

MAUI'S RESIDENTIAL WORKFORCE HOUSING POLICY: FINDING THE BOUNDARIES OF  
INCLUSIONARY ZONING

I. INTRODUCTION

Who should pay the cost of subsidized housing? Should it be paid by buyers in the non-subsidized segment of the market? Or should the cost be borne broadly, by the community as a whole? Consider a regulatory system in which some percentage of new housing development is required to be made "affordable." Is it even fair to categorize such a system as a form of subsidized housing?

In 2006, responding to soaring residential prices,<sup>1</sup> the County Council of Maui, Hawai'i passed the Residential Workforce Housing Policy, an ordinance requiring forty to fifty percent of the units in new developments to be set aside as "affordable" units.<sup>2</sup> The ordinance became effective after the Council overrode the then-outgoing mayor's veto.<sup>3</sup>

The Residential Workforce Housing Policy is a specific instance of a type of regulation referred to as an inclusionary zoning ("IZ") ordinance. Such regulations are designed, perhaps

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<sup>1</sup> In July of 2006, median home prices on Maui reached an all time high of \$780,000. Nina Wu, Maui Home Prices Hit \$780,000, HONOLULU STAR BULL., Aug. 11, 2006, at B1.

<sup>2</sup> Ilima Loomis, Council Approves Housing Policy, MAUI NEWS, Nov. 4, 2006, at A1.

<sup>3</sup> Claudine San Nicholas, Council Rejects Veto, OKs Housing Policy, MAUI NEWS, Dec. 6 2006, at A3.

to counteract the tendency of earlier regulations to exclude moderate and low income residents or perhaps in response to a shortage of supply, to encourage or mandate that some percentage of new development be "set aside" and made available to such buyers.<sup>4</sup> Like much economic regulation, IZ ordinances are frequently disparaged, either by those subjected to their requirements or by those whose faith in the fairness of the free market is offended by government interference.<sup>5</sup> Recently Maui's own IZ ordinance was challenged in federal court in a complaint alleging that the ordinance violates the constitutions of Hawai`i and the United States.<sup>6</sup>

There are a number of theories under which a mandatory affordable housing program might be challenged, and the programs have had mixed results in the courts. Perhaps the clearest judicial endorsement is Home Builders Ass'n of Northern

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<sup>4</sup> The term "inclusionary zoning" is sometimes used to refer generally to all land use regulations which encourage the construction of affordable housing. See, e.g., Jennifer M. Morgan, Zoning For All: Using Inclusionary Zoning Techniques to Promote Affordable Housing, 44 EMORY L.J. 359, 369-85 (1995). Other writers use the term to refer specifically to mandatory programs in which development is absolutely conditioned on meeting affordability goals. See, e.g., Barbara Ehrlich Kautz, In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing, 36 U.S.F. L. Rev. 971, 972 n.2 (2002).

<sup>5</sup> See Frederick Pellin, Letter to the Editor, MAUI NEWS, Sept. 4, 2007, at A9 ("Good luck trying to beat the fundamental economic principles at work here.").

<sup>6</sup> Kamaole Point Development LP v. County of Maui, No. 07-00447 (D. Haw. filed Aug 23, 2007).

California v. City of Napa, which upheld an ordinance requiring ten percent of new units to be affordable and rejected the claim that the ordinance worked a taking of property.<sup>7</sup> Other courts have rejected similar programs finding, for example, that the local government lacked authority to pass the ordinance;<sup>8</sup> that the local government was preempted by state law from passing such an ordinance<sup>9</sup>; or that the ordinance was arbitrary or self-defeating and violated substantive due process.<sup>10</sup> However, no reported case has invalidated a mandatory affordable housing program as violating the constitutional mandate that "private

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<sup>7</sup> Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60 (Cal. Ct. App. 2001); see also Holmdel Builders Ass'n v. Twp. of Holmdel, 583 A.2d 277, 292-93 (N.J. 1990) (holding that "[a] developer may be made to bear the economic burdens of providing affordable housing so long as those burdens are not excessive and the project remains profitable").

<sup>8</sup> E.g., Bd. of Supervisors v. DeGroff Enters., 198 S.E.2d 600 (Va. 1973) (invalidating a mandatory affordable housing program as beyond the power of the local government). See generally Frona M. Powell, Challenging Authority For Municipal Subdivision Exactions: The Ultra Vires Attack, 39 DEPAUL L. REV. 635 (1990).

<sup>9</sup> E.g., Town of Telluride v. Lot Thirty-Four Ventures, 3 P.3d 30 (Colo. 2000) (invalidating an affordable housing ordinance as a matter of statewide concern, beyond the authority of the Town to pass); Apartment Ass'n of S. Cent. Wis. v. City of Madison, 722 N.W.2d 614 (Wis. Ct. App. 2006) (holding that a statute explicitly prohibiting cities from passing rent-control ordinances applied to inclusionary housing ordinance), review denied, 727 N.W.2d 35 (Wis. 2006).

<sup>10</sup> E.g., MHC Fin. P'ship v. City of San Rafael, No. C 00-3785, 2006 WL 3507937 at \*10 (N.D. Cal. 2006) (denying summary judgment to City on plaintiff's substantive due process challenge to a rent-control ordinance).

property [shall not] be taken for public use, without just compensation.”<sup>11</sup>

IZ ordinances exist in a twilight zone between two relatively well understood bodies of law. On the one hand, municipal governments have broad authority to regulate the uses of land within their borders, and it is accepted that restrictions can be placed on the size, density, even the aesthetic character of buildings.<sup>12</sup> On the other hand, governments have far less power to “exact” concessions of money or property from would-be developers of property. The Takings Clause requires, according to current U.S. Supreme Court doctrine, that government may condition development approval on exactions of property only to the extent that the exaction is roughly proportional to the effects of the development.<sup>13</sup> However, there continues to be uncertainty as to the reach of this doctrine.<sup>14</sup> Depending on one’s perspective, a law mandating a set-aside of affordable housing may appear to be a burdensome and oppressive exaction, or the natural result of the

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<sup>11</sup> U.S. CONST. amend. V.

<sup>12</sup> See generally 1 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF’S THE LAW OF ZONING AND PLANNING, § 1:3 (Edward H. Ziegler, Jr. principle author for revisions, 2005).

<sup>13</sup> See discussion infra Part III.B.

<sup>14</sup> See discussion infra Part III.C.

community's desire that it not be driven into collective bankruptcy.

This article will not directly question the constitutionality of IZ ordinances in general. Rather, it will examine the Maui ordinance to illustrate the weakness of current exactions doctrine, which permits heightened judicial scrutiny only when certain predicates have been satisfied. If City of Napa was correctly decided and a mandatory affordable housing set-aside program is not an exaction, does it follow that all such programs, without regard to operational details, are valid? Today, a court may categorically deny the applicability of the exactions cases to an IZ ordinance,<sup>15</sup> and IZ advocates encourage cities to craft ordinances specifically to avoid the reach of the cases.<sup>16</sup>

Courts should not be led into an "all or nothing" approach, declining to examine the terms of a land use regulation as a possible exaction because it was legislatively enacted, or because its burdens may be satisfied by means other than dedication of property to the public. Exactions have been

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<sup>15</sup> See Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 65-66 (Cal. Ct. App. 2001) (finding these cases inapplicable to the challenged ordinance).

<sup>16</sup> E.g., Kautz, supra note 4, at 1022 (encouraging cities to minimize the discretion available to officials in applying an inclusionary zoning ("IZ") ordinance so as to avoid scrutiny under the exaction cases).

singled out by the courts for special treatment because of the risk that municipalities may use their permit approval power to extract from a developer more than would be fair, given the effects of the particular development.<sup>17</sup> The risk that an exaction is unfair takes on a different character when it is legislatively imposed, but it does not vanish.

This article will argue for increased emphasis on the principle of fairness in cases where the characterization of a development condition as an exaction is at least open to debate. A direct concern for fairness will not enable categorical assertions about the validity of IZ ordinances, but will instead encourage sensitivity to the magnitude of the burden imposed on developers and those purchasing from them. This renewed focus on the nature of the burden is consistent with recent Supreme Court takings jurisprudence.<sup>18</sup>

Part II describes the working of the Maui ordinance, and compares its terms to those of similar ordinances. Part III describes the fundamental constitutional doctrine under which a regulation may be found to work a taking, notes some of the shortcomings of the doctrine as currently announced by the

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<sup>17</sup> See discussion infra Part III.B.

<sup>18</sup> See Lingle v. Chevron U.S.A., 544 U.S. 528, 539 (2005) (noting that disparate takings doctrines all “focus[] directly upon the severity of the burden that government imposes upon private property rights”).

Supreme Court, and suggests a modest change in analytical emphasis. Part IV applies this modified standard to the concept of IZ generally, and to the Maui ordinance in particular. It will be seen that while IZ ordinances, despite inevitably being located in the grey area of interpretation,<sup>19</sup> are not automatically unfair, Maui's ordinance improperly shifts the burden of providing affordable housing away from the community and onto developers and newcomers.

## II. INCLUSIONARY ORDINANCES ON MAUI AND ELSEWHERE

All IZ ordinances share a common purpose--the provision of affordable housing--but vary widely in implementation details. This section describes the terms of Maui's IZ law, and compares it to laws passed in other jurisdictions.<sup>20</sup>

### A. Maui County's Residential Workforce Housing Policy

The stated purpose of the Maui ordinance is "to enhance the public welfare by ensuring that the housing needs of the County are addressed."<sup>21</sup> The ordinance is activated upon final subdivision or building permit approval, if the size of the

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<sup>19</sup> See Kautz, supra note 4, at 1018 (characterizing IZ ordinances as "neither fish nor fowl").

<sup>20</sup> Other counties in the State of Hawai'i have experimented with IZ ordinances as well. See Michelle DaRosa, Comment, When Are Affordable Housing Exactions an Unconstitutional Taking?, 43 WILLAMETTE L. REV. 453 (2007) (focusing on IZ programs in Hawai'i).

<sup>21</sup> MAUI, HAW., CODE § 2.96.010 (2007).

development exceeds certain thresholds. The size thresholds are, roughly, five or more dwelling units or new lots, conversion of one or more hotel units to dwelling units, or any hotel development or renovation which increases the number of units in the hotel.<sup>22</sup> The requirements of the law may be adjusted or waived "based upon the absence of any reasonable relationship or nexus between the impact of the development and the number of . . . workforce housing units . . . required."<sup>23</sup> Projects subject to the requirements of the law are granted the possibility at least of expedited permit processing.<sup>24</sup> Unlike many other IZ ordinances,<sup>25</sup> projects are offered no "density bonuses"--permission to build at a higher unit density than would otherwise be allowed.

The requirements of the law vary depending on the price for which the developer expects to sell the units. If fifty percent or more of the units will be sold for \$600,000 or more, fifty percent of the units must be available as affordable housing.<sup>26</sup>

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<sup>22</sup> § 2.96.030(A).

<sup>23</sup> § 2.96.030(C)(1).

<sup>24</sup> § 2.96.140.

<sup>25</sup> See discussion infra Part II.D.

<sup>26</sup> § 2.96.040(A)(2). As an unstated corollary, it would appear that at most fifty percent of the units in any development can be priced at \$600,000 or more.

Otherwise, forty percent of the units must be affordable.<sup>27</sup> A developer can then meet its affordability requirement by either offering the units for sale at appropriate prices, by paying an in-lieu fee or by donating property to be used for affordable housing.<sup>28</sup>

The in-lieu fee is specified as thirty percent of the average projected sale price of the market rate dwelling units in the development.<sup>29</sup> Assuming an average market rate price of \$600,000, the in-lieu fee, per unit, would be \$180,000. The fee is specified as "per unit," in a context in which a "unit" appears to refer to affordable units.<sup>30</sup> A development of forty units, with twenty market rate units at \$600,000 and twenty affordable units, would be subject to an in-lieu fee of \$180,000 per unit, for a total of \$3.6 million. By comparison, it is estimated that all other fees on a three-bedroom one-family house on Maui total about \$17,800.<sup>31</sup>

#### B. Inclusionary Zoning Generally

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<sup>27</sup> § 2.96.040(A)(1).

<sup>28</sup> § 2.96.040(B). There are also provisions permitting the rental or multi-family units or the conveyance of units to a "qualified housing provider" approved by the County. Id.

<sup>29</sup> See § 2.96.040(B)(4)(a).

<sup>30</sup> § 2.96.040(B)(4).

<sup>31</sup> Panel OKs Bill to Waive Fees on Affordable Housing, MAUI NEWS, Nov. 14, 2007, at A1.

It has been said that it is within the power of the government "to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."<sup>32</sup> It may then seem natural to conclude that the government should determine that housing should be affordable. The method by which the government expresses the limits on permissible land uses are zoning ordinances. "Zoning is the regulation by the municipality of the use of land within the community, and of the buildings and structures which may be located thereon, in accordance with a general plan and for the purposes set forth in the enabling statute."<sup>33</sup>

Such regulations have been upheld since the seminal case of Village of Euclid v. Ambler Realty Co.<sup>34</sup> Besides validating the legal framework of local zoning, Euclid is interesting for the tenor of the opinion, in which certain undesirable elements may be regulated away from the community. At issue in Euclid was an ordinance restricting, among other things, apartment buildings, which the Court characterized as "mere parasite[s]. . . . [They] interfer[e] with the free circulation of air and monopoliz[e]

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<sup>32</sup> *Berman v. Parker*, 348 U.S. 26, 33 (1954).

<sup>33</sup> RATHKOPF, supra note 12, § 1:3.

<sup>34</sup> 272 U.S. 365 (1926).

the rays of the sun.”<sup>35</sup> Without the protection granted by the ordinance, the looming menace of the apartment building would “utterly destroy[]” the desirable character of the neighborhood.<sup>36</sup> That the ordinance may have had the effect of excluding anyone unable to afford the ideal single-family detached home was of no concern to the Court.

The tendency for certain forms of zoning to effectively seal off communities became known informally as “exclusionary zoning.” Exclusionary zoning may be defined as “zoning that ‘has the effect of keeping out of a community racial minorities, lower-income residents, or additional population of any kind.’”<sup>37</sup> The term “inclusionary zoning” was adopted informally to describe efforts by municipalities to address shortcomings in traditional land use law, which tended to reinforce patterns of segregation and isolation.<sup>38</sup> The Maui ordinance operates at the building permit or subdivision approval stage, but is otherwise

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<sup>35</sup> Id. at 394.

<sup>36</sup> Id. at 394. In fairness, the Court did allow that “in a different environment” apartment complexes would be unobjectionable. Id. at 394-95.

<sup>37</sup> ALAN MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES 6 (1984) (quoting MARY BROOKS ET AL., HOUSING CHOICE 264 (1980)).

<sup>38</sup> Id. at 2.

substantially similar in its structure to other inclusionary zoning ordinances.<sup>39</sup>

### C. Inclusionary Zoning as Exactions

Paralleling the development of zoning systems has been the increasing reliance of cities on exactions to fund infrastructure development.<sup>40</sup>

Exactions can take various forms, including in-kind dedications for infrastructure, such as roads, parks, and schools, and 'in lieu' fees for the same purpose. Exactions also include impact fees, or special assessments, to cover the cost of development. The main goal of the imposition of exactions is 'to shift to the developer the costs of the public infrastructure that the development requires.' Essentially, exactions force developers to internalize the 'external cost' they impose on the surrounding community.<sup>41</sup>

These internalized costs may, of course, be passed on by the developer to the purchasers of the developed properties. In any case, when a proposed development project burdened by an

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<sup>39</sup> See URBAN LAND INSTITUTE, COUNTY OF MAUI, HAWAII: AN AFFORDABLE HOUSING STRATEGY 22 (referring to the Maui ordinance specifically as an IZ ordinance).

<sup>40</sup> See ALAN A. ALTSHULER & JOSÉ A. GÓMEZ-IBÁÑEZ, REGULATION FOR REVENUE 8-10 (1993); R. Marlin Smith, From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions, 50 LAW & CONTEMP. PROBS. 5, 28 (1987).

<sup>41</sup> Rogers Mach., Inc. v. Washington County, 45 P.3d 966 (Or. Ct. App. 2002) (quoting Abraham Bell & Gideon Parchomovsky, Givings, 111 YALE L.J. 547, 609 (2001)) (footnotes omitted in original); see also ALTSHULER & GÓMEZ-IBÁÑEZ, supra note 40, at 3-4.

exaction receives in exchange a roughly comparable benefit, there can be no argument that the exaction was unfair.<sup>42</sup>

Although exactions for infrastructure support had been employed for decades, in the 1970s their use expanded to cover social and general welfare costs as their ability to cover these costs from other sources diminished.<sup>43</sup> Voter initiated constraints on the taxing power, the advance of “no growth” sentiment among community activists, and courts increasingly willing to permit cities to use exactions to expand their fundraising abilities, help explain the increased role of non-tax financing.<sup>44</sup> Although such “general welfare” exactions can perhaps be justified as cost internalization measures to the extent that they purport to mitigate a harm caused by a development,<sup>45</sup> one may perhaps begin to feel uncomfortable by the

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<sup>42</sup> This “average reciprocity of advantage” has been recognized as justifying land use regulations since the epochal case of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1992).

<sup>43</sup> See Ronald H. Rosenberg, The Changing Culture of American Land Use Regulation: Paying For Growth With Impact Fees, 59 SMU L. REV. 177, 180 (2006) (describing the dual effects of reductions in state and federal revenue sources and “taxpayer revolt” limitations on local taxing power); see also Laurie Reynolds & Carlos Ball, Exactions and the Privatization of the Public Sphere, 21 J.L. & POL. 451, 454 n.16 (2005) [hereinafter Reynolds & Ball (2005)] (noting that reliance on non-tax revenue had nearly doubled between 1957 to 1997).

<sup>44</sup> See Reynolds & Ball (2005), supra note 43, at 455-56.

<sup>45</sup> Compare Hollywood, Inc. v. Broward Co., 431 So.2d 606, 612 (holding that a mandatory open space dedication demonstrated a “reasonable connection between the need for additional park facilities

increasing burden shift away from the tax base--borne, of course, by the citizenry generally--and toward a funding based on private exactions.<sup>46</sup>

But what of an exaction imposed on a commercial development requiring payment into an affordable housing fund? Here, the benefit conferred on the development is less direct, but it could perhaps be found by recognizing that the commercial development will draw new employees into the area, imposing an additional burden on the traffic system. Construction of new housing at affordable prices may help alleviate some of this additional traffic burden. This argument is strained at best, and many commentators have criticized such "linkage" programs, as they are called.<sup>47</sup>

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and the growth in population that will be generated by the [development]"), with *Isla Vista Int'l Holdings v. City of Camas*, 990 P.2d 429, 435 (Wash. Ct. App. 1999) (rejecting a thirty percent open space set-aside as disproportionate to the impact of the development), aff'd on other grounds, 49 P.3d 867 (Wash. 2002).

<sup>46</sup> See generally Carlos A. Ball & Laurie Reynolds, Exactions and Burden Distribution in Takings Law, 47 WM. & MARY L. REV. 1513 (2006); Reynolds & Ball (2005), supra note 43.

<sup>47</sup> E.g., Theodore C. Taub, Exactions, Linkages, and Regulatory Takings: The Developer's Perspective, 20 URB. LAW. 515 (1998). Compare John A. Henning, Jr., Mitigating Price Effects with a Housing Linkage Fee, 78 CAL. L. REV. 721 (1990) (arguing that linkage programs are redistributive, and therefore invalid), with Jane E. Schukoske, Housing Linkage: Regulating Development Impact on Housing Costs, 76 IOWA L. REV. 1011 (1991) (arguing in favor of principled application of linkage programs to offset burdens created by commercial development).

IZ ordinances, viewed as exactions, are even further removed from the norms imposed by the "reciprocity of advantage" standard.<sup>48</sup> As such, supporters characterize IZ ordinances not as exactions, but as just another of the many regulations on the uses of land imposed pursuant to a city's police power.<sup>49</sup> Just as the city can mandate setbacks or side yards, they can mandate that housing must be in some measure affordable.<sup>50</sup>

For an example of a decision upholding an IZ ordinance in the face of a challenge that it was an impermissible exaction, consider Holmdel Builders Ass'n v. Township of Holmdel.<sup>51</sup> This case concerned a mandatory fee imposed as a condition of commercial development approval which the developers attacked as being, among other things, an invalid tax.<sup>52</sup> The court

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<sup>48</sup> See ALTSHULER & GÓMEZ-IBÁÑEZ, supra note 40, at 5-6 (although IZ may be justified on other grounds, "development of market rate housing . . . clearly does not create a need for more subsidized housing").

<sup>49</sup> The term "police power," although "incapable of any very exact definition or limitation . . . 'extends . . . to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State . . .'" The Slaughter-House Cases, 83 U.S. 36, 62 (1872) (quoting Thorpe v. Rutland and Burlington Railroad Co., 27 Vt. 140, 149 (1854)).

<sup>50</sup> See, e.g., Kautz, supra note 4, at 989 (describing the arguments in City of Napa).

<sup>51</sup> 583 A.2d 277 (N.J. 1990); see also Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60 (2001) (upholding a ten percent mandatory affordable housing set-aside against takings and due process claims).

<sup>52</sup> Holmdel, 583 A.2d at 280.

disagreed, finding no need for a "stringent nexus" between the fee and the proposed development.<sup>53</sup>

Three points should be made about this decision as it relates to the Maui ordinance. First, it was decided before either of the two U.S. Supreme Court cases from which current exactions law is drawn.<sup>54</sup> Second, the case arose in the context of the municipal "fair share" affordable housing obligation established by the New Jersey Supreme Court in the epochal decision of Southern Burlington County NAACP v. Mount Laurel Township, commonly known as Mt. Laurel II.<sup>55</sup> The court imposed an obligation on cities to take affirmative measures to meet their fair share of low and moderate housing demand.<sup>56</sup> Many cities involved in the litigation were actively hostile to the

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<sup>53</sup> Id. at 288.

<sup>54</sup> The two cases are Nollan v. California Coastal Commission, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994). See discussion infra Part III.B.

<sup>55</sup> Mt. Laurel II, 456 A.2d 390 (N.J. 1983). In a prior decision the court had held that the effective exclusion of poor and moderate income residents by means of zoning was illegal under state law. S. Burlington County NAACP v. Mt. Laurel Twp., 336 A.2d 713, 727-28 (N.J. 1975). The Township responded to this ruling by making only minimal adjustments to its policies, rezoning less than one percent of its land for affordable housing. ZIEGLER, supra note 10, § 22:17 n.3.

<sup>56</sup> Mt. Laurel II, 456 A.2d at 442 ("Satisfaction of the Mount Laurel doctrine cannot depend on the inclination of developers to help the poor. It has to depend on affirmative inducements to make the opportunity real.").

notion of affordable housing obligations.<sup>57</sup> It was frequently the developers themselves suing the cities for the opportunity to construct affordable housing.<sup>58</sup> Mandatory affordability guidelines may be more appropriate in such contexts than in those such as Maui's, where there are no positive regulatory barriers to the construction of affordable housing.

Third, even the New Jersey courts recognized that an inclusionary ordinance may be self-defeating if it mandated too large a set-aside.<sup>59</sup> Given the extant marketplace factors, a twenty percent set-aside was found to be the maximum allowable for a realistic chance at commercially viable construction.<sup>60</sup> Compare the Maui ordinance, which mandates a forty to fifty percent set-aside.<sup>61</sup>

#### D. A Comparison of IZ Ordinances

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<sup>57</sup> Id. at 410 (“[T]en years after the trial court’s initial order invalidating its zoning ordinance, Mt. Laurel remains afflicted with a blatantly exclusionary ordinance.”).

<sup>58</sup> See, e.g., Glenview Development Co. v. Franklin Twp., 397 A.2d 384 (N.J. Super. Ct. Law Div. 1978); Urban League of Essex County v. Mahwah Twp., 504 A.2d 66, 69 (N.J. Super. Ct. Law Div. 1984) (developers “seeking a realistic opportunity to build low and moderate income housing”).

<sup>59</sup> See, e.g., Mahwah, 504 A.2d at 84 (accepting evidence of experts that excessive set-asides would prevent construction of any affordable units at all).

<sup>60</sup> Id. at 84.

<sup>61</sup> See supra text accompanying note 26-27.

How does the Maui ordinance compare with other IZ ordinances? A survey by the Brookings Institute of inclusionary ordinances in Maryland and the greater Washington, D.C. area found that the ordinances mandated on average a set-aside of around ten percent, and all included density bonuses.<sup>62</sup> The results of the ordinances were varied, but in general appeared to stimulate at least some affordable units.<sup>63</sup> Barbara Kautz, in a paper describing best practices for the adoption of IZ ordinances, says that most such ordinances require a ten to fifteen percent set-aside, with the "most aggressive city" requiring thirty-five percent.<sup>64</sup>

Allan Mallach, an IZ expert who testified in one of the cases consolidated in the Mt. Laurel II litigation,<sup>65</sup> notes that although it is impossible to identify with precision the ideal set-aside, a figure of twenty percent can typically be absorbed by developers, while a forty percent set-aside may prevent development altogether.<sup>66</sup> Mallach pointed out in his 1984 book

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<sup>62</sup> KAREN DESTOREL BROWN, EXPANDING AFFORDABLE HOUSING THROUGH INCLUSIONARY ZONING: LESSONS FROM THE WASHINGTON METROPOLITAN AREA 12 tbl.1 (2001), available at <http://www.brookings.edu/es/urban/publications/inclusionary.pdf>.

<sup>63</sup> Id. at 13.

<sup>64</sup> Kautz, supra note 4, at 980.

<sup>65</sup> See Mahwah, 504 A.2d at 69.

<sup>66</sup> MALLACH, supra note 37, at 107-08.

that an IZ ordinance adopted in 1977 by Bridgewater Township, New Jersey mandating a forty percent set-aside had yet to stimulate construction of a single affordable housing unit.<sup>67</sup>

Outside New Jersey, jurisdictions in California have become leaders in the development of IZ programs.<sup>68</sup> A recent survey published by the California Coalition for Rural Housing and the Non-Profit Housing Association of Northern California showed that the number of such programs in the state has increased from 75 in 1996 to 107 as of the survey date in 2003.<sup>69</sup> The mean affordability set-aside is thirteen percent, the median fifteen percent, and the most frequently used value is ten percent.<sup>70</sup> Only a single program reached a thirty-five percent requirement.<sup>71</sup> Density bonuses were offered in over ninety percent of the jurisdictions.<sup>72</sup>

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<sup>67</sup> Id. at 107.

<sup>68</sup> Nico Calavita, Introduction to Inclusionary Zoning: The California Experience, NHC AFFORDABLE HOUSING POL'Y REV. (Nat'l Housing Conf., D.C.), Feb. 2004, at 1, 2.

<sup>69</sup> Id. at 1.

<sup>70</sup> CALIFORNIA COALITION FOR RURAL HOUSING & NON-PROFIT HOUSING ASSOCIATION OF NORTHERN CALIFORNIA, INCLUSIONARY HOUSING IN CALIFORNIA: 30 YEARS OF INNOVATION iii (2003), available at <http://www.calruralhousing.org/system/files/Inclusionary30Years.pdf>.

<sup>71</sup> This was the city of Davis, Cal., listed as requiring twenty-five to thirty percent. Id. app. A at 31.

<sup>72</sup> Id. at 24.

In its policy recommendations, local governments are encouraged to "aim high" in setting affordable housing set-asides. The study suggests that "15 percent is realistic in most communities."<sup>73</sup> Perhaps most critically, the study concludes that the magnitude of the set-aside is not the most significant factor, indicating that factors other than the set-aside requirement determine the success of a program.<sup>74</sup> One program was forced to reduce its set-aside from twenty-five to twenty percent to make the program effective.<sup>75</sup> Programs comparable to Maui's cannot be found in either the experience of California jurisdictions nor in the recommendations of experts interested in promoting successful IZ programs. The author has yet to find a single IZ ordinance outside Maui imposing an affordable set-aside of more than forty percent.

### III. THE TAKINGS CLAUSE AND LAND DEVELOPMENT

#### A. An Overview of Regulatory Takings Doctrine

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation".<sup>76</sup> This prohibition has been applied against

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<sup>73</sup> Id. at 26. Developer incentives, entirely lacking from the Maui ordinance, are also encouraged. Id. at 27.

<sup>74</sup> Id. at 22.

<sup>75</sup> Id. at 22.

<sup>76</sup> U.S. CONST. amend. V.

the States for over 100 years.<sup>77</sup> Although initially only physical occupations of property were considered within the scope of the Takings Clause,<sup>78</sup> the last century has seen the development of judge-made law holding that regulation of property can also implicate the Takings Clause. The genesis of the doctrine of "regulatory takings" is typically found<sup>79</sup> in the case of Pennsylvania Coal Co. v. Mahon,<sup>80</sup> in which Justice Holmes held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>81</sup> Courts and commentators have struggled ever since to come up

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<sup>77</sup> See Lingle v. Chevron U.S.A., 544 U.S. 528, 536 (2005) (citing Chicago, B. & Q. Railroad Co. v. Chicago, 166 U.S. 226 (1897)); but see Aviam Soifer, Text-Mess: There is No Textual Basis for Application of the Takings Clause to the States, 28 U. HAW. L. REV. 373 (2006) (arguing that a textualist interpretation of the Constitution is incompatible with the notion that the Takings Clause operates against the states); Bradley C. Karkkainen, The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle", 90 MINN. L. REV. 826 (2006) (disputing that a holding of Chicago, B. & Q. was that the Takings Clause applies against the states).

<sup>78</sup> See FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, THE TAKINGS ISSUE 120 (1973) (stating that early cases established that police power regulations could not effect a taking). But see Kris W. Kobach, The Origins of Regulatory Takings: Setting the Record Straight, 1996 UTAH L. REV. 1211 (1996) (finding, contra Bosselman et al., that "nonacquisitive takings" existed prior to Pennsylvania Coal Co. v. Mahon).

<sup>79</sup> See BOSSELMAN, CALLIES & BANTA, supra note 73, at 124-38.

<sup>80</sup> 260 U.S. 393 (1922).

<sup>81</sup> Id. at 415.

with standards for determining when a regulation becomes a taking.<sup>82</sup>

The current state of regulatory takings doctrine was expressed with as much clarity as could be hoped by Justice O'Connor in Lingle v. Chevron U.S.A., Inc.<sup>83</sup> First, regulations which either require a physical invasion of property,<sup>84</sup> or which destroy "all economically beneficial use"<sup>85</sup> of the property will be deemed per se takings.<sup>86</sup> In most other cases--with one very important exception--courts will require an ad-hoc, fact bound analysis,<sup>87</sup> difficult enough in itself and complicated by "vexing

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<sup>82</sup> See, e.g., Carol M. Rose, Mahon Reconstructed: Why The Takings Issue is Still a Muddle, 57 S. CAL. L. REV. 561, 561 (regulatory takings is "[b]y far the most intractable constitutional property issue"); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) (admitting that the Court "quite simply, has been unable to develop any 'set formula' for determining [when a regulation effects a taking]"); Sheffield Development Co., Inc. v. City of Glenn Heights, 140 S.W.3d 660, 671 (2004) ("For our part, we have called these legal battlefields a 'sophistic Miltonian Serbonian bog.'" (quoting City of Austin v. Teague, 570 S.W.2d 389, 391 (Tex. 1978))).

<sup>83</sup> 544 U.S. 528, 537-40 (2005).

<sup>84</sup> See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

<sup>85</sup> See Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

<sup>86</sup> Lingle, 544 U.S. at 538.

<sup>87</sup> See Penn Central, 438 U.S. at 124. The factors in a Penn Central test are the economic impact of the regulation, the extent of its interference with "distinct investment-backed expectations," and the "character" of the regulation. Lingle, 544 U.S. at 538-39. For a discussion on the likelihood of a plaintiff's success in a Penn Central claim, see F. Patrick Hubbard, Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?, 14 DUKE ENVTL. L. & POL'Y. F. 121 (2003).

subsidiary questions.”<sup>88</sup> The exception is the “special context” of land-use exactions,<sup>89</sup> and since IZ ordinances can arguably be characterized as exactions, we shall take up this context in detail below. The Court then went on to describe what had sometimes been understood as a completely distinct takings standard, the requirement that a regulation “substantially advance” legitimate state interests,<sup>90</sup> and promptly denounced that standard as having “no proper place in our takings jurisprudence.”<sup>91</sup>

The Lingle opinion is remarkable for its frank admission that the Agins v. City of Tiburon standard was misplaced.<sup>92</sup> A requirement that a regulation actually advance some legitimate interest is, rather, in the nature of a due process claim.<sup>93</sup> For

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<sup>88</sup> Lingle, 544 U.S. at 539.

<sup>89</sup> Id. at 538. The Court refers to its leading exactions cases of Nollan v. California Coastal Commission, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994).

<sup>90</sup> Id. at 540 (quoting Agins v. City of Tiburon, 447 U.S. 255 (1980)).

<sup>91</sup> Id.

<sup>92</sup> In fact, and as emphasized by Justice Kennedy’s concurrence, the Agins standard is in the nature of a due process analysis, and is still viable in that realm. Id. at 548-49 (Kennedy, J., concurring).

<sup>93</sup> Id. at 540 (clarifying that “[t]here is no question that the ‘substantially advances’ formula was derived from due process, not takings, precedents”). But see Karckainen, supra note 77, at 908-11 (rejecting, in regulatory takings cases, both the Takings Clause and Lochner-style substantive due process challenges in favor of an approach based on “footnote 4” of United States v. Carolene Products

present purposes, the importance of Lingle is the shadow it casts over its exactions decisions. Although the Lingle Court did its best to shore up its exactions cases, describing them in terms of "the doctrine of 'unconstitutional conditions,'"<sup>94</sup> a doctrine "worlds apart"<sup>95</sup> from the Agins standard, it is arguable that those cases may have involved an implicit evaluation of the merits of the proposed exactions -- an evaluation strictly off-limits after Lingle.<sup>96</sup>

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Co., 304 U.S. 144, 152 n4 (1938), and the "unfair burden" test of Armstrong v. United States, 364 U.S. 40 (1960)).

<sup>94</sup> Lingle, 544 U.S. at 547 (quoting Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)). Scholars have noted the apparent disconnect in the Court's use of the doctrine of unconstitutional conditions in the takings context. See, e.g., Leading Cases: 1993 Term, 108 HARV. L. REV. 290, 296-98 (1994) (noting that no prior takings cases had employed the doctrine, which fails to provide meaningful guidance to lower courts); Lee Anne Fennell, Hard Bargains and Real Steals: Land Use Exactions Revisited, 86 IOWA L. REV. 1, 84-85 (2000) (noting the "theoretical shortcomings and logical inconsistencies" of Nollan and Dolan, and arguing that more flexibility is needed than can be provided by the doctrine).

<sup>95</sup> Lingle, 544 U.S. at 547.

<sup>96</sup> See Richard J. Lazarus, The Measure Of A Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court, 57 HASTINGS L.J. 759, 820 (2006) (arguing that the very care used by the Lingle Court to preserve Nollan and Dolan may operate to weaken them); Reynolds & Ball (2005), supra note 43, at 463 n.56 (noting that the actual decisions of Nollan and Dolan appear to be based at least in part on a disparagement of the aims of the regulations). But see David Callies & Christopher Goodin, The Status of Nollan v. California Coastal Commission and Dolan v. City of Tigard After Lingle v. Chevron U.S.A., Inc., 40 J. MARSHALL L. REV. 539, 541 (2007) (arguing that Nollan/Dolan proportionality "remains a viable takings test after Lingle").

To attempt to locate IZ programs in the constitutional spectrum, one must have an understanding of the Court's exactions cases. A litigant challenging an IZ ordinance by means of a Penn Central claim would assert that the "character" of the regulation and the extent to which it has interfered with the "distinct, investment-backed expectations" of the developer is such as to effect a taking.<sup>97</sup> The nebulous nature of this framework leaves litigants on both sides of a dispute with substantial uncertainty as to how a case would play out.

On the other hand, if in the context of a challenge to an IZ ordinance it were argued persuasively that Nollan v. California Coastal Commission and Dolan v. City of Tigard apply, the argument would be settled--even supporters of IZ acknowledge that housing development doesn't create a proportional need for additional affordable housing.<sup>98</sup> The remainder of this section will examine these cases and will attempt to bring to the foreground the fairness principle underlying the decisions.

#### B. The Exactions Cases: Nollan and Dolan

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<sup>97</sup> See Lingle, 544 U.S. at 538-39.

<sup>98</sup> See ALTSHULER & GÓMEZ-IBÁÑEZ, supra note 40, at 5 ("[D]evelopment of market rate housing . . . clearly does not create a need for more subsidized housing."); Herbert M. Franklin, Panel Comments, in INCLUSIONARY ZONING MOVES DOWNTOWN 149 (Dwight Merriam et al eds., 1985) ("I suspect that if a nexus test were to be applied such an [inclusionary] ordinance would fail.").

The Supreme Court's position on the constitutionality of exactions can be read in two cases: Nollan and Dolan. These cases have become nearly inseparable--a reference to one signals the inevitable appearance the other. The holdings of these cases can be summarized as follows: when a government agency conditionally approves a property owner's development plan, the conditions must have a "nexus" to the government interest upon which the condition is founded,<sup>99</sup> and the burden imposed to satisfy the condition must be "roughly proportional" to the impact of the particular development.<sup>100</sup>

In Nollan, the owners wished to replace the small bungalow on their beachfront property with a new three-bedroom house.<sup>101</sup> The new house was of a size consistent with others in the neighborhood.<sup>102</sup> Under California law, the Nollans were required to obtain a coastal development permit from the California Coastal Commission.<sup>103</sup> The Commission granted the permit subject to the condition that the Nollans dedicate an easement to the public permitting pedestrian access laterally across the property, between the mean high-water line and a seawall erected

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<sup>99</sup> Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

<sup>100</sup> Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

<sup>101</sup> Nollan, 483 U.S. at 827-28.

<sup>102</sup> Id. at 828.

<sup>103</sup> Id.

on the property.<sup>104</sup> The Nollans objected and sought a writ of administrative mandamus invalidating the condition.<sup>105</sup> Among the Commission's justifications for the condition was that the new house would tend to "prevent the public psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit."<sup>106</sup>

The core of the Court's reasoning in invalidating the condition is expressed in two paragraphs containing only a single direct cite to case law, which served merely to import the colorful charge that the condition is nothing more than "an out-and-out plan of extortion."<sup>107</sup> The decision is an exercise in pure reasoning from first principles.<sup>108</sup>

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<sup>104</sup> Id.

<sup>105</sup> Id.

<sup>106</sup> Id. at 828-29 (internal quotation marks removed) (omission in original). The majority focused on the "psychological barrier" rationale offered by the Commission, mentioning it five times in the opinion. None of the three dissents found it necessary to deal with this barrier at all. See id. at 844-45 (Brennan, J., dissenting) (characterizing the Commission's motivation as concern for "public access to the ocean and tidelands").

<sup>107</sup> Id. at 837 (quoting *J.E.D. Assocs. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

<sup>108</sup> Cf. Edward J. Sullivan & Nicholas Cropp, Making It Up-- "Original Intent" and Federal Takings Jurisprudence, 35 URB. LAW. 203, 248-49 (2003) (arguing that far from deploying an "originalist" argument, Justice Scalia's opinion is "an exercise in value-laden, result-driven reasoning, which originalists rail against in other contexts").

The Court acknowledged that circumstances do exist under which a hypothetical permitting authority could refuse to issue a building permit.<sup>109</sup> So, for example, a permit may be denied outright when the proposed building would violate height or width restrictions, or other restrictions imposed in furtherance of a "legitimate police-power purpose." Given this, it seems clear that a permit may be legitimately conditioned on mitigation of the harm purportedly caused by the development.<sup>110</sup>

But the legitimacy of the condition vanishes unless the condition is imposed to mitigate the same harm as would have justified the denial of the permit.<sup>111</sup> There must be, in the essential language of the case, a "nexus between the condition and the original purpose of the building restriction."<sup>112</sup> Without this nexus, the legitimacy of the condition vanishes and the extortionate purpose is revealed.<sup>113</sup>

Although the Nollans did not argue the point, the Court found it worthwhile to point out the fairness rationale of the Takings Clause, noting that "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some

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<sup>109</sup> Nollan, 483 U.S. at 836.

<sup>110</sup> Id. at 836-37.

<sup>111</sup> Id. at 837.

<sup>112</sup> Id.

<sup>113</sup> Id.

people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’”<sup>114</sup>

One can see that beyond the question of nexus is the question of degree: to what degree must the burden imposed by a development condition “match” the harm caused by that particular development? The Nollan Court passed over this question, finding that the condition required by the Commission would fail to satisfy “even the most untailored standards.”<sup>115</sup> It was inevitable that the issue would arise eventually, and the Court addressed the question in Dolan v. City of Tigard.<sup>116</sup>

Florence Dolan, wishing to expand her plumbing and electric supply store, applied to the city for building permits.<sup>117</sup> The permit was granted subject to a number of conditions, including that Dolan dedicate a portion of her property as a public “greenway” and for a storm drain improvement, and another portion as a pedestrian and bicycle path.<sup>118</sup> Because it was accepted by all parties that the development would have an impact on both traffic and increased

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<sup>114</sup> Id. at 836 n.4 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

<sup>115</sup> Id. at 838.

<sup>116</sup> 512 U.S. 374 (1994).

<sup>117</sup> Id. at 379.

<sup>118</sup> Id. at 380.

storm runoff,<sup>119</sup> the Court found that Nollan's "nexus" requirement was satisfied,<sup>120</sup> and passed on to a discussion of "whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of . . . [the] proposed development."<sup>121</sup>

The Court described three standards used by various state courts in defining this relationship.<sup>122</sup> Illinois required a "very exacting correspondence, described as the 'specifi[c] and uniquely attributable' test."<sup>123</sup> At the permissive end of the spectrum are states which require only "very generalized statements as to the necessary connection between the required dedication and the proposed development."<sup>124</sup> The Court found the happy medium in a standard requiring a "reasonable relationship" between the dedication and the impact.<sup>125</sup> The Court preferred, however, to adopt the phrase "rough proportionality" to avoid

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<sup>119</sup> Id. at 382-83.

<sup>120</sup> Id. at 387.

<sup>121</sup> Id. at 388.

<sup>122</sup> Id. at 389-91.

<sup>123</sup> Id. at 389 (quoting Pioneer Trust & Savings Bank v. Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961)) (alteration in original).

<sup>124</sup> Id. Decisions of the courts of Montana, Billings Properties v. Yellowstone County, 394 P.2d 182 (Mont. 1964), and New York, Jenad, Inc. v. Scarsdale, 218 N.E.2d 673 (N.Y. 1966), are cited as examples. Dolan, 512 U.S. at 389.

<sup>125</sup> Id. at 390 (citing Simpson v. North Platte, 292 N.W.2d 297, 301 (Neb. 1980)).

confusion with the highly deferential “rational basis” review under the Equal Protection Clause.<sup>126</sup>

Under the rough proportionality standard, the Court found that the burden imposed on Dolan by the conditions were not roughly proportional to the impact of the proposed development.<sup>127</sup> The fact that Dolan would lose the right to exclude others seemed to weigh heavily against the exaction.<sup>128</sup> What purpose, asked the Court, was served by a public, as opposed to a private, greenway?<sup>129</sup> As to the bikeway, the Court found that the City had simply failed in its burden of demonstrating that the additional traffic warranted this particular dedication.<sup>130</sup>

Once again, the Court cited the Armstrong “fairness principle,” this time in its opening remarks on the overall framework of takings jurisprudence.<sup>131</sup> Similarly, several of the cases relied upon by the Court for its standard of rough proportionality adverted, explicitly or implicitly, to the

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<sup>126</sup> Id. at 391.

<sup>127</sup> Id. at 394-95.

<sup>128</sup> Id. at 393 (citing Kaiser Aetna v. United States, 444 U.S. 164 (1979)).

<sup>129</sup> Id.

<sup>130</sup> Id. at 395-96.

<sup>131</sup> Id. at 384.

unfairness that may result from a less demanding standard. For example, in Collis v. City of Bloomington,<sup>132</sup> developers challenged an ordinance requiring the dedication of land for parks and recreational facilities, or payment in lieu of such dedication.<sup>133</sup> The Minnesota court upheld the ordinance as facially constitutional, leaving open the possibility that it may still be attacked as unconstitutional as applied in a particular instance.<sup>134</sup> The court noted the possibility of an unfair application of the ordinance "to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision."<sup>135</sup> Such an application "would be to allow an otherwise acceptable exercise of police power to become grand theft."<sup>136</sup>

In City of College Station v. Turtle Rock Corp.,<sup>137</sup> the Texas court likewise had before it a challenge to a parkland dedication ordinance.<sup>138</sup> The ordinance was again upheld on its

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<sup>132</sup> 246 N.W.2d 19 (Minn. 1976).

<sup>133</sup> Id. at 20.

<sup>134</sup> Id. at 27.

<sup>135</sup> Id. at 26.

<sup>136</sup> Id.

<sup>137</sup> 680 S.W.2d 802 (Tex. 1984).

<sup>138</sup> Id. at 803.

face,<sup>139</sup> but the court left open the possibility that it could be unconstitutional in its application.<sup>140</sup> Without a requirement that the dedication be reasonably connected to the "harm" caused by the development, which harm may be nothing more than a population increase, "a city could exact land or money to provide a park that was needed long before the developer subdivided his land."<sup>141</sup>

In Call v. City of West Jordan,<sup>142</sup> the ordinance at issue mandated dedication of land or payment in lieu for the purposes of flood control, as well as for parks and recreational facilities.<sup>143</sup> Once again, the ordinance was upheld by the Utah court.<sup>144</sup> The city's power was not without limit, however. "To the extent that the establishment of subdivisions increases the need for flood control measures or recreational facilities, it is both fair and essential that subdividers be required to

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<sup>139</sup> Id. at 806.

<sup>140</sup> Id. ("It is possible, of course, that the ordinance may be unduly harsh or create a disproportionate burden in the case of a particular subdivision or developer.").

<sup>141</sup> Id. at 807.

<sup>142</sup> 606 P.2d 217 (Utah 1979).

<sup>143</sup> Id. at 218.

<sup>144</sup> Id. at 221 ("[I]t is our opinion that the ordinance . . . is within the scope of the powers granted to the City . . .").

contribute to the costs of providing those facilities.”<sup>145</sup> We may infer from this rationale that the court would hold unfair a requirement that subdividers pay for measures unrelated to the effects of the development.<sup>146</sup>

We see, then, that even before Dolan courts were concerned with the potential for unfair treatment in the context of development exactions. The courts’ general deference to legislative authority was limited by an awareness that the leverage available to that authority may lead to unfair treatment. The applicability of this principle to IZ ordinances is clear. More important than the particulars of the standard described in Dolan is the basic notion that it is unfair to charge a segment of the population--developers and their purchasers--with responsibility for remedying social problems not of their own making. Disputes, however, over the applicability of Dolan have masked this fundamental proposition and turned the issue into a meaningless debate over the breadth of the holding.

### C. The Trouble with Nollan and Dolan

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<sup>145</sup> Id. at 219-20 (emphasis added).

<sup>146</sup> Indeed, Utah has recently held that the Dolan standard of rough proportionality holds in all land-use contexts, including uniform legislatively imposed schemes. *B.A.M. Dev. v. Salt Lake County*, 128 P.3d 1161, 1171 (Utah 2006) (retroactively applying a legislative order to that effect).

Although Nollan and Dolan may have provided some comfort to property-rights advocates, they have not been popular decisions with either state courts<sup>147</sup> or commentators.<sup>148</sup> They have not advanced regulatory takings doctrine, and have merely shifted the debate from “which regulations impose burdens equivalent to a taking?” to “which regulations are subject to Nollan and Dolan?” In particular, two unresolved issues have perplexed courts attempting to apply the Dolan test.

First, does heightened scrutiny apply when the exaction demands not the dedication of a property interest, as was the case in both Nollan and Dolan, but payment of a fee? Courts and commentators have split on this issue.<sup>149</sup> Adjudication of a suit

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<sup>147</sup> See Ronald H. Rosenberg, The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?, 6 FORDHAM ENVTL. L.J. 523, 537 (1995) (summarizing research showing that state courts “had given [the cases] far less attention and apparently attached far less significance . . . in reaching their own decisions” than would appear likely, given the amount of academic commentary); Reynolds & Ball (2005), supra note 43, at 466-67 (summarizing the inconsistent approaches taken by lower courts in applying Nollan and Dolan).

<sup>148</sup> See, e.g., Fennell, supra note 94, at 84-85 (“Efficient land use requires more flexibility and more coherence than these judicial bargaining limits can offer.”); Mark Fenster, Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity, 92 CAL. L. REV. 609, 614-15 (2004) (arguing that the exactions cases have created “judicial indeterminacy and regulatory variability,” and generally make no sense).

<sup>149</sup> Compare Ehrlich v. City of Culver City, 911 P.2d 429, 433 (Cal. 1996) (applying Nollan and Dolan to a monetary exaction), and J. David Breemer, The Evolution of the “Essential Nexus”: How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go From Here, 59 WASH. & LEE L. REV. 373, 375-76 (arguing that heightened

challenging an IZ ordinance could implicate this issue, since many such ordinances (including Maui's) permit the developer to satisfy its obligations by paying a fee "in lieu" of construction of affordable housing.<sup>150</sup>

Perhaps the most contentious post-Dolan issue has been the applicability of the doctrine of the case to broadly applicable regulations enacted by legislative bodies, as opposed to ad hoc, individualized exactions.<sup>151</sup> Dolan clearly applies to the later, but under the facts of the case may not apply to the former. This issue continues to be resolved on a state-by-state basis,<sup>152</sup>

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scrutiny should apply to monetary exactions), with Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 875-76 (9th Cir. 1991) (declining to apply Nollan to a development "linkage" fee) and Daniel A. Jacobs, Indigestion From Eating Crow: The Impact Of Lingle v. Chevron U.S.A. On The Future Of Regulatory Takings Doctrine, 38 URB. LAW. 451, 482 (suggesting that Lingle removes monetary exactions from Dolan's "sphere of applicability").

<sup>150</sup> See supra text accompanying notes 29-31.

<sup>151</sup> See generally Inna Reznick, Note, The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242 (2000); Jane C. Needleman, Note, Exactions: Exploring Exactly When Nollan and Dolan Should Be Triggered, 28 CARDOZO L. REV. 1563 (2006). The distinction between legislative and adjudicative actions may not be as clear as the cases imply. See Mark Fenster, Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions, 58 HASTINGS L.J. 729, 772 (2007) ("The line between legislative and adjudicative regulation frequently breaks down at the local level . . . .");

<sup>152</sup> Compare Ehrlich, 911 P.2d at 447 (Nollan and Dolan do not apply to "generally applicable development fee[s]"), with Town of Flower Mound v. Stafford Estaes Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004) (rejecting Ehrlich, it being "entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others").

and has never been adjudicated in Hawai'i. Because the Maui ordinance is generally applicable to all developments above a certain size threshold, it also clearly implicates this issue.

Dolan must have been a particularly upsetting decision for city planners. Not only were exactions to be scrutinized at a level at least somewhat less deferential than mere rationality, with "individualized determinations" that each exaction was justified and proportional,<sup>153</sup> but the city would apparently bear the burden of justifying the exaction should it ever come to litigation.<sup>154</sup> It is unsurprising that cities would not swallow Dolan willingly, and lower courts have been willing partners in helping cities avoid the requirements of Dolan.<sup>155</sup>

And yet Dolan cannot be said to have been a victory for property-rights advocates either. Cities fearful of being compelled in court to justify administratively imposed exactions can avoid the problem by imposing the exactions generally, via an ordinance. But because in this context the city can no

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<sup>153</sup> Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

<sup>154</sup> Id. at 391 n.8. Notwithstanding one's expectation that such a significant rule would not be buried in a footnote, courts have taken the note at its word. See, e.g., Garneau v. City of Seattle, 147 F.3d 802, 811 (9th Cir. 1998) (explaining the rationale for the "burden shifting"); Rogers Mach., Inc. v. Washington County, 45 P.3d 966, 975 (Or. Ct. App. 2002) (noting that the Dolan test "places the burden on the government . . . to justify the condition").

<sup>155</sup> See Rosenberg, supra note 147, at 537 (finding that most state courts decide cases with little reference to the main Supreme Court takings decisions).

longer take account of the varied circumstances in which the exaction will be applied, the law must be written broadly, with little or no discretion left to administrators. The generally applicable regulation may in fact impose a higher burden on property owners and developers generally than a regulation which permitted case-by-case discretion.<sup>156</sup> Alternately, rather than facing the risk that a court will strike down an exaction as excessive, cities may deny development altogether.<sup>157</sup>

Nollan and Dolan have provoked an enormous amount of commentary,<sup>158</sup> and law review articles continue to evince the debate on the cases' applicability and meaning. The Supreme Court has also offered equivocal signals on its holding on Dolan. In City of Monterey v. Del Monte Dunes at Monterey, Ltd.,<sup>159</sup> the Court said that it had "not extended the rough-proportionality test of Dolan beyond the special context of

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<sup>156</sup> See Fenster, *supra* note 151, at 748 (arguing that the mechanical application of generally applicable regulations "potentially limits the ability of property owners to negotiate an individualized exaction that would be more advantageous and attractive to both parties.").

<sup>157</sup> See David A. Dana, Land Use Regulation in an Age of Heightened Scrutiny, 75 N.C.L. REV. 1243, 1249 (1997) (arguing that the strict proportionality framework leads to inefficient allocation of development resources).

<sup>158</sup> See Ehrlich v. City of Culver City, 911 P.2d 429, 439 n.6 (Cal. 1996) ("Scholarly commentary on the two cases is almost unmanageably large.").

<sup>159</sup> 526 U.S. 687 (1999).

exactions--land-use decisions conditioning approval of development on the dedication of property to public use.”<sup>160</sup> Courts and commentators have seized upon this dictum to justify the limitation of Dolan to similar circumstances.<sup>161</sup> As well they might, there being little other guidance coming from the Court on the issue.<sup>162</sup> The silence might be read to indicate some misgivings on the breadth of Dolan, although there are some who clearly approve of a broad application.<sup>163</sup>

The Nollan and Dolan opinions are nearly always cited together, and while both opinions are controversial in their own rights, perhaps Dolan has caused the larger share of controversy. To the extent that Dolan can be seen as an extension or crystallization of Nollan, one would expect opposition to the former to be as strong or stronger as to the

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<sup>160</sup> Id. at 702.

<sup>161</sup> See, e.g., San Remo Hotel, L.P. v. San Francisco, 364 F.3d 1088, 1098-99 (9th Cir. 2004) (declining application of Dolan to hotel conversion fee), aff'd, 545 U.S. 323 (2005); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 697-98 (Colo. 2001) (proportionality test doesn't apply to wastewater treatment fee). But see Ehrlich, 911 P.2d at 433 (holding that the heightened standard of Nollan and Dolan applies to monetary exactions).

<sup>162</sup> The Court also passed up an opportunity to decide whether legislatively mandated exactions were subject to Dolan when it granted certiorari to answer only a different question in San Remo Hotel. 543 U.S. 1032, 1032 (2004) (limited grant of certiorari). See Fenster, supra note 151, at 750 (explaining the procedural background and certiorari petition in San Remo Hotel).

<sup>163</sup> See, e.g., Parking Ass'n of Ga. v. City of Atlanta, 515 U.S. 1116 (1995) (denying certiorari) (Thomas, J., dissenting).

latter. A quick, unscientific experiment was performed to test this hypothesis. On the assumption that law review titles bear some relation to their subjects, and that treatment as a law review subject correlates to some degree with a measure of controversy, a search was executed for law review articles with titles containing one case, but not the other.<sup>164</sup> Eighty-five articles have been written with "Dolan" in the title, but not "Nollan." Only thirty mention "Nollan" without "Dolan", despite the Nollan opinion having been written seven years before Dolan. Dolan appears to have attracted significantly more scholarly attention.

Perhaps is it the exactitude of the Dolan standard, felt to be unrealistic in the rough-and-tumble world of municipal development negotiations, that causes the additional angst over Dolan.<sup>165</sup> Perhaps Dolan's imposition of the "burden shifting" is felt to be an unwarranted imposition on the police power.<sup>166</sup> In any case, Dolan will remain controversial at least until the Supreme Court finally addresses the issues head on. In the

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<sup>164</sup> This search was performed by the author on Westlaw on March 7, 2008.

<sup>165</sup> See Fenster, supra note 151, at 733 (reading Lingle as "signal[ing] both that lower courts should limit Nollan and Dolan's application and that other levels of government . . . can limit--and indeed, frequently have limited--municipalities' discretion to impose exactions.").

<sup>166</sup> See text supra accompanying note 154.

meantime, a standard which applies in all cases, of monetary exactions or possessory dedications, of ad hoc adjudications and broad legislative enactments, would at least inject some measure of certainty into the negotiations between regulators and developers. But first, we must clarify the proposition we expect to be universally adhered to.

The holding of Nollan is often summarized as: conditions upon development approval must bear a nexus to a legitimate public purpose.<sup>167</sup> But this formulation obscures an essential aspect of the holding of the case, and can easily appear to be nothing more than a restatement of the deferential "rational basis" standard of due process. Beyond the due process requirement that the government's interest must be generally legitimate is the requirement that the effects of the development negatively impact that interest. A condition is not constitutional under Nollan merely because a "nexus" of some sort exists between the condition and the purpose. Rather, the condition must further the same purposes as would the outright denial of permission to develop. Although the Court framed the

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<sup>167</sup> E.g., Wis. Builders Ass'n v. Wis. Dept. of Transp., 702 N.W.2d 433, 498 (Wisc. Ct. App. 2005) (stating that Nollan requires that "there must be a nexus to a legitimate public purpose"); Tapps Brewing v. City of Sumner, 482 F. Supp. 2d 1218, 1229 (W.D. Wash. 2007) (summarizing Nollan as holding "that an 'essential nexus' must exist between the 'legitimate state interest' and the permit conditions") (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)).

requirement in these terms (equating the condition with the legitimate denial of development), an equivalent and perhaps clearer formulation is to say that the burden imposed by the condition must bear a nexus to a harm attributable in some degree to the development, the mitigation of which is a legitimate public purpose. This was the standard expressed with much greater clarity in the opinions relied upon in Dolan.

The rule to be applied in all cases of development conditions, whether imposed on an ad hoc basis or broadly across all developments, is that there must be some reasonable connection between the burden imposed by the condition and the anticipated effects of the development such that it is fair to impose the burden. Benefits accruing to the applicant as a result of the condition should be considered to offset the burden, but only to the extent that they are tangible and reasonably ascertainable. Conditions may be presumed to be constitutional,<sup>168</sup> and the burden must be placed on a challenger to demonstrate the unfairness of the condition, rather than on the government to justify every application of the rule leading to the specific condition in question.

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<sup>168</sup> Cf. Parham v. Hughes, 441 U.S. 347, 351 (1979) (holding that state laws will be presumed constitutional in equal protection challenges).

It would do no harm to consider this a weaker test than that imposed by both Nollan and Dolan. What the test loses in rigor it makes up in consistency of application. Such a standard would permit flexibility in negotiations leading to the issuance of development permits while discouraging overreaching by cities.<sup>169</sup>

How might one justify such a standard? One justification is a normative one: that increasing reliance on non-tax revenue sources such as exactions distorts the municipal agenda, focusing on physical infrastructure to the detriment of social welfare programs.<sup>170</sup> Instead, I advert to a more general principle, that of basic fairness. In his opinion in Armstrong v. United States, Justice Black provides a concise statement of the Takings Clause's purpose: that the government be absolutely barred from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>171</sup> Armstrong is frequently cited in the cases and the literature for this proposition, and is especially

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<sup>169</sup> See generally Fennell, supra note 94.

<sup>170</sup> See Reynolds & Ball (2005), supra note 43, at 456 (describing how such reliance leads to a focus "skewed toward the types of projects that are amenable to non-tax financing, producing an over-emphasis on the construction of tangible infrastructure and a necessary slighting of services for people").

<sup>171</sup> Armstrong v. United States, 364 U.S. 40, 49 (1960).

important in regulatory takings cases, in which the clear rules of per se takings do not apply.<sup>172</sup>

In an influential article, Frank Michelman argued that a standard derived from the "test of fairness" is the only correct method of evaluating the compensability of a government action.<sup>173</sup> While at first blush the use of fairness as a guiding

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<sup>172</sup> E.g., *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002) (referring to the proposition as the "Armstrong principle"); *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting) (emphasizing that land-use regulation does not violate the Armstrong principle when the use in question is the source of the problem regulated); *Florida Rock Indus. v. United States*, 45 Fed. Cl. 21 (Fed. Cl. 1999) ("The present case puts the Armstrong principle to the test and goes to the heart of Justice Holmes' formulation of regulatory takings."); *Ehrlich v. City of Culver City*, 911 P.2d 429, 447 (Cal. 1996) (associating Nollan and Dolan with the Armstrong principle, "one of the fundamental principles of modern takings jurisprudence"); *Mission Springs, Inc. v. City of Spokane*, 954 P.2d 250, 258 (Wash. 1998) (noting that a violation of the Armstrong fairness principle is "the talisman of a taking"); see also Jeffrey M. Gaba, Taking "Justice and Fairness" Seriously: Distributive Justice and the Takings Clause, 40 CREIGHTON L. REV. 569, 571 (2007) (discussing "the concept of distributive justice reflected in the Armstrong principle"); William Michael Treanor, The Armstrong Principle, the Narratives of Takings, and Compensation Statutes, 38 WM. & MARY L. REV. 1151, 1153 (1997) ("Justice Black's view has received a remarkable degree of assent across the spectrum of opinion."); Clynn S. Lunney, Jr., Compensation for Takings: How Much is Just?, 42 CATH. U. L. REV. 721, 747 (1993) (describing Armstrong as part of the "ritual litany" of takings analyses).

<sup>173</sup> Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1171-72 (1967). The article has been cited in many of the Supreme Court's landmark takings cases. See, e.g., *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 428 n.5 (1982); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 128 (1978) (Stevens, J., concurring); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

light may seem uncomfortably vague, it need not be so,<sup>174</sup> and ignoring fairness concerns in favor of a so-called “bright line” rule reduces the takings clause to a hollow shell.<sup>175</sup>

#### IV. APPLYING THE “FAIRNESS STANDARD” TO LAND USE REGULATIONS

##### A. As Applied to Exactions Generally

How would a principled application of the fairness rationale operate in land-use disputes? Since all parties to every dispute already claim fairness for themselves, one might expect few changes. Certainly, a city’s power to regulate the uses of property within its jurisdiction would be unimpaired. The exactions cases might, perhaps, have come out differently. It may not have been unfair to ask the Nollans to dedicate the lateral easement, or Florence Dolan the bike path.<sup>176</sup> A principled and consistent fairness based standard, focusing on the relation of the burden imposed by the exactions to the effects of the development, would advantage neither the developers nor the regulators.

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<sup>174</sup> See Michelman, supra note 173, at 1172 (arguing that fairness concerns can lead to a effective practical guidelines).

<sup>175</sup> Cf. STEPHEN BREYER, ACTIVE LIBERTY 129 (2005) (arguing, in the context of mandatory sentencing laws, that “rule-based clarity [is] not worth the constitutional price”).

<sup>176</sup> See Fenster, supra note 151, at 748-49; Ball & Reynolds, supra note 46, at 1557-58.

A standard explicitly grounded in the fairness principle would settle the main controversies surrounding the application of the present exactions doctrine. A court should certainly take into account the nature, whether legislative or individualized, of a disputed exaction, but it should do so in the context of an inquiry into the overall fairness of the exaction. The analysis should focus on the nature and magnitude of the exaction, a focus specifically mandated in Lingle for all manner of regulatory takings analyses.<sup>177</sup>

A fairness standard may be criticized as being overly idealistic and divorced from the rough-and-tumble realities of development negotiations and the very real needs of cities.<sup>178</sup> There is, of course, a risk that a clumsy application of such a blunt standard may sweep too broadly. But it is unacceptable to ignore the issue altogether on the theory that simply because developers and market rate buyers may be more capable of bearing the cost, they must bear it. To hold this would be to reduce regulatory takings doctrine to a comparison of bank account balances--an admirable simplification, perhaps, but also an

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<sup>177</sup> See Lingle v. Chevron U.S.A, Inc., 544 U.S. 528, 542 (2005) (proper regulatory takings analysis focuses on the "magnitude or character of the burden").

<sup>178</sup> See MALLACH, supra note 37, at 93.

abdication of the notion that a regulation could ever “go too far.”

B. As Applied to Inclusionary Zoning Generally

It is entirely possible to conceive of “run of the mill” IZ programs as being fair, and therefore protected under the proposed standard. In the first place, when projects subject to inclusionary requirements are granted benefits in the form of density bonuses or expedited processing of permits and licenses, it could be argued that there is no appreciable burden at all, and nothing to balance against the effects of the development. Even where, as will typically be the case, some cost must be absorbed by the project,<sup>179</sup> it does not immediately follow that the program is unfair. Where a city has taken upon itself an obligation to provide its “fair share” of affordable housing, as cities in New Jersey are mandated to do, it cannot be seen as unfair to pass some of that obligation on to developers.

Let us return to our opening question: who pays for affordable housing? A better starting point in the context of IZ is to ask whether there is any cost to be borne at all. First, consider a case where a developer opts to pay fees in lieu of the inclusionary requirement. When density bonuses are

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<sup>179</sup> Id. at 58 (“In the majority of cases, most probably some subsidy will be required.”).

available, the developer may be able to recoup these fees in the additional units afforded by the bonus.<sup>180</sup> Without a bonus or some other offsetting concession, it is clear that the in-lieu fee represents a very real cost to the developer. The magnitude of the fee and the presence or absence of bonuses will determine the cost.

The situation is much less clear when in-lieu fees are either not available or not used by the developer. The cost of the program is never manifested in the form of a check to the city. There appears, however, to be general agreement among supporters that IZ programs may impose burdens great enough that developers will not build at all.<sup>181</sup> In such cases the costs to the developer outweigh the expected gain. In any case, the cost or lack thereof of a given IZ program are tied directly to the specific parameters of that program. Although it is not meaningful to speak in general terms of the cost of IZ, it is

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<sup>180</sup> Kautz, supra note 4, at 986 n.91 ("[B]y providing adequate density bonuses, cities may design their programs so that there are no costs to anyone.").

<sup>181</sup> See, e.g., MALLACH, supra note 37, at 57-58 (noting that subsidies imposed on developers may be high enough to discourage development altogether); *Urban League of Essex County v. Mahwah Twp.*, 504 A.2d 66, 84 (N.J. Super. Ct. Law Div. 1984) (finding twenty percent to be the maximum mandatory set-aside under which development was realistic).

fair to say that the cost to the city imposing the project will be, in essence, zero.<sup>182</sup>

To the extent that an IZ program does impose costs, who pays? There are three possibilities.<sup>183</sup> First, the developer can pay out of his profits. Second, the costs can be passed "forward," to unsubsidized buyers from the developer. Third, the costs can be passed "backward" to landowners, as developers adjust the price they are willing to pay for land when their developments will be subject to affordability requirements. In theory, over the long run, the last factor should predominate.<sup>184</sup>

Even admitting that the development of market-rate housing does not itself create any need for additional affordable housing, and that the burdens imposed by an IZ program are not appreciably offset by any tangible benefits--admitting, that is,

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<sup>182</sup> Kautz, supra note 4, at 983 ("[F]rom a local agency standpoint, inclusionary zoning provides affordable housing at no public cost.").

<sup>183</sup> See MALLACH, supra note 37, at 88; see also Robert C. Ellickson, Inclusionary Housing Programs: Yet Another Misguided Urban Policy?, in INCLUSIONARY ZONING MOVES DOWNTOWN 85 (Dwight Merriam et al eds., 1985).

<sup>184</sup> MALLACH, supra note 37, at 88. However, in a location where much of the developable land is held by a few landowners, and where the landowner is the developer, this long-run factor may not come into play at all, and the cost of the program will be split between the developer and the market-rate purchasers. Although the extent to which this situation obtains on Maui today is unclear, land ownership in Hawai'i has traditionally been concentrated in a few large holdings. See Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 232-33 (1984) (permitting compelled leasehold to fee-simple conversion where eighteen owners held forty percent of the state's land).

a lack of "nexus"--such a program cannot be seen as inherently unfair. For better or worse, a fairness standard is a subjective standard, and the author finds himself unoffended by the notion that new developments must share to some degree in the general social obligation of providing housing for the community.

C. As Applied to Maui's IZ Ordinance

An inclusionary mandate, then, is not inherently unfair, and decisions upholding IZ programs against Fifth Amendment challenges<sup>185</sup> can be respected. But there is surely some point beyond which such a program ceases to be fair and tends to become nothing more than, to put it as bluntly as the U.S. Supreme Court, "an out-and-out plan of extortion."<sup>186</sup> Maui's ordinance lies beyond that point.

It does this not because it fails to guarantee any particular rate of return to the developers and their investors,<sup>187</sup> nor because the police power of Maui county does not permit the regulation of the uses of land in the county.

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<sup>185</sup> E.g., Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60 (Cal. Ct. App. 2001); Holmdel Builders Ass'n v. Twp. Of Holmdel, 583 A.2d 277 (N.J. 1990).

<sup>186</sup> Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (quoting J.E.D. Assocs. v. Atkinson, 432 A.2d 12, 14 (1981)).

<sup>187</sup> Cf. City of Napa, 108 Cal. Rptr. 2d at 66-67 (doubting that due process entitles developers to a "fair return" on their investment).

One can assume that Maui has the power to rezone land at will to prevent residential development entirely. Instead, although residential development remains a permitted use, it cannot be exploited unless a large contribution is made to the social welfare of the county. It is entirely unfair to impose a contribution of this magnitude on parties who, to speak plainly, bear no responsibility for the underlying problem. Or rather, the parties are responsible for solving the housing crisis to the same extent as every other citizen of Maui, and their contribution should be assessed in the same way: via taxes.

One objective measure of the fairness of a practice can be found in comparison with similar practices in other jurisdictions. As we have seen, Maui's IZ ordinance imposes a burden twice as great as that imposed even in cities with aggressive programs. Maui is unique in many ways, but nothing in Maui's unique situation justifies such a departure from accepted practices.

It is appropriate in general for the judiciary to defer to legislative determinations of need and appropriateness of social remedies, and to leave the political process room in which to operate.<sup>188</sup> But it is wrong to raise this tendency to

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<sup>188</sup> See *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 105 (Cal. 2002) (postulating that a city council enacting extortionate fees would soon be voted out of office).

the level of a fixed principle. The political situation on the ground may just as easily lead to abuses, which it is the prerogative of the courts to correct.<sup>189</sup> Maui, an island community subjected to and utterly dependent on a continual influx of outsiders, is at least arguably an environment in which such a situation could develop.<sup>190</sup> One may wonder whether there is any set-aside which, as a political matter, would go too far.<sup>191</sup>

#### V. CONCLUSION

No one should be satisfied with a standard the applicability of which in many common circumstances is so unclear as to render all parties uncertain as to their legal positions. It would be best if the Supreme Court clarified Dolan and ended debate on its applicability. But even if it should be held that the "rough proportionality" standard does not apply to legislative enactments such as Maui's Workforce

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<sup>189</sup> See Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004) (constituents may not only tolerate, but may actively support an uneven application of burdens).

<sup>190</sup> See, e.g., Ilima Loomis, Council Approves Housing Policy, MAUI NEWS, Nov. 4, 2006, at A1 (quoting a council member as supporting local residents against "millionaires who want to buy a piece of Maui").

<sup>191</sup> See, e.g., Charmaine Tavares, Editorial, Setting Affordable Housing at Eighty Percent will Bring Maui Back in Balance, MAUI NEWS, Sep. 13, 2006, at A8 (then Councilwoman, now Mayor, Charmaine Tavares, proposing that in order to meet Maui's housing needs, an eighty percent set-aside would be required).

Housing ordinance, such laws must remain subject to attack as unfair. Otherwise, even well-intentioned cities could be tempted by the political attractiveness of mandatory set-asides to an extent which stifles development altogether. At the extremes, the inclusionary aspect shades into its opposite.

There is no dispute that affordable housing is a problem on Maui. But the problem must be recognized for what it is: a community problem, the responsibility for which lies with the entire community. Developers must, in the nature of things, be centrally involved in efforts to combat the crisis. But loading upon developers and their purchasers significantly more than their fair share is to violate a central purpose of the Takings Clause: to ensure that those burdened for the benefit of society are compensated.

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