel Weinberger, *The High Cost of Free Highways*, 43 IDAHO L. REV. 475, 481 (2007) ("The value of land is a function of characteristics that include improvements on the land, potential improvements (what is feasible from an engineering perspective or allowed in zoning, for example), location (which serves as a proxy for accessibility to the land and accessibility to other complementary land uses), and other endowments."); Jens Kolbe et al., *Location, Location, Location: Extracting Location Value from House Prices* 3 (SFB 649, Discussion Paper 2012–040), http://edoc.hu-berlin.de/series/sfb-649-papers/2012-040/PDF/040.pdf (last visited Apr. 23, 2017) ("[H]ouse prices contain information on the value of the location.").

95. *See, e.g.*, KRIS HARTLEY, CAN GOVERNMENT THINK?: FLEXIBLE ECONOMIC OPPORTUNISM AND THE PURSUIT OF GLOBAL COMPETITIVENESS 174–76 (2015) (noting that the goals and challenges for inclusionary zoning vary by region).

96. *See generally* URBAN INST., *supra* note 9.

distorts real estate prices, especially at the low end of the real estate market.[97] Nevertheless, the literature on inclusionary zoning does not answer a basic question: How can a midsized city, such as Baltimore, ensure that inclusionary zoning accomplishes what it sets out to do? This question is important because it draws attention to how the assumptions about development shape land use doctrine.

C. BALTIMORE'S MANDATORY INCLUSIONARY ZONING ORDINANCE

In 2007, Baltimore, Maryland adopted its inclusionary zoning ordinance at the tail end of the housing bubble.[98] A midsized city that lost its economic footing as an industrial and manufacturing powerhouse, Baltimore has struggled to find its place and meaning at the end of the twentieth century and the beginning of the twenty-first century.[99] At the time that the city adopted the ordinance, office and residential development was transforming the city's downtown and waterfront-adjacent neighborhoods.[100] With building cranes in abundance, the city appeared to be finally reversing the steady trend of losing population to the surrounding suburbs since the 1970s.[101]

With the possibility of a new, economically thriving Baltimore on the horizon, a coalition of housing and community activists, sympathetic developers, and union representatives came together to advocate for legislation reflecting a variety of concerns and motivations.[102] But mostly they were seeking acknowledgment that gentrification and displacement were

97. *Compare* BENJAMIN POWELL & EDWARD STRINGHAM, REASON FOUND., DO AFFORDABLE HOUSING MANDATES WORK?: EVIDENCE FROM LOS ANGELES COUNTY AND ORANGE COUNTY 21 (2004) (finding that there are high costs associated with inclusionary zoning that are not offset by sufficient benefits for the Los Angeles County and Orange County areas) *with* Brentin Mock, *Inclusionary Zoning Does Not Drive Up Housing Costs*, CITYLAB (June 1, 2016), http://www.citylab.com/housing/2016/06/what-we-know-about-inclusionary-zoning-thus-far/485072 (describing a recent study that found that "[t]he most highly regarded empirical evidence suggests that inclusionary housing programs can produce affordable housing and do not lead to significant declines in overall housing production or to increases in market-rate prices" (quoting LISA A. STURTEVANT, NAT'L HOUS. CONFERENCE, SEPARATING FACT FROM FICTION TO DESIGN EFFECTIVE INCLUSIONARY HOUSING PROGRAMS 1 (2016))).

98. *See* BALT., MD., CODE art. 13, § 2B, Introductory Note (2016) (noting Ordinance 07-474's effective date as July 19, 2007).

99. Natalie Sherman, *After Decades of Manufacturing Decline in Maryland, Signs of Turnaround*, BALT. SUN (Jan. 27, 2017, 6:47 AM), http://www.baltimoresun.com/business/bs-bz-manufacturing-surge-20170127-story.html.

100. *See, e.g.*, Lorraine Mirabella, *Blaustein Building Sold to Del. Group*, BALT. SUN (Apr. 28, 2007), http://articles.baltimoresun.com/2007-04-28/business/0704280334_1_charles-street-north-charles-office-towers; Jill Rosen, *Harbor East Boomtown*, BALT. SUN (Mar 4, 2007), http://www.baltimoresun.com/news/maryland/baltimore-city/bal-harboreasto304-story.html.

101. Natalie Sherman, *Baltimore Population Falls, Nearing a 100-Year Low, U.S. Census Says*, BALT. SUN (Mar. 23, 2017, 12:04 AM), http://www.baltimoresun.com/news/maryland/baltimore-city/bs-bz-baltimore-population-loss-jumps-20170322-story.html ("The figures put Baltimore at about 614,664 people, down more than 1 percent. It's now returned to about the same size it was a century ago.").

102. *See generally* BALT. CITY TASK FORCE ON INCLUSIONARY ZONING & HOUS., AT HOME IN BALTIMORE: A PLAN FOR AN INCLUSIVE CITY OF NEIGHBORHOODS (2006) (advocating adoption of inclusionary housing ordinance was comprised of diverse group of members and participants).

likely as Baltimore became more popular with the affluent.[103] The coalition advocated for an inclusionary zoning ordinance to ensure that the revived Baltimore would grow inclusively and provide a place for both the newly arriving affluent professionals as well as citizens of moderate and low income—whether service workers, retirees, artists, or the unemployed.[104] At a minimum, principles of equity and fairness demanded that residents who'd borne the dark days should be able to remain in the city in places with access to affordable housing in vibrant, amenity-rich locations. Also, market-rate luxury housing would not by itself produce decent affordable housing. An inclusionary housing ordinance was a modest effort to work towards that vision.

When the city council passed the inclusionary zoning ordinance, it was a noteworthy achievement in a city that had been the home of the first racial zoning ordinance at the beginning of the twentieth century and was still riven by race and class segregation.[105] But the ordinance as adopted differed greatly from the one that proponents had presented.[106] Rather than strong inclusionary requirements, the ordinance, styled as a mandatory inclusionary requirement, turned out to be riddled with exceptions and onerous requirements for the city to fulfill, including that the city ensure that any developer subject to the inclusionary mandate be made whole.[107] The ordinance required that in every residential project with 30 or more units, the developer must provide between 10% and 20% of the units to eligible households at or below an affordable cost. For those projects receiving a significant land use authorization or rezoning, the set-aside requirement is

103. Coined by sociologist Ruth Glass in 1960, "gentrification" is a term used to refer to the influx of more affluent residents into working-class and lower-income neighborhoods, frequently changing the existing social hierarchy. The term is contested on many grounds, including whether and how such changes result in displacement of existing residents from rising rents, whether such changes are simply reflections of market change or are artificially by government and private developers, and the role of race and class in shaping the disinvestment that precedes gentrification as well as the resulting revitalization. For an introduction to the ample literature on this topic, see generally RUTH GLASS, LONDON: ASPECTS OF CHANGE (1964); MAUREEN KENNEDY & PAUL LEONARD, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES (2001); Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993); Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1 (2006); and Lance Freeman & Jenny Schuetz, Producing Affordable Housing in Rising Markets: What Works? (Sept. 2016) (unpublished manuscript), http://penniur.upenn.edu/uploads/media/Freeman-Schuetz_PennIUR-Philly_Fed_working_paper_091616v2.pdf.

104. *See generally* Joan Jacobson, *Dismantling the Ghetto: Local Initiatives Attempt to Give Poor Baltimoreans a Choice for Housing*, URBANITE, Oct. 2006, at 37 (detailing efforts to give low-income residents greater choice in their housing).

105. *See generally* Christopher Silver, *The Racial Origins of Zoning in American Cities*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 23 (June Manning Thomas & Marsha Ritzdorf eds., 1997).

106. *See* Sherman, *supra* note 14 ("The design of Baltimore's law—shaped by 100 amendments to the legislation first introduced in 2007—also made it ineffective . . . .").

107. *See generally* BALT., MD. CODE art. 13, § 2B (2016).

10%.[108] For those projects receiving a major public subsidy, the set-aside requirement is 20%.[109] For projects receiving neither subsidy nor rezoning, the requirement is 10%.[110] Under the terms of the ordinance, however, in all cases, any residential project of 30 or more units with inclusionary units would be entitled to 100% cost offsets either through cash payments from the city's Affordable Housing Trust Fund or through discretionary density bonuses, which are available upon application from the Board of Municipal and Zoning Appeals.[111] Developers are entitled to a cash cost offset even for projects receiving a major public subsidy, and the Housing Commissioner has the discretion to "determine[if] the major public subsidy is insufficient to offset the financial impact on the developer of providing the [required] affordable units."[112]

Although the standard in all cases is seemingly direct, it is actually subjective and vague. The ordinance provides that the developer must be made whole.[113] To explain this assumption further, at the beginning of the ordinance, under "Findings and [P]olicy," the ordinance states its assumptions that economic diversity is important, but so is the private sector's ability "to earn reasonable and customary levels of profitability."[114] Thus, this provision indicates the city saw its role as one of ensuring that the developer was made whole because the inclusionary units were viewed as an intrusion rather than a means for ensuring that the city developed in a balanced way—i.e., to encourage thriving diverse neighborhoods as a necessary antidote to the pervasive segregation and shortage of decent affordable housing. As of 2014, the ordinance has produced 32 units of affordable housing, and "[t]he city has spent $2.2 million to compensate builders for the 32 units [that have gone on the market] so far—an average of nearly $69,000 per unit."[115]

It may be difficult to pinpoint why the city adopted such a weak inclusionary mandate, but the real estate development context suggests some possible answers. First, the city had strongly prioritized real estate development to attract residents and employers back to the city. Large swaths of vacant and abandoned housing covered the eastern and western areas of the city. Following a triage approach, the city prioritized development where there is a real estate market that can be realistically stimulated. Thus, starting from the waterfront and the spectacular Inner Harbor festival marketplace redevelopment, development has hugged the harbor and radiated out east and to the north and south, with the highest property values now in these

108. *Id.* § 2B-22(b)(1).

109. *Id.* § 2B-21(b)(1).

110. *Id.* § 2B-23(b)(1).

111. *Id.* § 2B-22(c).

112. *Id.* § 2B-21(c).

113. *See id.* § 2B-6(a) ("If cost offsets and other incentives are not made available to a residential project in accordance with this subtitle, the residential project is not subject to the requirements of this subtitle.").

114. *Id.* § 2B-4(b), (d)(1).

115. Sherman, *supra* note 14.

areas.[116] These areas were and still are largely white. The areas that have not benefitted at all from this development are largely black. The emblematic example of the continued privation of disinvestment is the impoverished Sandtown-Winchester neighborhood in West Baltimore, where an officer fatally injured Freddie Gray following an impromptu police stop.[117]

Second, Baltimore has traditionally subsidized development heavily.[118] These subsidies include tax credits, abatements, enterprise zones, direct expenditures "in the form[s] of grants, bonds, tax increment financing (TIFs)," and other subsidies, such as "payments in lieu of taxes."[119] Critics derided these subsidies as being provided "to private developers with few, if any, standard criteria for determining public value or benefit."[120] In particular, tax increment financing, a form of bootstrap financing in which expected future increases in property tax revenues are pledged entirely to paying off the costs of a development project, has grown increasingly popular.[121] From 2003 to 2016, the city has awarded at least 11 tax increment financing subsidies.[122] In 2016, the city approved the largest deal in city history by awarding $660 million in TIF subsidies for Under Armor to build a new headquarters at Port Covington.[123] The headquarters would be built in an unpopulated industrial area, far from where the city would otherwise have been making infrastructure investments.[124] The Under Armor mixed-use

116. Greg Scruggs, *The Inner Harbor: What the World Can Learn from Baltimore*, BMORE MEDIA (Feb. 8, 2011), http://www.bmoremedia.com/features/innerharborlessonsfortheworldo20811.aspx.

117. Catherine Rentz, *Activists Focus Efforts on West Baltimore Neighborhood Where Freddie Gray Was Arrested*, BALT. SUN (Apr. 22, 2016, 6:45 PM), http://www.baltimoresun.com/news/2165reddie2165/2165reddie-gray/bs-md-sandtown-winchester-giving-20160422-story.html.

118. *See generally* KATE DAVIS ET AL., GOOD JOBS FIRST, SUBSIDIZING THE LOW ROAD: ECONOMIC DEVELOPMENT IN BALTIMORE (2002) (analyzing Baltimore's economic development efforts); Maximilian Tondro, The Baltimore Development Corporation: A Case Study of Economic Development Corporations, Shadow Government, and the Fight for Public Transparency and Accountability (Dec. 2010) (unpublished manuscript), http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1021&context=mlh_pubs (criticizing the lack of public accountability for development corporations in public redevelopment projects).

119. CITY COUNCIL OF BALT., A RESOLUTION OF THE MAYOR AND CITY COUNCIL CONCERNING PUBLIC DEVELOPMENT SUBSIDES [sic]—FAIR DEVELOPMENT STANDARDS 1 (2016).

120. *Id.*

121. Tax Increment Financing also has become a popular local economic tool in other jurisdictions. *See* Randall K. Johnson, *How Tax Increment Financing (TIF) Districts Correlate with Taxable Properties*, 34 N. ILL. U. L. REV. 39, 42 n.25 (2013) (describing how tax increment financing has been used in all 30 townships in Cook County, Illinois).

122. Luke Broadwater, *Baltimore Officials Declare New 'Standard' for Passing Development Subsidies*, BALT. SUN (Feb. 1, 2016, 8:46 PM), http://www.baltimoresun.com/news/opinion/editorial/bs-md-ci-council-tif-20160201-story.html.

123. *See* Luke Broadwater, *City Council Approves $660 Million Bond Deal for Port Covington Project*, BALT. SUN (Sept. 19, 2016, 8:50 PM), http://www.baltimoresun.com/news/maryland/baltimore-city/politics/bs-md-ci-port-covington-council-20160919-story.html (stating the deal is also one of the largest in the United States).

124. *See* Rachel M. Cohen, *Under Armour's Slam-Dunk Deal*, SLATE (June 20, 2016, 11:10 AM), http://www.slate.com/articles/business/metropolis/2016/06/under_armour_wants_its_port_covington_project_to_transform_baltimore_is.html (describing the Port Covington area as "an underused eyesore").

project is expected to include 1.5 million square feet of retail and entertainment space, including a distillery, and several new parks and greenways, and over 7,500 residences, most of which would be rental properties.[125] The debate over this TIF was polarized around undisclosed costs of the development as the project would increase service needs in an area outside of the path of development and whether inclusionary housing should be required.[126]

The result of this heavy subsidy has been an ever-growing, glittering downtown and ever-decaying outer reaches. Neglected, underresourced, and underserviced neighborhoods that are primarily black and lower middle class or poor with fantastic architecture and rich history fall further into decay and violence. These neighborhoods do not gain any benefit from the downtown development and, in fact, likely experience a detriment as custom and contract prioritize scarce city resources to address the service needs of the areas that have become the white, twenty-first century face of the city.[127] One public health researcher, Lawrence Brown, has mapped the consequences of the investment and disinvestment patterns and has dubbed the disparately treated areas the "white L" and the "black butterfly."[128] The researcher found that areas dubbed the "black butterfly" are significantly disadvantaged in nearly every measure of public health, including TIF policy, food access and policing strategies. The opposite is true for the "white L," which receives most of the publicly-supported private investment.[129]

This context cannot be ignored in assessing who has voice and who does not in property ownership and development in Baltimore.[130] Developers dominate the way in which development is structured and deployed in Baltimore mainly because the luxury development is successfully producing profitable, luxury "high-end" places for the affluent to enjoy.[131] However, it does so in a way that forces the city to pay higher costs to service these areas while reaping no increased property taxes even as property values improve

125. Adam Marton et al., *Port Covington Redevelopment Examined*, BALT. SUN, http://data.baltimoresun.com/news/port-covington (last visited Apr. 23, 2017).

126. *Id.*; *see* Mark Reutter, *Hidden from View: $29 Million in Unexpected Infrastructure Costs at Harbor Point*, BALT. BREW (June 2, 2016, 2:41 PM), https://www.baltimorebrew.com/2016/06/02/hidden-from-view-29-million-in-unexpected-tif-costs-at-harbor-point (describing a similar debate over another luxury commercial and residential development).

127. *See* Fern Shen & Mark Reutter, *A Poor, Black City Supporting Kayak and Boat Slips?*, BALT. BREW (July 19, 2016, 2:20 PM), https://www.baltimorebrew.com/2016/07/19/a-poor-black-city-underwriting-port-covingtons-kayak-and-boat-slips (criticizing the disconnect between the types of amenities planned for the new development and the dire needs in a resource-strapped city).

128. Lawrence Brown, *Two Baltimores: The White L vs. The Black Butterfly*, BALT. CITY PAPER (June 28, 2016, 5:34 PM), http://www.citypaper.com/bcpnews-two-baltimores-the-white-l-vs-the-black-butterfly-20160628-htmlstory.html.

129. *See id.* (characterizing these neighborhoods as "hypersegregated").

130. *See* IMBROSCIO, *supra* note 24, at 12–13 (discussing the problem of economic inequality leading to political disempowerment of low income city residents).

131. *Id.* at 13 (describing how developers turn economic success into political empowerment).

dramatically in some parts of the city.[132] By the time the city does start to see returns, the improvements will be old and likely in need of repair. This violates the common sense expectations for development—one would expect the development to enrich Baltimore's general revenues and enable the benefits to flow to other parts of the city. Instead, there are no expected increased property tax payments to city coffers for 30 to 40 years, yet there is increased demand for city services, which have not been built into the deals.[133]

While the city council was responsive to the demand for inclusionary housing, it ended up adopting an ordinance that subordinated the city's power over development to the interests of the developers. Under the popular narratives of government dominance and overreach, one would expect a robust inclusionary ordinance once advocates started pressing for it. Yet it was the city council that watered down its own bill to align with developers' expectations.[134] The enacted ordinance was deeply flawed, with numerous exceptions that made the ordinance essentially unenforceable. With the complexity of politics, finance, and race and class assumptions in the background, the city council accepted the popular developer narrative claims that the margins on a development project in Baltimore are such that the additional financial costs from inclusionary housing could ruin a deal and prevent it going forward.[135]

The other assumption seems to be that inclusionary housing is a gift from developers to the city. The role the city has played in making these profitable deals happen is considered irrelevant. Little thought is given to the impact the increase of luxury housing in the city has on the city and the local housing market. For example, any housing built in connection with a TIF will involve an increased demand by high-demand residents who will pay property taxes that are dedicated to repaying bonds floated to build the development—i.e.,

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132. *See* Rachel Weber, *Tax Incremental Financing in Theory and Practice*, *in* FINANCING ECONOMIC DEVELOPMENT IN THE 21ST CENTURY 283 (Sammis B. White & Zenia Z. Kotval eds., 2d ed. 2012); *see also* Mark Reutter, *Is Kevin Plank Getting "Free Money" While The City Takes the Risk?*, BALT. BREW (July 26, 2016, 4:15 PM), https://www.baltimorebrew.com/2016/07/26/is-kevin-plank-getting-free-money-while-the-city-takes-the-risk. *See generally* Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 80 (2010) (finding that studies are inclusive about whether tax increment financing is beneficial or harmful).

133. *See* Reutter, *supra* note 132 ("Over the next 41 years, [one particular] project will net [Baltimore] $1.8 billion in tax revenues, the bulk of the revenues coming after year 2045.").

134. *See* Jill Rosen, *Affordable Housing Bill Passes*, BALT. SUN (June 12, 2007), http://articles.baltimoresun.com/2007-06-12/news/0706120096_1_affordable-housing-bill-coalition (describing the dozens of amendments to the proposed inclusionary housing bill that resulted in the weak version adopted into legislation).

135. To date, research on the impact of inclusionary zoning has focused on the effect on housing prices in general. This literature does not consider the effect of inclusionary zoning on the profitability or feasibility of a particular development deal. *See, e.g.*, Antonio Bento et al., *Housing Market Effects of Inclusionary Zoning*, CITYSCAPE: J. POL'Y DEV. & RES., 2009 No. 2, at 7, 18 (finding very small increase in housing prices in jurisdictions with inclusionary housing policies); Mukhija et al., *supra* note 58, at 249 (concluding that critics of inclusionary zoning "overestimate its adverse effects on housing supply").

the project's immediate location.[136] Local officials may also have been reluctant to require developers to accept low-income residents in buildings that were intended for higher-income citizens or may have been reluctant to seem unfriendly to business interests, both of which could serve as a barrier to future economic development.[137]

While this story seems local, it is not only so. Apart from the politics that may have made Baltimore reluctant to seem business-unfriendly or to require developers to accept low-income residents, the way that the Baltimore inclusionary zoning ordinance is structured showed, at the very least, a misunderstanding of takings law or exactions law. As Part III will discuss, this misunderstanding about inclusionary zoning doctrine arises from a doctrinal framework that can privilege the concerns of the property developer in a way that ignores the reality of the complex relationship between developers, local governments and the general public.

III. THE DOCTRINAL PARAMETERS OF INCLUSIONARY ZONING

A. INCLUSIONARY ZONING AS AN ORDINARY LAND USE REGULATION

As a land use regulatory innovation, inclusionary zoning has both a settled and unsettled place in land use doctrine.[138] Iglesias has insightfully observed that its doctrinal place has been largely discussed through litigation and advocates on both sides characterize the regulation in a results-oriented way.[139] Proponents of inclusionary zoning are likely to focus on the doctrinal approach that leads to validation of a regulation or statute.[140] In contrast, opponents will seize upon the approach that best leads to invalidation, whether on a facial or an as-applied basis.[141]

Thus, a developer challenging inclusionary zoning could allege that this regulation impairs individual property rights without adequate justification, in violation of the Takings Clause of the Fifth Amendment.[142] The concept of takings can be either physical or regulatory. A physical taking occurs when the

136. *See* Weber, *supra* note 132.

137. *See* Audrey G. McFarlane, *Putting the "Public" Back into Public-Private Partnerships for Economic Development*, 30 W. NEW ENG. L. REV. 39, 49 (2007) (posing the questions as: "Is the public subsidy necessary as an economic, dollars and cents matter, where the deal cannot take place without the subsidy? Is the public subsidy necessary as a signal to the mobile developer that the city is business friendly?").

138. *See generally* Floryan, *supra* note 77 (arguing that inclusionary zoning is an unconstitutional exaction); Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971 (2002) (arguing that inclusionary zoning is ordinary land use regulation).

139. *See* Iglesias, *supra* note 72, at 592 ("Affordable housing and fair housing advocates might agree that the design decisions are a function of politics and local conditions, but may not come out on the same side of each issue because of their varied effects on the affordable housing and fair housing goals and their possibly conflicting evaluations of these effects.").

140. *Id.*

141. *Id.*

142. *See generally* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016) (finding an inclusionary housing law to be constitutional).

government exercises its power of eminent domain to take ownership of a land or a building.[143] A regulatory taking can occur when the operation of a government regulation goes too far in impairing an owner's rights to use their property as they see fit.[144] Presumably, the belief is that developers have a "right" to a "reasonable" return on their investment, so a regulatory taking arises from inclusionary zoning's affordability requirement when it forces the developers to forgo some income. Popular belief about regulatory takings differ with the actual doctrine, which rarely finds something wrong with a regulation that places additional burdens on developers simply because developers believe that regulation to be inconsistent with individual property rights.[145]

The prevailing test for regulatory takings is an ad hoc factual inquiry, which sounds more precise than it really is.[146] This test, which was announced in *Penn Central Transportation Co. v. City of New York*, asks whether there is a severe enough impact upon investment-backed expectations that the regulation would be viewed as unjustified.[147] A related question is whether the regulation would be accepted as ordinary and beneficial to the general public, such that its impact may be justified based on the overall benefits that are generated by state action.[148]

To date, few challenges have succeeded because of the doctrine's deference to state and local governments' broad police powers.[149] Since *Euclid*

143. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.").

144. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

145. *See* Tim Iglesias, *Inclusionary Zoning Affirmed:* California Building Industry Association v. City of San Jose, 24 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 409, 429 (2016) (noting the role of property rights advocates in the shaping inclusionary zoning debate). *But see* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 260 (2004) (noting that developers enjoy "significant protection against potentially abusive practices by local governments" including "[t]he enactment of property rights legislation").

146. *See Lingle*, 544 U.S. at 539 (explaining that the ad hoc test's three factors raise "vexing subsidiary questions"); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 333 (2007) (explaining that "the Court's recent reinvigoration of the *Penn Central* test . . . has shed little light on the content of the test's three factors, or on how to balance them"). *See generally* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN. ST. L. REV. 601 (2014).

147. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124–25 (1978) (explaining that the economic impact on "distinct investment backed expectations" is one of the relevant considerations in the regulatory takings analysis which is an "essentially ad-hoc factual inquir[y]"). *But see* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (finding a regulatory taking where the property has been stripped of "*all* economically beneficial uses").

148. *Penn Cent.*, 438 U.S. at 124 (discussing the role of "the character of the governmental action" as a balancing factor in the analysis).

149. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388, 395 (1926) (stating that a zoning regulation will be upheld if its justifications are "fairly debatable" and cannot be expected to be overturned unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"). *But see* Adam J. MacLeod, *Identifying Values in*

approved zoning as a valid exercise of the police power, which allows governments to regulate for the benefit of the health, safety, morals, and welfare of its residents, courts have largely deferred to zoning regulations when analyzing a takings issue even where a significant diminution in property value can be demonstrated.[150]

The underlying rationale is that land use regulations have a reciprocity of advantage, which is to say that while any individual property owner gives up the right to freely use his or her land, other property owners also do the same in return.[151] The touchstone for the standard arises from ordinary land use regulation and how courts, before and since *Euclid*, have treated this governmental action.[152] What has been consistent is that courts have accepted, with respect to ordinary land use regulation, severe decreases in economic value—up to over 80% to 90% in past cases.[153] This result indicates that courts may accept that a regulation is justified, at least in cases where it is beneficial to the public, notwithstanding the fact that the regulation may bar owners from selecting the most lucrative land use.[154] Such deference is considered warranted because a court second-guessing whether an exercise of governmental regulatory power is valid or invalid would amount to broadly applying substantive due process assessments of local planning decisions based on personal sensibilities rather than concrete, objective standards.[155] Thus, the strong tradition has been for the courts to defer to local land use regulations unless the regulation is arbitrary and capricious, such as when a regulation that prevents an owner from making any use of (or getting any return from) his land with no discernible benefit or serious justification.[156]

Land Use Regulation, 101 KY. L.J. 55, 111–12 (2012) (arguing that state courts regularly depart from this deferential standard without applying transparent or consistent standards).

150. *See* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 645 (1993) ("[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."); *Penn Cent.*, 438 U.S. at 131 ("[T]he decisions sustaining other land-use regulations . . . uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking' . . . ."). *See generally* Daniel L. Siegel, *Evaluating Economic Impact in Regulatory Takings Cases*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 373 (2013) (discussing the "economic impact" factor in the ad hoc factual analysis).

151. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 417–19 (1922) (Brandeis, J., dissenting) (describing the nuisance exception).

152. *See Concrete Pipe*, 508 U.S. at 645 (citing to zoning cases as the paradigmatic example of how much diminution in value is constitutionally acceptable).

153. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1064 (1992) (Stevens, J., dissenting) (noting that 95% would not be a taking but 100% would constitute a taking).

154. *See* Avery Emison Carson, Comment, *Integrating Conservation Uses into Takings Law: Why Courts Should View Conservation as a Possible Highest and Best Use*, 86 N.C. L. REV. 274, 281–87 (2007) (indicating inconsistencies in how courts determine "highest and best use" in valuing land).

155. *See, e.g.*, Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988) (rejecting a substantive due process challenge to an adverse zoning decision as "present[ing] a garden-variety zoning dispute dressed up in the trappings of constitutional law").

156. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (Regulations must be "clearly arbitrary and unreasonable, having no substantial relation to the . . . general welfare" before the Court will declare them unconstitutional.); *see also* Nectow v. City of Cambridge, 277 U.S. 183, 187–88 (1928) (restating the *Euclid* standard).

The Supreme Court has been largely consistent in this aspect of land use jurisprudence, although an unresolved tension remains about how to strike the proper balance between property rights and the public interest. One perspective is skeptical of governments and concerned that collectivist goals should not disturb existing allocations of property rights, whereas the competing perspective believes that the government is a beneficial steward of the public interest and any adequately justified sacrifice of individual property rights is part of the social contract.[157] This tension has resulted in an effort to identify bright-line, categorical rules for when a regulation rises to the level of a taking, while also retaining *Penn Central*'s ad hoc factual inquiry and balancing standard.[158]

The retention of this contextually-based standard largely reflects the fact that bright-line rules quickly became difficult to administer in an increasingly dynamic world.[159] As a result of this unresolved tension, regulatory takings doctrine has evolved into niche areas of protection wherever a credible exception to the deferential ad hoc analysis can be carved out without upending the prevailing standard of not substituting judicial views for that of the legislature.[160] If not for this approach, takings analysis would be a subset of substantive due process.[161]

The question is where does inclusionary zoning fit within the context of constitutional limitations on land use regulation. It would seem to occupy a very strong place as an exercise of the police power, as a remedy, or as an antidote to exclusionary zoning.[162] Without inclusionary zoning and its mandate for low-income housing within market-rate developments plus

157. *See* PETER M. GERHART, PROPERTY LAW AND SOCIAL MORALITY 27 (2014) (arguing that property law should be viewed through the lens of obligations rather than through the lens of rights); *see also* Eric T. Freyfogle, *Private Property—Correcting the Half-Truths*, PLAN. & ENVTL. L., Oct. 2007, at 3, 8 ("Private ownership is sound because it is useful to us collectively as a people. . . . [It] is an individual right only secondarily.").

158. *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538–40 (2005) (explaining when the per se rules and the *Penn Central* standard are applied); Audrey G. McFarlane, *Rebuilding the Public-Private City: Regulatory Taking's Anti-Subordination Insights for Eminent Domain and Redevelopment*, 42 IND. L. REV. 97, 154–55 (2009) (discussing the use of categorical rules in takings cases and concluding that "[r]egulatory takings cases are really about fairness rather than any bedrock coherent right of property").

159. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002) (indicating that takings analysis is a fact-specific inquiry where per se rules may not always be applicable); *see also Lingle*, 544 U.S. at 543–45 (indicating flaws in attempting to create a new bright-line rule for takings cases).

160. *See Coniston*, 844 F.2d at 467 (explaining the high standard for substantive due process challenges). *But see* Twigg v. Cty. of Will, 627 N.E.2d 742, 745 (Ill. App. Ct. 1994) (applying a multifactor test to a substantive due process challenge, so as to avoid placing the state court in the position of judicially second guessing a legislative policy).

161. *See* Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 1005 (2000) (discussing the interaction between takings and substantive due process protections).

162. *See* Recent Case, 129 HARV. L. REV. 1460, 1467 (2016) (arguing that inclusionary zoning should be viewed as a restriction on exclusionary residential construction); *see also* Iglesias, *supra* note 4, at 5–6.

existing zoning regulations that control what can and cannot be built, there would likely be no remedy for individuals or groups that externalities, such as economic and racial segregation, harm.[163]

This characterization of inclusionary zoning reflects an acknowledgement that the current land use geography may unjustifiably impose costs on unacknowledged third parties to development, especially members of racially stigmatized groups who experience persistent economic and racial segregation.[164] When viewed in this light, inclusionary zoning actually reflects a more informed view that concentrations of affluence and poverty are interrelated.[165] By way of comparison, a mere rezoning that allows denser development is incapable of addressing the societal problems created, exacerbated, and enshrined by local zoning.[166]

Within this context, the "inclusionary" in "inclusionary zoning" is intended as an antidote for past and current racial and economic exclusion, which is to say that the regulation has an important economic integration or compensatory function.[167] This type of anti-exclusion regulation also serves as a way to stop private property owners from benefitting from a system of exclusion that would allow them to pass losses to: (1) those who would occupy substandard housing; and (2) their local government that must step in to provide for the unmet need.[168] Finally, mandatory inclusionary zoning in particular operates as an anticipatory response to future attempts to create new geographies of exclusion.[169] As a result, inclusionary zoning is correctly seen as a much needed and valid correction to land use regulation.

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163. *See* Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6, 7 (2016) (arguing that both land use regulation and land use decision-making contribute to "the segregation of the affluent").

164. *See* Patience A. Crowder, *More Than Merely Incidental: Third-Party Beneficiary Rights in Urban Redevelopment Contracts*, 17 GEO. J. ON POVERTY L. & POL'Y 287, 318 (2010) (arguing that residents of low income communities subjected to redevelopment are third-party beneficiaries of urban redevelopment contracts). *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) (discussing the persistence of racial segregation and concentration of poverty).

165. *See* Lens & Monkkonen, *supra* note 163, at 6–7 (arguing that segregation of the wealthy is as significant a problem as segregation of the poor).

166. By definition, a "rezoning" is a change in use that a local government grants at its discretion. This state action should be distinguished from other public goods and services, which developers and other permit-seekers are automatically entitled to receive. *See generally* N.Y.C. DEP'T OF CITY PLANNING, ZONING HANDBOOK (2011).

167. *See* Iglesias, *supra* note 72, at 590–91, 599 n.4 (discussing how often this is bypassed with waivers or offsite housing).

168. *See* FENNELL, *supra* note 43, at 157 (discussing the possibility of forcing property owners to pay for the privilege to exercise the preference for exclusionary zoning).

169. *See generally* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903). *See generally* DAVID SIBLEY, GEOGRAPHIES OF EXCLUSION: SOCIETY AND DIFFERENCE IN THE WEST (1995) (arguing that Western society is fundamentally premised on exclusion).

B. *INCLUSIONARY ZONING AS AN EXACTION*

Exactions doctrine relies on a different subset of legal principles within land use regulation.[170] The principles set a standard for how a local government must treat potential developers by allowing them to proceed with development and only imposing conditions on that development project—i.e., specific steps or limits on the contemplated project—that offset direct, measurable, physical impacts of that landowner's particular development.[171] These principles arose out of a specific set of land use cases where a local government demanded a public easement as a condition for signing off on an intensification of land use.[172] These principles reflect judicial concerns that property owners may often be powerless in the face of certain types of governmental action.[173]

Under a regulatory takings analysis, a court would have found no taking in any of the prototypical exactions cases because the government regulation serves a valid purpose and, for the developer, reasonable use and a reasonable return would still be available from the property.[174] Because the landowners seeking to develop were being forced to give up something that was considered illegitimate for the government to require them to give up—in these cases, access by the public to the property—the Supreme Court weighed in on an area of doctrine formerly handled at the state level: exactions doctrine.[175] This area of law, in effect, protects developers from the government if the government requires the developer to satisfy certain requirements before engaging in a proposed intensification of land use when compliance would mean the developer would be complicit in giving up his or her property rights.[176]

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170. *See* Fenster, *supra* note 21, at 622 ("The exactions decisions' rules attempt to limit exactions to a single purpose: the direct abatement of nuisancelike impacts caused by the proposed land use.").

171. *See generally* Dolan v. City of Tigard, 512 U.S. 374 (1994) (finding that a condition placed on a building permit was unconstitutional because there was not a "reasonable relationship" between the condition and the permit); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (same).

172. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2591–92 (2013) (swamp land in Orange County, Florida, east of Orlando); *Dolan*, 512 U.S. at 379 (hardware store in Tigard, Oregon); *Nollan*, 483 U.S. at 827 (beach bungalow in Ventura County, California).

173. *See* Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 14–15 (2000) ("[T]he choice of the word 'exaction' . . . amounts to a linguistic stacking of the deck. . . . [I]t connotes something done by one (powerful) party to another (powerless) party." (emphasis omitted)).

174. *See generally* Jerold S. Kayden, *Celebrating* Penn. Central*: How the Supreme Court's Preservation of Grand Central Terminal Helped Preserve Planning Nationwide*, PLANNING, June 2003, at 20 (noting the role of *Penn Central* as the basis of modern land use and planning regulatory power).

175. *See* Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 520 (2012) ("[T]he commands of *Nollan* and *Dolan* represent a more stringent standard of review than most, if not all, state courts previously employed in the permit condition context.").

176. *See* Daniel P. Selmi, *Negotiations in the Aftermath of* Koontz, 75 MD. L. REV. 743, 743 (2016) ("Deterring 'extortion[],' 'coercion,' 'evasi[on],' and use of 'leverage' by local governments plainly motivated the Court's decision." (alterations in original) (quoting *Koontz*, 133 S. Ct. at 2594–95)).

Under this line of cases, inclusionary zoning could be seemingly characterized as an "unconstitutional condition" under a mechanical application of exactions doctrine's special requirements of a valid and supportable connection between the goal of a development permit condition and what the condition requires of a person undertaking development.[177] Under this conception, inclusionary zoning operates as a condition, which must be limited to directly offset the potential impacts of development to be valid. Of course, an implicit corollary is that a government would be entitled to identify all potential impacts and ensure that they are accounted for.[178]

The applicability of the exactions doctrine would seem to depend upon whether an inclusionary zoning program is implemented legislatively or administratively.[179] If the legislation imposes a particular condition on development, it would mean that the government has announced generally applicable requirements that apply to every developer.[180] If the requirement involves flexible case-by-case implementation, which would seem to be more administrative than adjudicative and deserving of modestly closer review to ensure legislative standards are met, then a heightened standard of review could apply to review of any challenge to the inclusionary requirement.[181]

Thus, a valid claim seems more likely whenever a local government adds a certain amount of flexibility, through additional discretion, to an

177. *See generally* David L. Callies, *Mandatory Set-Asides as Land Development Conditions*, 42/43 URB. LAW. 307, 325 (2010/2011) (discussing inclusionary zoning as an exaction likely to be unconstitutional without "incentives").

178. *See* Selmi, *supra* note 23, at 340–41 (noting that since the advent of the exaction cases, the number and frequency of offsets for impacts have risen dramatically). "[T]he expansion in the types of impacts that form the basis for exactions imposed as conditions on projects. As concerns over environmental degradation have expanded over the last forty years, local governments have increasingly responded by conditioning project approvals to minimize impacts on a broader variety of environmental concerns." *Id.* at 340.

179. *Id.* at 350, 367 (citing Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994)) (noting that this distinction is mentioned in *Dolan* only). "[I]n *Dolan*, the Court placed the burden of proof to uphold the exaction on the city, with the unconvincing explanation that the city was engaged in making an adjudicative decision." *Id.* at 367; *see also* Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in the denial of certiorari) (noting the split between lower courts over the legislative–administrative distinction and expressing "doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking'" (quoting Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116, 1117–18 (1995))).

180. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2592 (2013) (noting that the challenged conditions were granted by state law, the Warren S. Henderson Wetlands Protection Act, which authorized conditions to mitigate the impact of development in wetlands); *see also* FLA. STAT. § 373.414(1)(b) (2016) ("If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. Such measures may include, but are not limited to, onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136.").

181. *See* Iglesias, *supra* note 4, at 4 ("[O]pponents might selectively present the developer's situation, e.g. treating a land use regulation-type as a 'exaction' by isolating the 'in lieu fee' and urging the court to treat the 'in lieu' fee as an 'impact fee.' Moreover, if a local requirement offers a developer several options for compliance, there is no clear legal rule directing the court how to frame its review of each option or how to interpret severability clauses." (footnote omitted)).

inclusionary zoning ordinance.[182] One example of flexibility is when a statute permits the number of units to be individually tailored to a particular project or when an ordinance creates a menu of choices for either building units or contributing towards an affordable housing fund.[183] With flexibility comes discretion, and with discretion comes the opportunity for the other part of land use regulation, which is deal-making.[184]

The biggest challenge reflected in this indeterminate area of exactions, as opposed to takings analysis, is the reality that it has become customary in development for a local government to simultaneously act not only as a regulator but also as a dealmaker.[185] This dual role has often troubled courts, especially the U.S. Supreme Court, because of the varying perspectives on the propriety of governmental regulation.[186] From one perspective, the government is viewed as a well-meaning regulator, who is best positioned to assess the needs of the polity and the impact and costs of intensified use.[187] Alternately, the government may be viewed as a rent-seeking and careless oppressor, acting in a proprietary, opportunistic, and potentially arbitrary way, insulated from any political check by some notion of political process failure.[188] In other words, the single or few developers are powerless to democratically protect their interests because they are relatively few in number. As such, the Court has paid increasing attention when a local government requires property owners to accede to what are perceived to be public needs that, based on an invisible metric, the government should purchase rather than be perceived to be forcing an uncompensated trade. This perceived need for scrutiny may be especially acute when these landowners' individual property rights would normally entitle them to

182. *Id.* at 10 ("[F]lexibility is likely to assist in meeting goals. . . . Flexibility in forms of compliance and offering waivers may also help the ordinance withstand legal attacks, but not necessarily.").

183. *Id.* at 5–9 (arguing that an inclusionary zoning ordinance is, ironically, more, not less, vulnerable to challenge as an exaction when it provides alternatives).

184. *See* ELLICKSON ET. AL., *supra* note 18, at 332.

185. *See* Fenster, *supra* note 21, at 674 ("Formulaic exactions . . . eliminate[] the inclusion, contingency, and openness that might be found in the deal making of political compromise."). *See generally* Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957 (1987) (discussing land use deals in the context of municipalities' police and contract powers).

186. *See, e.g.*, Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1516 (2006) ("*Nollan* and *Dolan* have received a great deal of attention from commentators, who can be divided roughly into two camps." (footnote omitted)).

187. *See* Fenster, *supra* note 21, at 675–78 (discussing government as consensus builder).

188. *See* McFarlane, *supra* note 158, at 101 ("The evolution of the ad hoc doctrine of regulatory takings reflects an imperfect, yet effective, attempt to insulate private property owners from the [perceived] structural inequities of the political process."). *But see* Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 5 (2003) ("As repeat players in the political process without significant coordination costs, developers generally have a leg up in the political arena.").

autonomy and a right to opt-out even if the local government has significant justification for the action.[189]

Within this context, the government's efforts in *Nollan v. California Coastal Commission*[190] could be understood as a valid regulatory effort to generate public value by improving the public's access to the beach.[191] Specifically, the California Coastal Commission sought to create more public value by converting the increased intensification of use that would occur due to Mr. Nollan's expansion of his dilapidated beach house into a tangible benefit for the public, which would otherwise not have the same level of access to the beach.[192] In other words, Nollan granting the easement would offset the harms caused by his proposed development project.[193]

The idea of granting physical access to the most desirable part of a private beach, however, seemed to run counter to the Court's ideas about individual property rights. The exactions doctrine announced in *Nollan* was not unprecedented. Pre-*Nollan* precedents seemed to assume the need for some connection between what is asked for and what purpose it is supposed to serve.[194] The question is the amount of deference that courts should give to local governments in terms of evaluating the closeness of fit. Recognizing the departure from the deferential standard in Due Process and Equal Protection review, the *Nollan* Court articulated a new standard—a requirement that the permit condition relate closely with a legitimate state interest: the "essential nexus."[195]

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189. *See* McFarlane, *supra* note 158, at 138–39 (arguing that the suburbs were created as a place to "escape from disadvantage" and this geographical context has shaped regulatory takings doctrine).

190. *See generally* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (holding that state action requiring property owners to give an easement to the public as a condition for the receipt of a land-use permit is a taking when: (1) the state action fails to advance a legitimate governmental interest; (2) the ceding of an easement is inadequately related to the government's interest in the harm that is imposed on the public (deprivation of the public's view of the beach); and (3) the burden to be imposed on the public did not justify an unjustified taking of property by the government).

191. The term "public value" refers to the process of taking into account "the benefits and costs of public services not only in terms of dollars and cents, but also in terms of how government actions affect important civic and democratic principles such as equity, liberty, responsiveness, transparency, participation, and citizenship." Shayne Kavanagh, *Defining and Creating Value for the Public*, GOV'T FIN. REV., Oct. 2014, at 57, 57 (reviewing MARK H. MOORE, RECOGNIZING PUBLIC VALUE (2013)).

192. *See Nollan*, 483 U.S. at 842 (Brennan, J., dissenting) ("The Commission reasonably concluded that such 'buildout,' both individually and cumulatively, threatens public access to the shore.").

193. *Id.* at 856 ("Allowing appellants to intensify development along the coast in exchange for ensuring public access to the ocean is a classic instance of government action that produces a 'reciprocity of advantage.'" (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922))).

194. *See* Fenster, *supra* note 21, at 680 ("Before the Court involved itself in exactions, state courts had developed their own approaches to protecting individuals from excessive regulatory conditions, and state legislatures continue to control the authority of local governments to impose exactions.").

195. *See Nollan*, 483 U.S. at 837 ("The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes

In a subsequent exactions case, *Dolan v. City of Tigard*, the government conditioned a permit to expand a commercial building and an adjacent parking lot on the property owner granting a public easement.[196] The Court further elaborated on the constitutional standard for exactions that it had announced in *Nollan* by requiring that any condition requested by local governments must be "rough[ly] proportional[]" to the harm being caused by a development project.[197] This requirement also has to be narrowly tailored, as determined by an "individualized determination"—i.e., an individual project assessments.[198]

Thus, the *Dolan* Court reinforced that a blanket requirement was discouraged. The local government, instead, has to make some effort to expertly quantify impact and that what the government asked for was somehow equivalent to the development's impact.[199] Why? There seems to be a sense that without the court as referee, the local political process does not shield owners from abusive local government. There is, however, some common sense appeal to the outcome in *Dolan* because it seems that perhaps, in some respect, the City of Tigard did ask for more than it needed (an easement for a public right of way) in order to offset the impact of the developer's anticipated project on flooding.[200] The question remains, however, why the close scrutiny here and not elsewhere where a deferential standard applies.

The heightened standard of review that applies to imposing such a condition, which must be directly related to the impact of a development project, is hard to reconcile with the separation-of-powers-based judicial deference to legislative policymaking.[201] Oddly, *Nollan* and *Dolan* provide only modestly helpful guidelines about what local government can and cannot ask for. In doing so, these cases have helped to advance a somewhat restrictive and disempowering view of government regulation.[202] This restrictive and disempowering view of government regulation, in turn, could provide an

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the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury.").

196. Dolan v. City of Tigard, 512 U.S. 374, 377–80 (1994).

197. *Id.* at 391.

198. *Id.*

199. *See id.* (determining that an "individualized determination" is required).

200. *Id.* at 386.

201. *See* Mugler v. Kansas, 123 U.S. 623, 660–61 (1887) ("Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.").

202. *But see* Fenster, *supra* note 17, at 731 ("The Court's exactions rules check government discretion only selectively, while leaving it up to other governmental institutions, as well as to developers, homeowners, voters, and the market for local governments' packages of taxes and services, to check discretion over exactions to which *Nollan* and *Dolan* do not apply.").

opening for sophisticated developers to advocate for limiting regulation, especially the general health, safety and welfare of all types of its citizens, not only high-income but also middle- and low-income.[203]

The Court's initial rationale for *Nollan* and *Dolan*, was that any condition that is placed on a development permit must substantially advance a legitimate state interest.[204] This was conceptually quite appropriate, at least in cases where a permit was subject to complying with certain conditions, since any honest of assessment of the exactions standard was that it imposed a heightened standard of review in cases where individual property rights may be impaired by state action. Although this standard was well understood within zoning jurisprudence arising out of *Euclid* as a signal to defer to local government policymaking with respect to land use, the Court ultimately abandoned it in exactions doctrine to avoid its misapplication elsewhere in economic legislation.[205]

One result of this revision is that the Court had to make changes to the underlying rationale for exactions doctrine. It did so by drawing on a less developed area of analysis: "unconstitutional conditions."[206] Similar to the exactions doctrine, as announced in *Nollan*, unconstitutional conditions analysis assumes that there will be liability whenever landowners seeking to develop are asked to give up something that has little to no connection to the harm that their development imposes upon third parties, such as the general public.[207] As a result, the local government is required to limit its demands of developers to mere offsets, in order to ensure that individual and public interests are properly balanced.[208]

What has not been adequately considered is how the typical unconstitutional conditions case differs from land use takings cases.[209]

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203. *See* Selmi, *supra* note 23, at 341 ("[O]nce the Court began articulating the extortion narrative in *Nollan*, development interest groups perceived an important vehicle both for attracting the Court's attention to appeals and for articulating a theme in briefing them.").

204. *See* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) ("A land 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.'" (alterations in original) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980))); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987) (same).

205. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 532 (2005) ("This case requires us to decide whether the 'substantially advances' formula . . . is an appropriate test for determining whether a regulation effects a Fifth Amendment taking. We conclude that it is not."). Instead, *Dolan* sets the standard as being one of measuring unconstitutional conditions. *Dolan*, 512 U.S. at 385 ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . to receive just compensation when property is taken for a public use . . . where the benefit sought has little or no relationship to the property.").

206. *Lingle*, 544 U.S. at 547.

207. Id. at 547–48 ("[T]he 'doctrine of "unconstitutional conditions"' . . . is worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest." (citing *Dolan*, 512 U.S. at 385)).

208. *See generally* Daniel L. Siegel, *Exactions After* Lingle*: How Basing* Nollan *and* Dolan *on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577 (2009) (arguing that *Lingle* limits the applicability of *Nollan* and *Dolan* to only those permits that require owners to dedicate real property to a public use).

209. *Id.*

Unconstitutional conditions cases generally involve wholly unrelated requests that are made by governments.[210] In the land use context, the development benefit and its offsetting impact are, in many respects, both a function of regulation.[211]

Thus, not only does treating these cases the same elevate the ability to control property to the level of a fundamental right, even though fundamental rights are typically never available for taking by government through payment of compensation,[212] it also provides an elevated level of protection that fails to acknowledge the unique role that government plays in dealing with development-induced social problems, such as racial and economic segregation; the shortage of affordable housing for low-, moderate-, and middle- income households; and in encouraging beneficial uses for private property.[213] At base, the question is whether local government has the discretion to identify the loss to the public then negotiate and trade on behalf of the public for a right or benefit as an indirect offset.

In other words, how does government ensure its ability to assure that developers fully internalize their externalities that arise from more intensive land uses?[214] For example, in *Nollan*, what could the government have done to assure that the developer did not shift his private costs onto the public—i.e., the loss to the public of the view of the Pacific Ocean?[215] The Court explained that the only supportable possibility would be to require the developer to provide a viewing spot that is permanently held open.[216] But the Court did not seriously consider whether that really would have offset the actual cost to the public of the lost view, particularly when combined with the intensification of development along the entire beach.[217]

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210. *See generally* Peter A. Clodfelter & Edward J. Sullivan, *Substantive Due Process Through the Just Compensation Clause: Understanding* Koontz*'s "Special Application" of the Doctrine of Unconstitutional Conditions by Tracing the Doctrine's History*, 46 URB. LAW. 569 (2014).

211. *See* Selmi, *supra* note 23, at 364 ("[T]he lack of underlying cohesion [in unconstitutional conditions doctrine] has so fragmented the doctrine that it takes different forms depending on the specific constitutional provision at issue—freedom of speech, freedom of association, or here, takings.").

212. *Id.* at 365–66 (noting that a property right is not a fundamental right because the government can take it for a price using the eminent domain power). In other words, a right that can be bought is not the same order of right as other traditionally recognized fundamental rights.

213. *See* Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) (constitutional exercises of the police power must be done in furtherance of the "health, morals, or safety of the community").

214. Similar questions are being raised in different fields of scholarly inquiry, including economics. *See* Neva Goodwin, *Internalizing Externalities: Making Markets and Societies Work Better*, OPINIÓN SUR, Dec. 2007, at 1, 2 ("It is very a [sic] positive development that the discipline of economics is wrestling with efforts to 'internalize' the costs of economic activity that have been 'externalized' to the natural world. In order to assess the likelihood that externalities will in future [sic] be internalized . . . we must ask, first, why have they been allowed to remain external up to now? [sic] and, second, what has changed so that we can expect the future to be different in this respect?").

215. *See* Nollan v. Cal. Costal Comm'n, 483 U.S. 825, 835–36 (1987).

216. *Id.*

217. *Id.* at 836–39.

These questions, among others, can only be answered in light of judicial concerns about government overreach,[218] which have continued to surface in the most recent exactions case, *Koontz v. St. Johns River Water Management District.*[219] Among the consequences of failing to answer these questions, ideally in the affirmative, is that the U.S. Supreme Court winnowed away at the state's right to negotiate with developers over how to internalize their externalities.[220] In other words, exactions doctrine fails to acknowledge the key role that local governments play in mitigating the cost of key social problems.[221]

Nollan and *Dolan* broadly suggest that heightened scrutiny of the essential nexus and rough proportionality tests are always required, even for a program like inclusionary zoning because a permit tailored to a particular development is being issued.[222] However, perhaps the better approach is a narrower one. This Article asserts that *Nollan*'s and *Dolan*'s prohibitions should only apply in two narrow situations: The first situation is where local governments fail to adequately support their claims, such as when there is no evidence that higher than average costs arise from a development; and the second case is where the local government uses its discretion to treat similarly-situated developers in nonstandard ways, at least in cases where that local government seemingly has no adequate justification under the dictates of exactions doctrine's emphasis on impact.

IV. WHY INCLUSIONARY ZONING SHOULD SURVIVE EXACTIONS ANALYSIS

As discussed above, at least for the modest number of courts that have considered this specific issue, the general view is that inclusionary zoning is an ordinary land use regulation that is covered by the *Penn Central* framework.[223] Under this view, *Penn Central* applies to inclusionary zoning because what the government requires from developers, an additional condition for the grant of a permit, is not tied to the negative effects that arise from a specific development. Instead, these generally applicable requirements are prescribed in zoning regulations and applied to every single

218. *See* Selmi, *supra* note 23, at 346 (arguing that the exactions doctrine's underlying extortion narrative and it's concerns about government overreach have extended the doctrine to providing prophylactic protection during the negotiation process preceding a taking).

219. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2599, 2603 (2013) (holding that failed negotiations over permit conditions are subject to exaction analysis notwithstanding statewide legislation authorizing water management districts to offset impact of wetlands development).

220. *Id.* at 2595 ("Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack." (citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926))).

221. *See* Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) (noting that constitutional exercises of the police power must be done in furtherance of the "health, morals, or safety of the community").

222. *See generally* Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

223. *See generally* Eagle, *supra* note 146 (discussing conventional views of the *Penn Central* framework).

property owner that meets the qualifying conditions to be regulated.[224] As a result, inclusionary requirements are not likely to be subject to a successful legal challenge.

Recent litigation in California[225] and Illinois[226] suggests, however, that there is still a real need to consider how mandatory inclusionary zoning would fare under a *Nollan/Dolan* exactions analysis. In both cases, developers argued that local governments had exceeded their authority by imposing inclusionary zoning requirements.[227] If case studies, which methodically tracked the facts in various regulatory scenarios were available, then developers could have made more informed decisions about whether to challenge inclusionary zoning.[228]

So, what accounts for the decision to sue over inclusionary zoning? Perhaps it can be explained by the poor framing of the issues presented, as seen in *Home Builders Association of Greater Chicago v. City of Chicago* and *California Building Industry Association v. City of San Jose*.[229] This framing may arise from the fact that the story of development is incomplete, at least as it pertains to the costs that individual developers impose upon local governments and the general public. The key issue in recent cases is whether local government can require developers to provide offsets, in the form of inclusionary zoning, at least in the absence of direct subsidies.[230] It would seem that the short answer, under the applicable law, would be yes. Certainly, popular beliefs about regulatory takings, which do not map onto the doctrine that actually delimits the use of inclusionary zoning, could help to explain this disjuncture.

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224. For an example of mandatory inclusionary zoning, see SAN JOSE, CAL., MUN. CODE, §§ 5.08.010–.730 (2017) (providing parameters and requirements for affordable housing).

225. *See generally* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016) (holding that developers could be required to sell a portion of their housing at an affordable cost).

226. *See generally* Home Builders Ass'n of Greater Chi. v. City of Chicago, No. 15 C 8268, 2016 WL 5720482 (N.D. Ill. Sept. 30, 2016), *appeal filed* (dismissing developer's claim for failing to allege an affordable housing ordinance had taken its property).

227. *Home Builders*, 2016 WL 5720482, at *2; *Cal. Bldg.*, 351 P.3d at 985.

228. *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 ("The trade association and a venture of Mangan Construction & Development today filed a complaint in Cook County Circuit Court, seeking a judgment saying that the Affordable Requirements Ordinance—designed to create more affordable housing—is unconstitutional because it takes property away from developers without just compensation. The ARO violates the Illinois and U.S. constitutions, according to the lawsuit filed by Steven Blonder, partner at Chicago-based law firm Much Shelist . . . [because] '*[i]f you're going to impose an impact fee such as this, it needs to be tied proportionally to the impact of the activity. These two six-flats aren't causing an increase in the need for affordable housing. There's no proportionality, and that's really what the problem is.*'" (emphasis added)).

229. *See* Brentin Mock, *Chicago Developers Are Pushing Back Against Affordable Housing Rules*, CITYLAB (Sept. 1, 2015), http://www.citylab.com/housing/2015/09/chicago-developers-are-pushing-back-against-affordable-housing-rules/403042 ("The Chicago and California cases . . . ask whether cities can force private developers to integrate low-income housing into their projects, especially those working without subsidies.").

230. *Id.*

The conventional story about development, as reflected in popular beliefs, is incomplete because it reduces the varied experiences of all developers to that of the unsubsidized developer.[231] By definition, an unsubsidized developer is a property owner who does not ask a local government for financial assistance nor requires the government to do any additional work in issuing a permit. By focusing on this extremely rare case, the public is led to believe that most developers are largely unsubsidized and undeserving of regulatory attention. In the process, this incomplete story fails to account for the fact that developers are never asked to offset all the costs of their developments. Thus, claims of government overreach underlying their challenges to regulation are often significantly overstated.

Therefore, in order to tell a more complete story, there are three reasons to account for the experiences of the variety of types of developers and their varied experiences with local governments. First, this accounting process is essential to determining which legal standard applies to inclusionary zoning ordinances. It also helps to place such regulations within their proper context, as a way to hold developers responsible for the numerous costs they impose upon local governments and the general public.[232] Lastly, identifying the entire universe of developers helps to correct a common misconception: that developers give more than they receive.

A more complete story would take into account three basic situations. In the first scenario, a highly-subsidized developer may be given a city-owned parcel with an existing use and makes a decision to improve it.[233] Permit fees

231. By definition, an unsubsidized developer is a permit seeker who does not receive any government subsidy. For the purposes of this Article, a government subsidy comes in only two forms: additional work in issuing a permit and direct financial assistance. *See* Jonathan D. Epstein, *Buffalo Is Starting to Lure Out-of-Town Money for Real Estate Development*, BUFFALO NEWS (Mar. 10, 2016), http://www.buffalonews.com/2016/03/10/buffalo-is-starting-to-lure-out-of-town-money-for-real-estate-development ("Harvey Kaylie is a bit of a rarity in Buffalo – an outsider willing to join an insider's game. . . . He already owns real estate elsewhere, not only for his company's facilities but also investments in housing complexes in Atlanta, Colorado and the Chicago area, with 600 units in all. His surprise bid for One Seneca caught most people off-guard, but he said he has some specific ideas for reusing the 40-year-old building. Moreover, he says he has the financial capacity to do it on his own.").

232. In addition to the economic costs that this Article has described, noneconomic costs also may arise from new development. Examples of the noneconomic costs that may be imposed on members of the general public are social costs, such as emotional distress, due to heightened levels of social conflict. *See* Smith, *supra* note 92 ("'The Effects of Neighborhood Change on NYCHA Residents,' written by the consulting firm Abt Associates with help from New York University's Furman Center for Real Estate, found that NYCHA tenants often wind up feeling like aliens in their own neighborhoods.").

233. By definition, a highly-subsidized developer is a permit-seeker who receives the greatest amount of subsidy. This definition applies when a highly-subsidized developer asks for: (1) a grant of government land, a zoning change and government funding; (2) a grant of government land and a zoning change; (3) a grant of government land and government funding; or (4) a zoning change and a grant of government funding. *See, e.g.*, Natalie Sherman, *BDC Considers EBDI, West Side Projects*, BALT. SUN (Sept. 25, 2014, 10:17 AM), http://www.baltimoresun.com/business/real-estate/wonk/bal-bdc-considers-ebdi-west-side-projects-20140925-story.html ("The Baltimore Development Corp. voted unanimously in a closed session Thursday to start exclusive negotiations with a developer seeking to build market-rate apartments on two city-owned sites . . . . A final price for the land is subject to negotiation, said BDC President William H. Cole.").

and other user fees, which are modest payments demanded by local governments that give developers access to scarce government resources, such a grant of government funds, a grant of government land and other public benefits, are the only amounts demanded from heavily-subsidized developers. These modest charges, which are often limited to a nominal amount, are insufficient to offset the amounts that are paid to, or on behalf of, heavily-subsidized developers. The difference between what is charged of developers and what they pay is made up by local governments, often using funds held in public trust.[234] As such, local governments are justified in demanding affordable housing that is valued in the same amount. Additional amounts also may be demanded of developers, especially in cases where their development project has an especially negative impact or has recurring costs.

In the second scenario, a moderately-subsidized developer already owns a parcel and decides to change how it will be used.[235] The developer, again, does not fully pay for the cost of their requested state action, which in this case is limited to a grant of government funds, a grant of government land or an individualized assessment of the net impact of a specific development. These modest amounts, in most cases, are insufficient to completely offset the amounts spent in reliance. Local governments are entitled to recover the difference in cash or in-kind services as a general rule, as well as any additional public funds that it has spent in mitigating the negative impacts of the proposed development project.

The third scenario is the most familiar and involves a situation in which an unsubsidized developer already owns a parcel, does not change the existing land use, and does not request financial assistance. This property owner merely asks a local government to confirm that her improvement complies with the law. The permit fee often fully offsets the cost of this regulation, at least in cases where the proposed change does not have any other negative impacts, which means that a local government would not be justified in demanding anything else from this developer.

This more complete story undercuts exactions and unconstitutional conditions arguments against inclusionary zoning for several reasons. For

234. *See* Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 652 (2010) ("The public trust doctrine has a special role to play in moderating development rights because it is, as suggested by Justice Scalia's majority opinion in *Lucas v. South Carolina Coastal Commission*, a background principle of property law. . . . A number of post-*Lucas* decisions have confirmed Justice Scalia's insight that the public trust serves to limit property owners' reasonable expectations to such an extent that loss of their development rights does not give rise to constitutional compensation.").

235. By definition, a moderately-subsidized developer is a permit-seeker who receives an intermediate amount of subsidy. This definition applies when a moderately-subsidized developer asks *only* for: (1) a grant of government land; (2) a subsidized zoning change; or (3) a grant of government funding. *See, e.g.*, Natalie Sherman, *Port Covington Developer Asks City for $535 Million in Support*, BALT. SUN (Mar. 9, 2016, 8:49 PM), http://www.baltimoresun.com/business/bs-bz-port-covington-tif-20160309-story.html ("The city is being asked to contribute $535 million to help finance the redevelopment of Port Covington . . . . Plank, who founded Under Armour and is its largest shareholder, has spent more than $100 million of his personal fortune to buy about 160 acres in Port Covington and 40 acres in nearby Westport.").

example, it highlights the many ways that local governments gratuitously bestow value on developers. Second, this more complete story points out that developers have little problem with imposing their costs on unrelated third parties. Lastly, it illustrates that developers receive more benefits than local governments ever ask them to pay for.

Nonetheless, it is clear that additional reforms may be necessary for local governments to demand an optimal amount from developers. For example, a better connection could be made between the costs and benefits of development projects. By expressly making this connection clear and visible to all, perhaps through something as simple as creating additional marketing materials, it may become clear why more government regulation is needed in the form of inclusionary zoning.

Another option is to undertake better individualized assessments of specific development projects. Such a change would require that local governments determine the actual cost of regulating development projects.[236] Once it is determined, this cost may be subtracted from a standard amount.[237] The amount to be demanded of a developer would be the difference between the two sums.

There is a potential downside to these two reforms, in that each requires a societal consensus about which costs are attributable to each development project and how to quantify such costs. This points to an inherent difficulty that arises from relying upon measurable impacts. It is a challenge to properly account for such impacts, in an objective manner, due to the conflicting interests underlying local zoning laws.

V. CONCLUSION

Situating inclusionary zoning, properly, within constitutional doctrine requires broadening the development narrative to include a wider variety of development settings and realities. Cities are grappling with promoting the health, safety and welfare of all their citizens by ensuring that well-located, affordable housing be built. The current crisis in affordable housing suggests many cities are losing that battle, including midsized cities such as Baltimore. Cities also grapple with the needs and demands of influential citizens like developers, who are not always victims of overreaching government but rather agents acting powerfully in their own interests. That public–private relationship often involves significant direct and indirect subsidy and assistance.

Any evaluation of mandatory inclusionary zoning must take this reality into account. In particular, exactions doctrine's exclusive focus on

236. This total cost is equal to the sum of the costs of mitigating the harms that arise from a proposed development project, plus the change from baseline for administrative costs in the immediate area, plus any subsidies that are provided by local governments minus user fees paid by the developer.

237. This standard amount is equal to the total number of hours spent in making assessments of this type times the hourly rate of the individuals that undertook these analyses, divided by the total number of development projects that the local government has analyzed.

unsubsidized developers tells an incomplete story about the true costs of development. This framework assumes that developers are engaged in purely private behavior of little interest to anyone else. Yet the reality is that development actually imposes hidden costs on certain subsets of the public, such as low-income renters, which are not fully accounted for by developers.

The predominant view in the United States is that any increase in land value is an economic windfall that results from a developer's ingenuity or luck rather than through concerted community planning effort.[238] In many other countries, however, the relationship between increases in land value, community planning, and land use regulation is exemplified by the widespread adoption of land value recapture policies.[239] Land value recapture assumes that new development increases property values but only with the social, political, and economic assistance of local governments and the general public.[240] As such, cities, on behalf of the public, are entitled to receive a share of a development's rising market value. By analogy, the propriety of mandatory inclusionary zoning should include some recognition that the local government is not seeking a windfall with inclusionary zoning but is merely recouping on past and future investments. By clarifying the interactive nature of land use regulation, local economic development subsidies and investments in private projects, and the real costs of development, the constitutional law governing land use regulation and doctrine may help cities to understand that they do not need to give away as much as they are now so, unfortunately, inclined.

238. *See* Nico Calavita & Alan Mallach, *Inclusionary Housing, Incentives, and Land Value Recapture*, LAND LINES, Jan. 2009, at 15, 17–18 (comparing the United States' view of the "right to develop" to the European view that land value increases are "unearned").

239. *Id.* at 17.

240. *See generally id.*