Inclusionary Zoning In California

Legal Questions And Issues

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Inclusionary Zoning In California: — Legal Questions And Issues

By David P. Lanferman

I. INTRODUCTION

The quest to increase the supply of affordable housing has been an important public policy goal in California for decades.[1] That goal, however, has proven to be elusive. Even during times of recession and depressed housing markets, housing in many parts of California has remained prohibitively expensive to moderate and lower income households.[2] State and local governments have experimented with a wide variety of approaches intended to address this problem.[3] One of the most prevalent of these is "inclusionary zoning."

"Inclusionary zoning" is the common term for a distinct response by some local governments to the affordable housing conundrum, requiring new residential developments to include a specified percentage of new homes to be provided for rent or sale on restricted terms deemed "affordable" to households of below-average or moderate incomes.[4] Advocates

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[1] *E.g.*, CAL. GOV'T CODE § 65913 (1980): "The Legislature finds and declares that there exists a severe shortage of affordable housing . . . ."; *see also Knight v. Hallstammar*, 29 Cal.3d 46, 52 (1981) ("The California Legislature has long recognized the dearth of affordable housing in this state," and has declared that addressing this shortage of affordable housing is a subject of "vital, statewide importance. . . .").

[2] *See, e.g.*, *Priced Out: Persistence of the Workforce Housing Gap in the San Francisco Bay Area* (Urban Land Institute), Feb. 2010, at 4 ("Housing in the S.F. Bay Area is persistently and pervasively unaffordable despite the recent housing and market downturn."); *see also* Deborah Myerson, *Is There Still a Need for Workforce Housing?*, LAND DEVELOPMENT, Fall 2009, at 35-40 (Despite a sharp drop in median housing prices (nearly 35 % in San Francisco metro area 2007-2008), there is still a significant need for subsidized workforce housing.); *California's Deepening Housing Crisis* (Cal. Dep't of Housing & Cmty. Dev.), Feb. 15, 2006 (showing a decrease from 2004 to 2005, from 19% to just 14%, in the percentage of households able to afford a median-priced detached home in California); *Locked Out 2004: California's Affordable Housing Crisis* (Cal. Dep't of Housing & Cmty. Dev.), Jan. 2004.

[3] By 1987, the Legislature had enacted "no less than 19 different sets of laws and programs [illustrating] efforts to both increase the housing available to Californians and to help make it affordable." *Wilson v. City of Laguna Beach*, 6 Cal. App. 4th 543, 545 (1992). See also CAL. GOV'T CODE § 65582.1, in which the Legislature listed 13 statutory "reforms and incentives to facilitate and expedite the construction of affordable housing," ranging from requiring "density bonus" incentives to developers who voluntarily include "affordable" units in their projects to requiring cities to allow "granny units" on residential lots.

[4] "An 'inclusionary zoning' or 'inclusionary housing' ordinance is one that requires a residential developer to set aside a specified percentage of new units for low or moderate income housing." (footnote continued)

champion inclusionary zoning as a means to increase the number of new affordable housing units in a community without increasing financial burdens on municipal budgets and without asking the community at large to provide the subsidies that might otherwise be necessary to make new homes "affordable."[5]

Although inclusionary zoning programs have been around since the 1970s, and have become increasingly widespread in recent years, the *legal* issues inherently raised by such programs have largely escaped substantive judicial scrutiny in California — until recently. This article examines some of those legal issues and questions, in light of recent court decisions. The intense and intriguing "public policy" debates over many aspects of inclusionary policies, such as their effectiveness and economic impact, are largely beyond the scope of this article.[6]

As used in this article, "inclusionary zoning" (aka "inclusionary housing" or "below market rate" housing) refers to local ordinances which require, as a *mandatory* condition of

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Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 HOFSTRA L. REV. 539, 540 (1995) (quoted in *Home Builder's Ass'n v. City of Napa*, 90 Cal. App. 4th 188, 192 n.1 (2001)).

[5] *See, e.g.*, Richard A. Judd & David Paul Rosen, *Inclusionary Housing in California: Creating Affordability Without Public Subsidy*, 2 A.B.A. J. OF AFFORDABLE HOUSING AND COMMUNITY. DEV. L. 4 (Fall 1992) [hereinafter Judd & Rosen]; *see also* Daniel R. Mandelker, *The Effects of Inclusionary Zoning of Local Housing Markets: Lessons from the San Francisco, Washington D.C., and Suburban Boston Areas*, A.L.I.-A.B.A. LAND USE INST., August 2008 ("Among supporters, IZ ["inclusionary zoning"] is heralded as an important evolution in affordable housing policy because it requires less direct public subsidy than traditional affordable housing programs . . . ."; Brian R. Lerman, *Mandatory Inclusionary Zoning – The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 386 (2006) ("The advantage of an inclusionary system to a community is that it helps provide affordable housing without a major public financial commitment."; Paul S. Quinn, Jr., *Inclusionary Zoning and Linkage: Land Use Planning Techniques in an Age of Scarce Public Resources*, 1 U. FLA. J. L. & PUB. POL'Y 21 (1987).

[6] Illustrations of these policy debates include, for example, *Inclusionary Zoning: Pro and Con*, 1 LAND USE FORUM 1 (Cal. CEB), Fall 1991, including "The Case for Inclusionary Zoning" by Marc Brown and Ann Harrington, and "The Case Against Inclusionary Zoning" by Robert Rivinius. See also Judd & Rosen, *supra* note 5; Jennifer M. Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L. J. 359 (1996), and articles in THE CALIFORNIA INCLUSIONARY HOUSING READER (Inst. for Local Self Gov't 2003). Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning*, 36 U.S.F. L. REV. 971, 974 (2002) ("While inclusionary zoning is not used widely when viewed on a national basis, it has attracted significant hostile commentary."); *e.g.*, Robert Ellickson, *The Irony of Inclusionary Zoning*, 54 S. CAL. L. REV. 1167 (1981) (arguing that such programs "are just another form of *exclusionary* practice," because they add to the cost of new housing development, indirectly driving up prices for existing homes as well in communities with such requirements, and eventually reduce the overall affordability of housing, hurting those they purport to help.").

development approval, that new market-rate residential developments (both for-rent and for-sale projects) provide a specified percentage of homes that will be priced or rent-restricted so as to be deemed affordable at targeted household income levels.[7] In a minority of the communities with some form of inclusionary housing, such programs are *voluntary*, based on incentives to developers (such as increased development densities, expedited permit processing, waivers or credits against development fees and other requirements, or other forms of preferential treatment) to provide affordable housing units in new projects. This incentive-based approach is also embodied in California housing legislation, requiring incentives and regulatory reforms to encourage voluntary production of more affordable housing.[8]

More frequently, however, inclusionary zoning ordinances *require*, as a condition of development approval, that some percentage of homes in new developments (typically in the range of 10-30%) be provided for purchase or rent by residents on terms specified by the local government to meet local "affordability" criteria.[9] The "inclusionary" units are usually required to be part of, and adhere to the same standards as, the rest of the project. Some programs, however, allow the affordable units to be provided offsite, and/or allow the payment of fees "in-lieu" of providing the required affordable units. Inclusionary units are typically subject to long-

[7] Prevailing usage of the term "inclusionary zoning" refers to mandatory programs, although it is sometimes used broadly to refer to both voluntary and mandatory programs, as well as other types of affordable housing policies. 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 22.7 (rev. Nov. 2010) ("Unlike incentive zoning, inclusionary zoning is neither voluntary nor activated by incentives."); *see also, e.g.*, Kautz, *supra*, note 6, at 1006-07; Cecily T. Talbert, Nadia L. Costa & Alison L. Krumbein, *Recent Developments in Inclusionary Zoning*, 38 URB. LAW. 701, 702 (2006); Morgan, *supra*, note 6, at 369. The term is increasingly used in other situations contemplating some form of mandated private subsidization. *E.g.*, Nadir S. Ahmed, *Inclusionary Seating: Application of the Principle of Inclusionary Zoning to Stadium Event Ticket Pricing*, 16 SPORTS L. J. 301 (2009).

[8] CAL. GOV'T CODE §§ 65582.1, 65915; *see also Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 826 (2007) (describing the "spirit" of the Density Bonus law, CAL. GOV'T CODE § 65915 that was enacted in 1979, "which [was] designed to encourage, even require, incentives to developers that construct affordable housing."); Gregory M. Fox & Barbara R. Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L. Q. 1015 (1976).

[9] "Affordability" of housing is typically defined by a ratio between housing costs per household and total household income, Morgan, *supra*, note 6 (not exceeding 30% of gross annual income). Most inclusionary programs restrict the prices or rents to designate units "affordable" for "moderate" and "below average" income households, as defined periodically by reference data from the relevant housing and employment markets. *California's Deepening Housing Crisis*, *supra* note 2; *see also* CAL. GOV'T CODE § 65915.

term recorded restrictions on the resale or other subsequent use of the premises, and may even allow the government to retain much of any appreciation in the homes.[10]

Such inclusionary zoning policies first appeared in a few California communities in the mid-1970s and reportedly are now found, in one form or another, in nearly one-third of the cities and counties in California.[11] The gradual increase in the number of jurisdictions adopting inclusionary zoning[12] has remarkably occurred without the benefit of legislation or any court precedent expressly validating this approach, and with only limited judicial analysis.

In 2009, however, two California appellate court decisions reviewed and invalidated significant portions of different inclusionary housing programs, calling some of the key legal assumptions underlying such mandates into question.[13] These decisions highlight the fact that many legal aspects of inclusionary zoning have not yet been analyzed, much less validated, in the California courts or elsewhere.[14]

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[10] INCLUSIONARY HOUSING IN CALIFORNIA: 30 YEARS OF INNOVATION 19-20 (Calif. Coalition for Rural Housing & Non-Profit Housing Ass'n. of N. Cal. 2003) (duration on resale restrictions range from 10 years to perpetuity); *see also* 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING, *supra* note 7.

[11] AFFORDABLE BY CHOICE: TRENDS IN CALIFORNIA INCLUSIONARY HOUSING PROGRAMS 5 (Non-Profit Housing Ass'n of N. California 2007) (reported that there were 170 cities and counties in California that had adopted some form of "inclusionary" policy in 2007 (mandatory, as well as voluntary and other variants, of inclusionary zoning)).

[12] It should also be noted, however, that some jurisdictions have recently reconsidered or rejected inclusionary zoning programs. *See, e.g.*, City of Folsom, Cal., Ordinance No. 1140 (Jan. 2011) (repealing city's "inclusionary housing ordinance.") Also, the County of Contra Costa substantially reduced its inclusionary program in December 2009, eliminating in lieu fees on rental projects and reducing in lieu fees on for-sale projects from $25,000 to $3,888 per unit (Board Res. No. 2009/559 (Dec. 2009), and the County of San Benito replaced its former mandatory inclusionary housing requirements with a voluntary program including more attractive density bonus incentives (San Benito County Ord. No. 866 (Dec. 2010). See also the *veto* by former Mayor Jerry Brown of a proposed inclusionary zoning ordinance in the City of Oakland in October, 2006: "Brown spoke strongly against inclusionary zoning, which he called an additional tax burden on property owners and developers. 'It means fewer houses, higher prices, and less development.'" (SF Chronicle, Nov. 1, 2006, at SFGate.com.)

[13] *Building Industry Ass'n. of Central Cal. v. City of Patterson*, 171 Cal. App. 4th 886 (2009) ("*Patterson*"); *Palmer/Sixth Street Properties, L.P. v. City of L.A.*, 175 Cal. App. 4th 1396 (2009) ("*Palmer*").

[14] New Jersey's "*Mt. Laurel* decisions" are often cited as providing judicial sanction for "inclusionary zoning." However, the focus of those cases was the obligation of *municipalities* under the state constitution to provide for low- and moderate-income housing, and to *allow* a developer to build low income housing. *See infra* note 47. These decisions led to a unique statewide approach for allocating affordable housing responsibilities among the state's townships (footnote continued)

II. INCLUSIONARY ZONING IN CALIFORNIA

A. Origins Of Mandatory Inclusionary Zoning

The origins of "inclusionary zoning" have been traced to the affluent suburbs of Washington, D.C.[15] In the first reported decision to consider a mandatory inclusionary zoning enactment, the Virginia Supreme Court invalidated Fairfax County's 1971 inclusionary ordinance as (1) an unlawful "taking" of private property without just compensation, and (2) in excess of the county's local authority.[16]

Despite that dubious legal debut, the concept of requiring new residential developments to provide privately subsidized housing units or fees in lieu appeared to have found an audience, particularly in communities that might otherwise be perceived as being economically or culturally "exclusive." Shortly after Fairfax County's ill-fated experiment, similar mandatory inclusionary ordinances were adopted in expensive new suburbs such as Montgomery County, Maryland, and Orange County, California, and in growth-resistant university towns such as Palo Alto, Berkeley, and Davis, California, and Cambridge, Massachusetts.[17]

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and municipalities by a state Council on Affordable Housing (COAH). COAH is legislatively-empowered to mandate that local governments include affordable housing in their communities. *See, e.g.*, Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mt. Laurel Cases*, 70 NEB. L. REV. 186 (1991) (describing the New Jersey cases, and questioning their constitutionality). This differs from the concept of "inclusionary zoning" as practiced in California, where it is used by local governments to mandate that individual development projects include various percentages of affordable housing units as conditions of approval. *See* Nico Calavita, Kenneth Grimes & Alan Mallach, *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 HOUSING POL'Y DEBATE 109 (1997) (programs in New Jersey and California "are quite dissimilar").

In any event, even New Jersey now appears to be making major changes to its "controversial affordable-housing rules," (M. Rayo, "N.J. Assembly Passes Affordable Housing Changes",, THE PHILADELPHIA INQUIRER, Dec. 14, 2010, at bigbuilderonline.com/industry-news-print.asp?sectionID=365&articleID=1465334), and recent court decisions have invalidated key portions of the latest "third round" of COAH fair share/inclusionary zoning practices. *In re Adoption of N.J.A. C. 5.96 and 5.97*, 6 A.3d 445 (2010) ("We conclude that the *Mount Laurel* doctrine, as articulated in *Mount Laurel II* and *Toll Bros*., and as codified by the FHA, requires municipalities to provide incentives to developers to construct affordable housing.").

[15] Marc T. Smith, Charles J. Delaney & Thomas Liou, *Inclusionary Housing Programs: Issues and Outcomes*, 25 REAL ESTATE L.J. 155, 156 (1996) ("The inclusionary technique was first used by Fairfax County, Virginia in 1971.") The Fairfax County inclusionary zoning ordinance required developers of more than 50 multifamily units to provide not less than 6% of the total dwelling units for "low income" occupants, and 9% for moderate income residents.

[16] *Board of Supervisors of Fairfax County v. DeGroff Enters.*, 198 S.E.2d 600 (1973).

[17] Smith, Delaney & Liou, *supra* note 14, at 157.

Early critics expressed concern about the legal validity of such inclusionary mandates.[18] For example, in 1978, the California Attorney General concluded that a county ordinance which required that new residential developments either set aside 15% of new housing units, or alternatively, pay "in lieu participation fees" for the purpose of providing housing for low and moderate income persons would be a "special tax" that would be invalid without two-thirds voter approval under Proposition 13.[19] Similarly, the Governor's Office of Planning and Research issued a publication in December 1982 describing and analyzing various types of financing for public facilities and amenities, which critically examined such "affordable housing" requirements as a dubious new form of "social exaction" that should be viewed with "caution."[20]

B. 1979: California's "Density Bonus" Legislation

In 1979, the California Legislature adopted a density bonus law to encourage the voluntary production of affordable housing,[21] and "to address the shortage of affordable housing in California."[22] These statutes, which require local governments to provide "regulatory concessions and incentives" to encourage affordable housing in their jurisdictions, have been regarded as the enabling legislation for voluntary inclusionary zoning programs in California.[23]

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[18] *See, e.g.*, Ellickson, *supra* note 6; Thomas Kleven, *Inclusionary Ordinances — Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 UCLA. L. REV. 1432 (1974).

[19] 62 Op. Cal. Atty. Gen. 673 (Nov. 1, 1979); CAL. CONST. art. XIIIA, § 4.

[20] PAYING THE PIPER: NEW WAYS TO PAY FOR PUBLIC INFRASTRUCTURE IN CALIFORNIA ch. 5 *"Exactions: Squeezing Developers,"* (CAL. OPR 1981) ("Exactions are the legal, legitimate equivalent of extortion. . . . Especially recently, local governments have used or at least flirted with using exactions in more novel ways. This novelty has three frontiers. . . . The third frontier is reached when localities ask developers to contribute things that are only conjecturally related to a proposed new subdivision, such as low income housing units to satisfy a community's general need. . . . In short, the jury is still out on the social exaction. Practitioners should use caution.")

[21] CAL. GOV'T CODE §§ 65915 *et seq.*

[22] *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 826. "One of these statutes, Section 65915, offers incentives to developers to include low-income housing in new construction projects. Although application of the statute can be complicated, its aim is fairly simple: When a developer agrees to construct a certain percentage of the units in a housing development for low or very-low-income households, or to construct a senior citizen housing development, the city or county must grant the developer one or more itemized concessions and a 'density bonus,' which allows the developer to increase the density of the development by a certain percentage above the maximum allowable limit under local zoning law. . . ." *Id.* at 824; *see also Wollmer v. City of Berkeley*, 179 Cal. App. 4th 953, 940-41 (2009) ("When a developer agrees to construct a certain percentage of the units in a housing development for low- or very-low-income households, . . . the city . . . must grant the developer one or more itemized concessions and a density bonus . . . .")

[23] Smith, Delaney & Liou, *supra* note 14, at 157.

However, they do not explicitly authorize, much less require, California cities and counties to enact mandatory inclusionary zoning policies.[24]

C. "Linkage Fees" On Non-Residential Developments For Affordable Housing

During the early 1980s, a new form of affordable housing exaction on commercial and industrial developments began to appear. Commonly referred to as "linkage" fees,[25] such exactions are based on the notion that there is a link or causal connection (also referred to as a "nexus") between new commercial and industrial development and an increased community need for additional workforce housing to accommodate the anticipated new employees to be generated by the new development.[26] Such linkage exactions have been distinguished from "inclusionary" mandates by this explicit "nexus-based" rationale.[27] Linkage fees and exactions are predicated upon showing a causal connection or reasonable relationship between the impacts of new development and the costs of providing additional affordable housing, in contrast to many inclusionary ordinances that dispense with any factual or nexus-based justification for whatever housing set-aside percentage is mandated.[28]

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[24] Judd & Rosen, *supra* note 5, at 5.

[25] "The concept of housing linkage evolved in the 1980s as a principled way to shift some of the burden of producing affordable rental housing away from government onto private developers." Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011, 1011 (1991); Quinn, *supra* note 5.

[26] *See, e.g.*, Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69 (1987); Jerold S. Kayden & Robt. Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 LAW & CONTEMP. PROBS. 69 (1987); John A. Henning, Jr., *Mitigating Price Effects with a Housing Linkage Fee*, 78 CAL. L. REV. 721, 722 (1990) ("Instituted in San Francisco, Boston, and a handful of other cities, linkage programs find support in studies that link development to an increased need for housing by showing that new workers increase the demand for, and thus the price of, existing housing.")

[27] Connors & High, *supra* note 26; Schukoske, *supra* note 25, at 1021; *see also* William W. Merrill & Robert K. Lincoln, *The Missing Link: Legal Issues and Implementation Strategies for Affordable Housing Linkage Fees and Fair Share Regulations*, 22 STETSON L. REV. 469, 475 (1993) ("Linkage fees do not fit neatly into an impact fee framework because local governments do not adopt a 'level of service' for affordable housing."; *cf.* Henning, *supra* note 26, at 722-23 (arguing that "unlike other development exactions, housing linkage programs are not valid exercises of the police power" because they do not "mitigate" for externalities or impacts caused by development but rather "are redistributive in nature, and act like taxes."

[28] *See Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) (emphasizing the importance of showing such a nexus to support "linkage"). The appellate court affirmed, 2-1, the validity of the city's requirement that new commercial development pay "affordable housing" fees according to a formula based on building size and type, based on the majority's finding that the city had provided an evidentiary nexus study which adequately (footnote continued)

In 1980, the City of Palo Alto reportedly became the first local government to impose linkage exactions on commercial development.[29] San Francisco introduced another type of affordable housing linkage program in 1980, under interim Planning Commission guidelines, which were eventually embodied in an ordinance in 1985 permanently establishing the City's "Office Affordable Housing Production Program." Large new office building developers were required either to build affordable housing units, or to rehabilitate existing affordable housing structures, or to pay a fee to the City's home mortgage assistance fund.[30]

D. 1980-2000: Slow Spread Of Inclusionary Programs

After the first wave of inclusionary experiments and linkage exactions in the 1970s and early 1980s, and the critical backlash, inclusionary zoning programs were gradually adopted in a slowly-growing minority of other California jurisdictions.[31] It was reported that 107 cities and counties had adopted some form of inclusionary zoning before 2001, which generally tended to be "high cost housing markets in the coastal counties," with little vacant land available for residential development.[32] Such communities were no longer experiencing large volumes of new

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demonstrated a rational nexus between new commercial/industrial development and the purported need for new affordable housing.

[29] Linda Dodd Major, *Linkage of Housing and Commercial Development: The Legal Issues*, 15 REAL ESTATE L.J. 328, 329 (1987) ("The Palo Alto program was based on an exactions rationale . . . . " *Id*. at 330. Palo Alto also was one of the first California cities to enact a form of mandatory inclusionary zoning requirements on residential developments, in 1974, locally referred to as the city's "Below Market Rate" housing policy. *Compare, e.g.*, CITY OF PALO ALTO CODE §§ 18.14.030 *et seq.* ("Below Market Rate Housing" program, no nexus study), *with id.* § 16.47 (Commercial housing linkage fee program, based on nexus study).

[30] San Francisco's OAHPP ordinance is described in *San Franciscans for Reasonable Growth v. City & County of San Francisco*, 209 Cal. App. 3d 1502, 1509-12 (1989). *See also* Susan R. Diamond, *The San Francisco Office/Housing Program: Social Policy Underwritten by Private Enterprise*, 7 HARV. ENVT'L. L. REV. 449 (1983); R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments*, 50 LAW & CONTEMP. PROBS. 5, 25-28 (comparing the linkage programs in San Francisco and Boston) (1987).

[31] "Approximately 35 cities and counties in California have adopted inclusionary housing programs through zoning ordinances or general plan policies in the past ten years." *Inclusionary Zoning: Pro and Con*, *supra* note 6. A survey in 1992 found only 52 cities and counties reporting some form of inclusionary policy or ordinance, including "voluntary" programs. Judd & Rosen, *supra* note 5. Another survey in 1994 reported 64 such programs. INCLUSIONARY HOUSING IN CALIFORNIA: 30 YEARS OF INNOVATION, *supra* note 10, at 4.

[32] INCLUSIONARY HOUSING IN CALIFORNIA: 30 YEARS OF INNOVATION, *supra* note 10, at 7; *see also* Robert Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA. L. REV. 983, 1020 (2010) ("The exaction of inclusionary housing from developers is most prevalent in states where housing is exceptionally expensive, such as California, Maryland, Massachusetts, and New Jersey.")

residential development, or were characterized by such high desirability to home builders ("a building permit at any price"), that their inclusionary housing demands apparently did not generate legal challenges.[33]

The *legality* of mandatory inclusionary zoning thus remained largely untested in California until the beginning of the new millennium. As pointed out in 1996: "[n]o court decisions in California have addressed a local government's right to impose inclusionary requirements."[34]

E. 2001: *Home Builders' Association v. City of Napa*

The first reported California appellate court decision involving mandatory inclusionary zoning was *Home Builders' Association v. City of Napa*.[35] However, since that case merely affirmed the dismissal of a facial challenge to the inclusionary ordinance for lack of ripeness, the decision never reached the issue as to the substantive validity or invalidity of inclusionary zoning mandates.[36]

Home Builders' Association nonetheless merits analysis. Napa's Inclusionary Zoning Ordinance ("IZO") was adopted in 1999, and generally required that 10% of all new residential units be affordable as defined in the IZO, but also offered alternatives such as a dedication of land, offsite construction of affordable units, or payment of a fee in lieu of contributing land or property to the program.[37] It also included a "savings clause" allowing project-specific appeals for relief from these requirements if the application of the requirements in a particular case might

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[33] While it may appear unusual that a practice that has been around for more than 30 years has not generated much litigation, such an absence of published case law should not be deemed tacit validation. As noted in a recent Hawaii case, involving a challenge to Maui's "residential workforce housing" policy, prior acquiescence or decisions not challenging a law "[do] not somehow insulate that law from legal challenges by others." *Kamaole Point Dev., L.P. v. County of Maui*, 573 F. Supp. 2d 1354, 1372 (D. Haw. 2008) (partially granting County motion summary judgment and rejecting facial equal protection and due process claims, but denying summary judgment on as-applied equal protection and due process claims).

[34] Smith, Delaney & Liou, *supra* note 14, at 157; *see also* Judd & Rosen, *supra* note 5, at p.4 ("Surprisingly, no reported court decision confirms California local government's authority to impose inclusionary requirements.")

[35] 90 Cal. App. 4th 188 (2001).

[36] *See, e.g.*, Note, 115 HARV. L. REV. 2058, 2061 (2002) (Since the *Napa* case was decided on grounds that the facial challenge was not "ripe" for review, "the court's analysis [in *Napa*] thus leaves the constitutionality of inclusionary zoning unsettled.") Another commentator also pointed out what *Napa* did not decide, and astutely anticipated the 2009 appellate decisions with the observation that the decision "did not entirely foreclose scrutiny of inclusionary ordinances as either exactions or rent control ordinances." Kautz, s*upra* note 6, at 976-77.

[37] Napa actually adopted two ordinances to address its "inclusionary" issues, which applied "to all development in the city, including residential and nonresidential." 90 Cal. App. 4th at 192.

be deemed to work a hardship or uncompensated taking. The complaint challenged the validity of the IZO on its face on grounds including Fifth Amendment takings and denial of due process.[38] The appellate court affirmed the trial court's order sustaining the City's demurrer, without leave to amend, largely on grounds that the facial challenge was not "ripe." The court emphasized the effect of the savings clause in the IZO, reserving the City's discretion to waive or modify "the exaction required by the ordinance" in any particular case: "Since City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking."[39]

The facial due process challenge similarly was not ripe for judicial review. Having already held that the claims were not ripe for judicial review, however, the decision also went on to refute arguments seeking "heightened scrutiny" under the United States Supreme Court decisions in *Nollan* and *Dolan.* [40] It also included *dicta* reflecting the court's assumption that the IZO requirements would substantially advance the important governmental interest of providing affordable housing.

Although the *Napa* case was decided on procedural grounds, and clearly did not reach or decide the substantive issue as to the constitutionality of inclusionary zoning, its *dicta* apparently created a perception among affordable housing advocates of a judicial "endorsement" of such inclusionary zoning mandates.[41] Accordingly, the trend toward adopting such mandates subsequently accelerated and spread.

F. 2002: *San Remo Hotel L.P. v. City & County of San Francisco*

Although *San Remo Hotel L.P. v. City & County of San Francisco* involved "affordable housing replacement fees" imposed under a "hotel conversion" ordinance ("HCO"),[42] it was the next major decision to shed light on inclusionary zoning issues. San Francisco's HCO required that the owner of property containing "residential" hotel rooms (a form of lower cost rental housing) who sought to demolish or convert such rooms to other uses (*e.g.*, tourist use) must replace them, or pay conversion "in lieu" fees according to a legislatively-established formula. The amount of the in lieu fees in the HCO was based on a detailed evidentiary study and analysis of the reasonable and proportionate costs of providing equivalent replacement housing space. Justice Werdegar's majority opinion for the California Supreme Court built on the Court's earlier, albeit divided, decision in *Ehrlich v. City of Culver City*,[43] and clarified the standards of

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[38] The court's analyses of other challenges based on the Mitigation Fee Act and Proposition 218 were not certified for publication, but the decision affirmed the dismissal of the entire complaint.

[39] 90 Cal. App. 4th at 194.

[40] *Nollan v. Calif. Coastal Comm*., 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

[41] *E.g.*, Talbert, Costa & Krumbein, *supra* note 7; Kautz, *supra* note 6.

[42] *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643 (2002).

[43] 12 Cal. 4th 854 (1996).

judicial review applicable to development exactions and fees.[44] The decision confirmed that the "heightened scrutiny" of *Nollan* and *Dolan* remains applicable to individualized or ad hoc exactions and fees, but held that the HCO legislatively established "a set formula" for calculation of housing replacement in lieu fees that did not involve any discretion as to the size or imposition of the fees.[45] The HCO fees were therefore "not subject to *Nollan/Dolan/Ehrlich* scrutiny."[46]

Significantly, however, the Court clarified that such legislatively established fees and exactions were not relegated to the lax, or deferential, "rational basis" scrutiny applicable to many other forms of local legislation. Rather, the Court cautioned that such "legislatively imposed development mitigation fees" are subject to distinct intermediate judicial scrutiny which entails "meaningful means-ends review": "*As a matter of both statutory and constitutional law, such [legislatively established fees of general application] must bear a reasonable relationship, in both intended use and amount to the deleterious public impact of the development*."[47] The concurring and dissenting opinion (by Justices Baxter and Chin) further explained that the majority opinion's formulation of the standard (above) "makes plain that *something more* is required than mere rational-basis review. . . ."[48]

G. 2006: *BIA v. City of San Diego*

In 2006, a California Superior Court held that the City of San Diego's inclusionary zoning ordinance was invalid, under a facial takings challenge.[49] Although San Diego defended its ordinance based on its superficial resemblance to the Napa ordinance in *Home Builder's Association*, the court found a fatal distinction: The San Diego "savings clause" permitted the City to waive its inclusionary requirements "only upon the determination of four separate findings," and thus, on its face the San Diego ordinance did "not provide for the granting of a waiver solely because of an absence of any reasonable relationship or nexus between the impact of the development and the inclusionary requirement." Since that limited waiver provision did not allow the City to avoid the unconstitutional application of the IZO, the court found that it violated the takings clause. San Diego soon thereafter amended its IZO to model its "savings" clause on the Napa IZO.

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[44] The Court noted that since it was merely reviewing a ruling on demurrer, "the burden of proof is not at issue." 12 Cal. 4th at 670 n.13.

[45] *Id.* at 668.

[46] *Id*. at 670.

[47] *Id.* at 671.

[48] *Id.* at 687.

[49] *Building Industry Ass'n. of San Diego County v. City of San Diego*, No. GIC817064, 2006 WL 1666822 (Cal. Super. Ct., May 24, 2006).

H. 2008: *Action Apartment Ass'n. v. City of Santa Monica*

A California Court of Appeal next rejected a facial challenge to an amended affordable housing ordinance, which required in-kind construction of the required "affordable" units.[50] The court viewed the amendment as a legislative act and rejected claims that the amendment was subject to "heightened scrutiny" under *Nollan* and *Dolan*.

I. 2009: *Building Industry Ass'n. of Central California v. City of Patterson*

Finally, in 2009, the first California appellate court decision to address the substance of an inclusionary zoning requirement after a trial on the merits[51] concluded that the City's failure to use appropriate methodology consistent with "the legal standards generally applicable to development fees" rendered its "affordable housing in lieu fees" invalid.[52] In *Building Industry Ass'n. v. City of Patterson*, the City's inclusionary in lieu fees were challenged as unjustified exactions,[53] and the Court of Appeal held that *San Remo Hotel* provided the applicable standard of judicial review. The Court held that the amount of the City's in lieu fee (nearly $21,000 per new home) was not "reasonably justified" as required by the terms of a development agreement and as required by prevailing California law generally applicable to development fees and exactions.

The City had amended its Housing Element in 2006 to adopt a new "inclusionary zoning" approach to provide affordable housing by requiring developers to provide a percentage of all new homes at prices affordable to various income levels or, alternatively, to pay an in lieu fee calculated in a purported "nexus study." The fee calculations were based on the local Regional Housing Needs Assessment (under the Housing Element Law) which had concluded that the City needed to plan for providing 642 new affordable homes in different income ranges over the

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[50] *Action Apartment Ass'n. v. City of Santa Monica*, 166 Cal. App. 4th 456 (2008), *cert. denied*.

[51] *Building Industry Ass'n. v. City of Patterson*, 171 Cal. App. 4th 886 (2009).

[52] "Every now and then, a piece of litigation blazes across the firmament, showing up on everyone's radar screen. *BIACC v. City of Patterson* is such a case." M. Berger, *Update on Impact Fees, Vested Rights, and Development Agreements*, A.L.I.-A.B.A. LAND USE INST., Aug. 2009, at 719 (analysis of *Patterson*, concluding that review of affordable housing in lieu fees as exactions is appropriate). See also, *Exactions or Extortions?* by Professors Roger Bernhardt and David Callies in 32 REAL PROPERTY LAW REPORTER 73 (Cal. CEB 2009) (describing significance of the exactions analysis applied in *Patterson*, and questioning the "nexus" between new residential development and "deleterious public impact" on affordable housing).

[53] Such an exactions-based challenge had been previously anticipated by at least two commentators who had expressed surprise that "none of the existing California inclusionary ordinances has been attacked on the basis that there is no nexus between construction of new market-rate housing and demand for additional affordable housing," despite the increased visibility of such arguments in light of *Nollan* and *Dolan*. Judd & Rosen, *supra* note 5, at 5; *see also* Kautz, *supra* note 6, at 995-96, 1007-08 (discussing the likelihood that inclusionary in-lieu fees would be viewed as exactions and subjected to "nexus" based judicial scrutiny).

planning horizon as its "fair share" for the region. However, the target of 642 new affordable homes was not related in any way to any particular impacts of new residential development in the City, nor to any identified needs for housing caused by the particular development project. The trial court questioned the magnitude of the fee increase, but deferred to the City's legislative action.

The court of appeal reversed the trial court's ruling, and directed the lower court to enter a new decision "that invalidates the $20,946 fee." The court held the record demonstrated that the City's reasoning purporting to justify the in lieu fee was flawed, –not that there was insufficient evidence to justify the fee. The underlying assumption of the "need" for new affordable housing was fatally flawed: "No connection is shown, . . . between this 642-unit figure and the need for affordable housing generated by new market rate development." Citing the "reasonable relationship" requirement of the Mitigation Fee Act,[54] the Court held that the fees were not "reasonably related to, and limited to" the City's costs of addressing adverse public impacts on affordable housing attributable to new development, as required by the legal standards generally applicable to such fees.

J. 2009: *Palmer/Sixth Street Properties v. City of Los Angeles*

Shortly after the *Patterson* decision was published in 2009, another court of appeal invalidated key provisions of the City of Los Angeles's inclusionary housing ordinance, holding that the ordinance was in conflict with — and preempted by — controlling State law, at least as to the City's attempt to regulate the initial rents charged on newly constructed rental units.[55] In *Palmer*, the City's inclusionary policy required that new multifamily developments either provide replacement of any existing affordable housing units removed by the project, on a one-for-one basis, or construct and dedicate a minimum of 15% of the total new units for occupancy by city-selected tenants at restricted, below-market, rents for at least 30 years (175 Cal.App.4th at 1401.) Alternatively, City policy provided an option of paying a fee in lieu of providing the rent-restricted homes, which in this case was more than $5.7 million (*Id*. at p. 1403.) The appellate court held that these inclusionary housing requirements were inconsistent with the Costa-Hawkins Rental Housing Act.[56] Enacted in 1995, the Costa-Hawkins Act provides that all residential landlords may, except in specified situations, establish the initial rental rate for dwelling units at the beginning of a new tenancy. The court held that not only were the conditions demanding dedication of 60 rent-controlled units in violation of the Act, but also that the alternative provisions for payment of in lieu fees were so "inextricably intertwined" with the

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[54] CAL. GOV'T CODE § 66001(b); *San Remo Hotel*, 27 Cal. 4th at 671. The Court in *Patterson* also distinguished the 2001 decision in *HBANC v. Napa*, 90 Cal.App.4th 188 (2001), and noted that it had preceded, and did not have the benefit of, the Supreme Court's 2002 decision in *San Remo Hotel*. (177 Cal.App.4th at 898, n. 14.) .

[55] *Palmer/Sixth Street Properties v. City of Los Angeles*, 175 Cal. App. 4th 1396,1410-1412 (2009).

[56] CAL. CIV. CODE §§ 1954.51-1954.535.

underlying mandates for dedication of inclusionary units as to also be inconsistent and preempted by the Costa-Hawkins Act.[57]

III. LEGAL ISSUES RAISED BY INCLUSIONARY ZONING

Mandatory inclusionary zoning raises a multitude of legal issues, many of which remain unresolved by the few California appellate decisions that have addressed inclusionary zoning. These legal issues include:

* What is the authority, if any, for local governments in California to impose mandatory inclusionary zoning on new developments?

* Is inclusionary zoning inconsistent with, or preempted by, State law?

* What is the nature of inclusionary zoning? Is it really "zoning"?

* Does mandatory inclusionary zoning impose an unlawful "exaction" on development?

* Is inclusionary zoning a form of "special tax"?

* Can the imposition of inclusionary zoning be viewed as a form of "taking"?

* Are other constitutional constraints (for example, equal protection, due process) implicated by inclusionary zoning mandates?

* How do inclusionary mandates on residential development differ from nexus-based "linkage" requirements on new commercial and industrial developments?

* If inclusionary zoning operates as a development exaction, what kind of "nexus" is required to justify such exactions?

We address each of these issues in turn.

A. Is There Legal Authority For "Inclusionary Zoning"?

The constitutional or statutory authority for local governments to require that developers or builders provide new homes for occupancy by other private parties at below market prices or rents has been questioned since the first appearance of mandatory "inclusionary zoning" policies.[58] However, neither the Legislature[59] nor the California courts[60] have squarely addressed the issue.

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[57] 175 Cal. App. 4th at 1412.

[58] *Bd. of Supervisors of Fairfax County v. De Groff*, 198 S.E.2d 600 (Va. 1973) (discussed in Part II,A, above); *Hochberg v. Zoning Comm'n of the Town of Washington*, 589 A.2d 889 (Conn.
(footnote continued)

The "police power" of municipalities[61] is well recognized as the source of authority for most types of "zoning" and other traditional land use regulations,[62] and is usually invoked as the implied authority for inclusionary zoning.[63] However, this police power to "regulate" is distinct from the power to tax[64] and the power to "take" by eminent domain.[65]

It is therefore critical to determine whether a particular "inclusionary zoning" enactment is a "land use regulation" or something else— such as a special tax, a taking, or a development exaction. The authority of local governments to exercise each of these powers is subject to different limitations, and thus different legal standards and procedures are applicable to each of these forms of governmental power.[66]

App. Ct. 1991) (zoning commission lacked authority to condition condominium permit on developer setting aside percentage of new units for sale below certain prices); *see also* Kleven, *supra* note 18, at 1494. More recently, the Supreme Court of Rhode Island unanimously held that a town did not have authority under state law, nor under its police power or home rule authority, to adopt an ordinance imposing 'inclusionary zoning in-lieu fees' on new development. *North End Realty, LLC v. Mattos*, 25 A.3d 527 (R.I., 2011).

[59] *Cf.* CAL. GOV'T CODE § 65589.8 (explaining that nothing in the Housing Element Law should be construed to expand or contract any authority of a local government to adopt an "inclusionary" type policy, and specifying that any local policy requiring the inclusion of a fixed percentage of affordable units must permit the developer to satisfy the requirement by constructing rental housing at affordable rents to be determined by the government). The validity of this provision is unsettled, in light of the Costa-Hawkins Act and the *Palmer v. Los Angeles* decision.

[60] See *supra* note 32 (noting the lack of definitive case law as to "authority" to impose inclusionary mandates).

[61] CAL. CONST. art. XI, § 7.

[62] *E.g.*, *DeVita v. County of Napa*, 9 Cal. 4th 763, 782 (1995).

[63] *E.g.*, Judd & Rosen, *supra* note 5, at 5 (analogizing inclusionary mandates to "accepted exercises of the zoning power, such as lot coverage, setback, parking, lot size, etc."); Lerman, *supra* note 5; Kautz, s*upra* note 6, at 976-90; Kleven, *supra* note 18, at 1504-12; *see also Inclusionary Zoning: Legal Issues* (Calif. Affordable Housing Law Project and Western Center on Law & Poverty, Dec. 2002.)

[64] *City of Cupertino v. City of San Jose*, 33 Cal. App. 4th 1671, 1677 (1995).

[65] *Mid-Way Cabinet Mfg. v. County of San Joaquin*, 257 Cal. App. 2d 181, 187-88 (1967).

[66] Henning, *supra* note 26, at 727 ("Because taxes and police power exactions are imposed under different constitutional and statutory frameworks, a municipality must distinguish carefully between the two — using taxes to redistribute wealth . . . and exactions to regulate burdens placed by an activity upon public entitlements and property. Housing linkage programs, however, have ignored this distinction, employing police-power means to achieve redistributive ends.")

Even if a mandatory inclusionary zoning policy were deemed to be a form of "regulation" under the police power, the scope and extent of municipal authority are still relevant inquiries. Although California courts view the police power as broad and flexible, it nevertheless has some limits — even in the area of local "affordable housing" regulations.[67] As *Palmer* recently illustrated, some aspects of inclusionary zoning may be found to be in conflict with controlling state law, and therefore beyond a city's authority.[68]

If not found to be authorized as a form of "land use regulation" under the police power, it may be difficult to identify explicit statutory authority for most types of mandatory inclusionary zoning in California.[69] Some advocates have argued that such statutory authority may be "inferred" from the Housing Element Law.[70] However, such arguments have been refuted by the Department of Housing and Community Development, the California agency charged with enforcement of that law, which has declared that nothing in the Housing Element Law requires local enactment of mandatory inclusionary programs.[71]

B. Is It "Zoning"?

It is frequently argued that inclusionary zoning requirements should be characterized as just another creative extension of the form of "land use regulation" known as zoning.[72] If so,

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[67] *E.g.*, *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 140-50 (1976) (local rent control initiative transgressed the limits of police power, and conflicted with state laws regulating evictions).

[68] *See also* CAL. GOV'T. CODE § 65581(c) (recognizing that each locality should have broad discretion in determining what measures to adopt in pursuit of the state housing goal, "provided that such determination is compatible with the state housing goal and regional housing goals.")

[69] There are distinct statutory schemes that include express requirements for the inclusion of affordable housing units in certain types of developments, e.g., redevelopment projects, CAL. HEALTH & SAFETY CODE § 33413, and housing developments in the coastal zone under the Mello Act. CAL. GOV'T. CODE § 65590; *cf. id.* § 65913.1 (part of the "Least Cost Zoning" law).

[70] CAL. GOV'T CODE §§ 65580 *et seq.*

[71] The California Department of Housing and Community Development ("HCD") currently considers most exactions and fees to be counterproductive "constraints" on housing development rather than essential components of a valid housing element. *See State Housing Element Law, Overview*, CAL. DEP'T OF HOUSING & CMTY. DEV. (2007). The Director of HCD has recently explained: "Neither State law nor Department policy requires the adoption of any local inclusionary ordinance in order to secure approval of a jurisdiction's housing element." Letter by Director of Cal. Dep't of Housing & Cmty. Dev. to Building Indus. Ass'n of Central Cal.(Aug. 29, 2009) (on file in Santa Clara County Super. Ct. Case No. CV 154134).

[72] *See supra* note 45. However, other scholarly analysts have long recognized clear distinctions between ordinary zoning and development exactions: "While zoning involves no more than negative prohibitions on certain uses of the owner's property, sub-division regulation often makes positive exactions of the owner. It may require him to construct streets or sewers, to convey a portion of his land to the municipality for public use, or to pay the equivalent of such construction or dedication in cash. It is submitted that this difference necessitates a more (footnote continued)

then more deferential standards of practice and judicial review may be appropriate. Local governments are deemed to have broad discretion in adopting legislative zoning measures under their "police power" authority, provided their actions are reasonable, compatible with regional welfare, and not arbitrary.[73]

No appellate court has determined, however, whether an "inclusionary zoning" program — with its requirements that builders designate, construct, and "contribute" (either to the local government itself, or to occupants selected by the local government) newly-built homes at restricted rents or purchase prices (or mandatory exactions of "fees" in lieu of providing such new homes) — is an authorized exercise of the zoning power.[74] "Zoning is a separation of the municipality into districts and the regulation of buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land."[75] "Zoning ordinances are concerned with the uses to which property may be put,"[76] "not its taking."[77] Under such established definitions, it may be a misnomer to refer to these mandates as zoning at all.

Inclusionary zoning ordinances typically do not regulate the "nature and extent of ***use***" of residentially zoned property, nor the manner of construction or use of structures. To the

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specific test of constitutionality, i.e., the legislation should not only be substantially related to the public health, safety, morals, or general welfare, but, insofar as dedications, activities, and expenditures are positively required of the subdivider, these requirements should be reasonably related to the subdivision in question and should concern types of improvement for which municipalities have generally been conceded the power to levy special taxes or assessments." John W. Reps & Jerry L. Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405, 407 (1963).

[73] *See supra* text accompanying notes 45-46; *Euclid v. City of Ambler*, 272 U.S. 365 (1926) (affirmed that zoning could be used to exclude "parasitic" apartments from single-family residential neighborhood); *Miller v. Board of Public Works*, 195 Cal. 477, 486 (1925); *cf., Mid-Way Cabinet*, 257 Cal. App. 2d at 188 (citing *Euclid*: "Zoning ordinances which are reasonable, not arbitrary in operation, have long been upheld as a legitimate exercise of the police power.")

[74] In *Southern Burlington County NAACP v. Mount Laurel*, 456 A.2d 390 (N.J. 1983) ("*Mt. Laurel II*"), the New Jersey Supreme Court viewed "inclusionary housing" ordinances as generally applicable land use regulations, within the zoning power of municipalities. This view may also have permeated the decision in *HBANC v. Napa*, 90 Cal.App.4th 188 (2001). It is not clear that this approach has been followed elsewhere. *Cf. Holmdel Builders Ass'n. v. Town of Holmdel*, 583 A.2d 277 (N.J. 1990) ("Because a mandatory set aside [of affordable housing] requires a developer to allocate a percentage of units for lower income housing, the requirement can be viewed as an exaction in kind, and, arguably, as a tax.")

[75] *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 780 (1965) (quoted in LONGTIN'S CALIFORNIA LAND USE § 3.02[1] (2d. ed., 1987)).

[76] *Cohn v. Bd. of Supervisors*, 135 Cal. App. 2d 180, 184 (1955).

[77] *Mid-Way Cabinets,* 259 Cal. App. 2d at 188.

contrary, such ordinances frequently require that the "affordable" dwelling units be interspersed with and blend into the rest of the development. Inclusionary zoning ordinances instead define and identify (by income levels) the residents who may occupy the designated "affordable housing" units. No appellate decision has approved the use of zoning for such purpose. Attempts to invoke the "zoning" power to control the characters or identities of the residents of a community, rather than the types of permissible land uses, have been met with judicial skepticism. As the Supreme Court has emphasized: "*In general, zoning ordinances are much less suspect when they focus on the use, than when they command inquiry into who are the users*."[78]

If an inclusionary mandate is found to be an exercise of the zoning power, does its application comply with the requirements[79] that zoning regulations be reasonable, not discriminatory or arbitrary, and not confiscatory?

C. Is It An "Exaction"?

The two 2009 appellate decisions, and the Supreme Court's approach in *San Remo Hotel*, support the argument that inclusionary zoning set-aside requirements are in the nature of exactions.[80] The United States Supreme Court has recognized the distinction between ordinary

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[78] *City of Santa Barbara v. Adamson*, 27 Cal.3d 123, 133 (1980) (*emphasis* by the Court); *see also Friends of Davis v. City of Davis*, 83 Cal. App. 4th 1004, 1013 (2000) (city properly interpreted its zoning ordinance as precluding consideration of the identity of proposed tenant as basis for permit approval).

[79] *E.g.*, *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 522 (1980) (zoning regulations must not be arbitrary and must be reasonably related to the public welfare; invalidating zoning that discriminated against particular property and prevented affordable housing development project).

[80] Many other analysts have concluded that inclusionary zoning mandates are "exactions." *See, e.g.*, Bernhardt & Callies, *supra* note 52; M. Berger, *supra* note 37; Michelle DaRosa, *When Are Affordable Housing Exactions an Unconstitutional Taking?*, 43 WILLAMETTE L. REV. 453, 489 (2007); Charles Delaney & Marc T. Smith, *Development Exactions: Winners and Losers*, 17 REAL EST. L. J. 195, 196 (1989) ("Exactions for the purpose of providing low and moderate income housing include inclusionary zoning in residential markets and linkage fees in office markets.") Berger, *supra* note 14 ("[T]he predominant remedy under *Mount Laurel* (New Jersey) has become the mandatory set-aside, itself a form of subdivision exaction."; *see also* R. Babcock, Foreword to *Exactions: A Controversial New Source for Municipal Funds*, 50 LAW & CONTEMP. PROBS. 1-4 (1987) (describing San Francisco's affordable housing "linkage" requirements on new office construction as "exactions"); Connors & High, *supra* note 26, at 69, 70 (analyzing Boston's mandatory "affordable housing" linkage ordinance as an "exaction"); Kleven, *supra* note 18; *see also*, LONGTIN'S CALIFORNIA LAND USE § 8.02[5], at p. 775 (2d ed. 1987) ("Current new and unusual types of exactions include: . . . . Exactions to relieve housing shortage problems" (referring to San Francisco's hotel conversion ordinance and Palo Alto's inclusionary zoning requirements)).

land use regulations (such as zoning), and development exactions.[81] The distinction is also recognized in California law.[82] Different constitutional standards and statutory processes apply to each.[83]

Ordinary land use regulations "regulate" or restrict the use of the applicant's property, while exactions are conditions of land use approval that divest the applicant of property interests or money.[84] As used in California land use contexts, exactions include a wide range of compelled "contributions" required as conditions of development approval,[85] and include mandated dedications or transfers of property (whether in fee or some lesser interest), reservations of interests in property, performance of work, contributions of improvements, and payments of money under various labels (taxes, assessments, charges, fees, etc.).[86]

Following the 2002 decision in *San Remo Hotel*, at least one insightful commentator questioned whether that decision might presage explicit judicial recognition of inclusionary zoning set-aside requirements as a form of land use exaction. "A closer question is whether inclusionary

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[81] *E.g.*, *Lingle v. Chevron*, 544 U.S. 528 (2005); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

[82] *See Exactions: Dedications and Development Impact Fees*, *in* CALIFORNIA LAND USE PRACTICE § 18.7 (CEB 2010) (noting that "exactions" are distinct "from ordinary land use restrictions"); *Fogarty v. City of Chico*, 148 Cal. App. 4th 537, 544 (2007) (distinguishing "exactions" — which "divest" an applicant of money or property — from land use "regulation").

[83] *See, e.g.*, *San Remo Hotel v. City & County of San Francisco*, 27 Cal.4th 643 (2002) ("reasonable relationship" standard of review applies to legislatively established exactions and fees); *Ehrlich v. Culver City*, 12 Cal.4th 854 (1996) (heightened scrutiny applies to ad hoc development exactions); Reps & Smith, *supra* note 71; *see also Fogarty v. City of Chico*, 148 Cal. App. 4th 537, 544 (2007) (the statutory "pay or perform under protest" procedures apply to "fees, dedications, and other exactions" pursuant to Government Code §§ 66020 and 66021, as distinct from standard zoning regulations); *Branciforte Heights v. City of Santa Cruz*, 138 Cal. App. 4th 914, 928 (2006) (applying Section 66020, rather than the Subdivision Map Act, to developer's action for review of credits against park impact fees).

[84] *Fogarty*, 148 Cal. App. 4th at 544.

[85] *See, e.g.*, *Grupe Dev. Co. v. Super. Ct.*, 4 Cal. 4th 911, 920 (1993); *Parks v. Watson*, 716 F.2d 646, 652-53 (9th Cir. 1983) (demand for conveyance of the applicant's geothermal wells as a condition of approval of a street vacation was invalid exaction); *Liberty v. Cal. Coastal Comm'n*, 113 Cal. App. 3d 491, 504 (1980) (demand for a deed restriction to provide free parking spaces for the public, beyond needs created by applicant, was an invalid exaction); *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 641 (1971) (park land in lieu fees).

[86] *Williams Comm'cns v. City of Riverside*, 114 Cal. App. 4th 642, 657-61 (2003) (adopting the dictionary definition of "exactions" as "compensation arbitrarily or wrongfully demanded," and holding city charges for permission to install communications cable in street trenches to be exactions, even though not "development fees"]; *Bright Dev. v. City of Tracy*, 20 Cal. App. 4th 783 (1993) (requirement for installation of offsite underground utilities treated as "exaction").

ordinances will be considered exactions subject to the 'reasonable relationship' test."[87] The author noted that the hotel conversion ordinance in *San Remo Hotel* did not impose an exaction for "public facilities," and offered the developer the choice of providing replacement rooms in kind or paying a fee in lieu, but the Supreme Court nevertheless treated them like "impact fees — a type of exaction — subject to the reasonable relationship test."

In 2009, the courts of appeal in *Patterson* and *Palmer* used similar analyses to invalidate inclusionary in lieu fees as unjustified exactions, and to treat in lieu fees as "inextricably intertwined" with the underlying housing exactions. The court of appeal in *Patterson* treated the city's "affordable housing in lieu fees" like exactions, and therefore subject to the "legal standards generally applicable to fees and exactions," as clarified in *San Remo Hotel*. The affordable housing fee requirements in *Patterson* had been challenged under the "pay under protest" procedure of Government Code section 66020(d), available to challenge "any fees, dedications, assessments or other exactions." The Court stated it did not need to decide whether the housing in lieu fees were "development fees" as defined in Government Code section 66000(a) to hold them subject to scrutiny under the *San Remo Hotel* standards.

Similarly, in *Palmer*, it was not necessary to classify the city's "affordable housing requirements" in order for the court of appeal to conclude that they were preempted by the Costa-Hawkins Act; and the court did not reach plaintiff's argument that the Mitigation Fee Act[88] prohibits a local agency from imposing an exaction unless it first makes statutorily required nexus determinations.[89] However, *Palmer* made it clear that a fee imposed in lieu of constructing affordable housing units is subject to the same legal standards and constraints as the underlying affordable housing requirement. Further, because the affordable housing requirement and the in lieu fee alternative were "inextricably intertwined," they were both equally invalid.

It is well established that development fees and fees in lieu of dedicating public improvements or community amenities are "exactions" under California law.[90] Under the reasoning of *Palmer*, therefore, it would seem logical that an inclusionary zoning program that imposes a fee in lieu of actually constructing and contributing new homes to the local affordable housing program is equally a form of exaction, subject to the standards of judicial review "generally applicable to" exactions.[91]

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[87] Kautz, *supra* note 6, at 1006-07. "If, then, an inclusionary ordinance is examined as a generally applicable mitigation fee, rather than as a land use regulation, it will need to have an adequate factual basis to demonstrate a 'reasonable relationship' between the ordinance's requirements and the impact of the development." *Id*. at 996.

[88] CAL. GOV'T CODE §§ 66000 *et seq.*

[89] See *supra* note 12.

[90] *San Remo Hotel*, 27 Cal. 4th 643 (2002); *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996).

[91] *Patterson*, 171 Cal. App. 4th at 898-99; *supra* Part II.C. See also the prescient 2002 Kautz article, *supra* note 59, at 1007 ("[I]nclusionary ordinances look like exactions when they allow developers to pay fees in lieu of actually constructing affordable units. If the inclusionary (footnote continued)

Most recently, in *Trinity Park v. City of Sunnyvale*,[92] the California Sixth Appellate District Court held that a city's requirement that a developer contribute 12.5% of the new homes in a project for sale at below market rate prices may be an "exaction," but still not be subject to the statutory pay under protest procedure of Government Code sections 66020 and 66021: "Not all exactions imposed by a public entity on a development project constitute an 'other exaction' within the meaning of section 66020 and 66021." The decision interpreted the protest statutes as being limited only to challenges to development "exactions" imposed for the purpose of "defraying all or a portion of the cost of public facilities related to the development project" or "to alleviate the effects of the development on the community."[93]

D. Is It A "Special Tax"?

Local enactments requiring a small segment of the community to bear the financial burden of providing affordable housing for the community at large have been viewed as "taxes" by some courts[94] and commentators.[95] For example, the Supreme Court of Washington invalidated a Seattle ordinance requiring owners of low-income housing either to replace such housing with other suitable space or to pay a fee to a housing replacement fund as a condition of approval for converting existing low-income housing to other use, holding the ordinance was "an

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requirement can be met by paying a fee — which is clearly an exaction — then perhaps the inclusionary requirement itself is an exaction.")

[92] No. H05573, 2011 WL 1054221 __ Cal. App. 4th __ (Cal. Ct. App. Mar. 24, 2011).

[93] The court took judicial notice of the declaration of "purpose" in the city's below market rate housing ordinance, and held that Sunnyvale's version of inclusionary zoning did not impose exactions for either of the purposes impliedly incorporated in the "pay-or-perform under protest" procedure of sections 66020 and 66021. The court emphasized that its decision was "limited to the facts of this case," and did not address the practical challenges that appear likely to arise from the apparent judicial addition of a new requirement for an evidentiary determination as to the "purpose" behind the various types of development exactions, in order to determine whether the particular exaction may be subject to protest and review under sections 66020 and 66021.

[94] *E.g.*, *Pennell v. City of San Jose*, 42 Cal. 3d 365, 375-76 (1986) (J. Mosk, dissenting) (arguing that a City rent control ordinance which required consideration of the "hardship" to low income tenants of any rent increase exceeding 8% per year was unconstitutional, since it made the landlord's return subject to the arbitrary whims of the financial position of their respective tenants) ("Satisfying the housing needs of persons in lower economic strata is necessary, but the issue is whether that obligation can be thrust upon private property owners rather than remain a responsibility of society as a whole if it was tax supported government agencies. . . . I am convinced this scheme is unconstitutional. . . . The tragic aspect of this provision is that it will likely prove detrimental to the very interests it seeks to protect.")

[95] *See also* Henning, *supra* note 26 (arguing that affordable housing linkage exactions are not impact fees, because they do not "mitigate" impacts shown to be caused by new developments, but rather, are a means of redistributing resources to less affluent residents, which is otherwise a social goal normally addressed by means of taxation on the community at large).

unconstitutional tax on a limited number of property owners."[96] The court rejected the City's argument that it does not require direct payment of money to the city: "Requiring a developer either to construct low income housing or to 'contribute' to a fund for such housing gives the developer the option of paying a tax in kind or in money."[97]

The California Attorney General published an opinion in November 1979 concluding that the imposition of fees in lieu of requiring a new development project to contribute affordable housing units would appear to constitute a "special tax" requiring super-majority voter approval: "An in lieu fee imposed by a county as a condition for issuance of a building permit for the purpose of providing housing for low and moderate income persons is a 'special tax' within the meaning of §4 of Article XIIIA of the California Constitution [which] requires approval of two-thirds of the qualified electors. . . ."[98] To be sure, one California court rejected a claim that the hotel conversion ordinance, requiring payment of fees in lieu of constructing replacement affordable housing units, imposed a "tax" because the fees did not exceed the reasonable cost of providing replacement housing and the fees were not levied for general revenue purposes.[99]

Subsequent voter initiatives — for example, Proposition 62 and Proposition 218 — have broadened the definition of "taxes" to include many types of charges imposed by local governments. The distinction between valid "regulatory fees" and "special taxes" that are invalid without the requisite voter approval has been discussed in several California appellate decisions.[100]

The approval of Proposition 26 in the November 2010 elections may add a new series of considerations to the "tax vs. fee" paradigm. Proposition 26 amended Section 1 of Article XIIIA of the California Constitution to define "any levy, charge or exaction imposed by a local government" as a "tax," unless it falls into one of the few express exceptions, including "a charge imposed as a condition of property development." However, if a city or county invokes this exception for its inclusionary zoning fees or charges to avoid the need for seeking voter approval, does it weaken the argument that such inclusionary requirements are simply "zoning regulations"?

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[96] *San Telmo Assocs. v. City of Seattle*, 735 P.2d 673 (Wash. 1987).

[97] *Id*. at 675.

[98] 62 Ops Cal.Atty.Gen. 673, *supra* note 19.

[99] *Terminal Plaza Corp. v. City & County of San Francisco*, 177 Cal. App. 3d 892 (1986).

[100] *See, e.g.*, *Beutz v. City of San Diego*, 184 Cal. App. 4th 1516 (2010) (rental ordinance administrative "fee" was actually an invalid special tax); *see also Holmdel Builders Ass'n*, 583 A.2d 277 (N.J. 1990) observing that inclusionary set asides could be viewed "as a tax"); *San Telmo Assocs.*,735 P.2d at 675 (invalidating ordinance imposing conditions or fees on conversion of low income housing as an illegal tax) ("Requiring a developer either to construct low income housing or 'contribute' to a fund for such housing gives the developer the option of paying a tax in kind or in money.").

E. Are Inclusionary In Lieu Fees "Development Fees"?

The Mitigation Fee Act[101] includes a statutory definition of "development fees" and requires local governments to make a detailed series of evidence-based determinations regarding the relationships between proposed fees and public needs attributable to new development to establish or impose valid development fees.[102] Section 66000(a) defines "fees" as monetary exactions, other than taxes and other exceptions, charged for the purpose of defraying the costs of "public facilities" related to the development project. "Public facilities" in turn are defined in section 66000(d) as including "public improvements, public services, and community amenities." Even if privately-occupied or privately-owned "affordable housing" units are not considered "public improvements," such affordable housing programs are often portrayed as providing a form of "community amenity."

If so, are fees imposed in lieu of providing such affordable housing community amenities subject to the Mitigation Fee Act? As noted above, this argument has been raised in several appellate cases, but the courts have not yet squarely addressed and answered the question.[103] In *Patterson*, the court of appeal acknowledged the issue, but noted that it expressed no opinion on whether the Mitigation Fee Act applies to affordable housing in lieu fees.[104]

Could local governments comply with the evidentiary requirements of the Act? For example, section 66001(g) prohibits the imposition of development fees to cure existing deficiencies of facilities, services, or amenities. Arguably, communities would need to establish a baseline as to their existing "level of service" for affordable housing, identify any existing shortfalls or deficiencies in various income-affordability ranges, and limit the amount of inclusionary fees or exactions on new development to the incremental additional needs for affordable housing shown to be attributable to new development.[105]

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[101] CAL. GOV'T CODE §§ 66000 *et seq.*

[102] *Ehrlich v. Culver City*, 12 Cal. 4th 854, 865-70.

[103] *HBANC v. City of Napa*, 90 Cal.App.4th 188 (2001); *Building Industry Ass'n. of Central Cal. v. City of Patterson*, 171 Cal. App. 4th 886 (2009) ("*Patterson*"); *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396 (2009) ("*Palmer*").

[104] 177 Cal.App.4th at 898 n.13.

[105] J. Michael Marshall & Mark A. Rothenberg, *An Analysis of Affordable/Work-Force Housing Initiatives and Their Legality in the State of Florida*, 82 FLA. B.J., Aug. 2008, at 53 (contrasting the difficulty of "adopting a level of service for affordable housing" against the established practice of setting such level of service standards when calculating development fees for water and other traditional municipal services); *see also Warmington Old Town Assocs. v. Tustin Unified School Dist.*, 101 Cal. App. 4th 840 (2002); *Bixel Assocs. v. City of Los Angeles*, 216 Cal. App. 3d 1208 (1989).

F. Takings, Equal Protection, And Due Process

While ensuring the availability of affordable housing is recognized as a laudable governmental purpose, "the means by which a governmental entity achieves that purpose is circumscribed by not only the due process clause of the Fifth and Fourteenth Amendments to the U. S. Constitution, but also the takings clause of the Fifth Amendment . . . ."[106] The question of whether the cost of providing a community "good" (more affordable housing) is being disproportionately imposed on a few residential developers or market-rate homebuyers could be raised either in a constitutional takings context, or in connection with an equal protection claim.[107]

The first case where the United States sought review of mandatory inclusionary zoning, *Fairfax County v. DeGroff Enterprises*, held that inclusionary zoning effected an unconstitutional "taking." The first California appellate case involving inclusionary zoning, *HBANC v. City of Napa*, rejected a "facial takings" challenge, albeit on ripeness grounds rather than on the substantive merits of the ordinance. It has been observed that the "constitutional issue" posed by such ordinances mandating affordable housing set-asides has not been resolved in California. Following the *Napa* decision, most, if not all inclusionary ordinances contain a similar savings clause that effectively precludes a "facial takings" challenge. However, the question remains whether a constitutional challenge may be based on an "as-applied" claim that the application of inclusionary housing requirements to a particular project may effect a "taking" without just compensation, in violation of the Fifth Amendment (and California Constitution Article I, section 19).[108]

The 2005 United States Supreme Court decision in *Lingle v. Chevron*,[109] explained that traditional "takings" analysis is distinct from the legal analysis applicable "in the special case of exactions," and also arguably revived substantive due process as a distinct basis for review of land use regulations.[110] Inclusionary zoning may well be challenged on those constitutional

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[106] *Santa Monica Beach, Ltd. v. Super. Ct.*, 19 Cal. 4th 952, 986 (1999) (J. Baxter, dissenting).

[107] *See, e.g.*, *152 Valparaiso Associates v. City of Cotati*, 56 Cal. App. 4th 378, 386 (1997) ("It is not only unconstitutional, it is also — appellants suggest — futile and self-defeating to attempt to finance relief for the poor by regulatory exactions on local owners of private rental property."); *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 773 (1997) (a regulation may effect a 'taking' even though it "leaves the property owner some economically viable use of his property."). "Given that the affordable housing problem already exists, is it legal (let alone equitable) to require the developer, and ultimately the prospective purchaser of other market-rate housing in the development to pay to address an existing problem?" Marshall & Rothenberg, *supra* note 105.

[108] *Cf. McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008).

[109] 544 U.S. 528.

[110] *See Crown Point Dev. v. City of Sun Valley*, 506 F.3d 851, 854-55 (9th Cir. 2007) (acknowledging *Lingle*'s restoration of substantive due process as a distinct basis for possible challenge to land use actions); James S. Burling & Graham Owen, *The Implications of Lingle on*
(footnote continued)

grounds as well. To the extent that cities or counties specify the percentage of affordable homes to be provided under their inclusionary mandates without nexus-type analyses or evidentiary justifications, are such programs open to charges of being "arbitrary" or "unreasonable," and subject to challenge on due process grounds?[111]

G. State Preemption

Palmer held that at least some aspects of local inclusionary zoning policies (initial rents on new rental units) may be found to be inconsistent with, and preempted by, controlling State law addressing these housing issues. The extent of state law preemption over local housing initiatives continues to be tested.[112]

At least two other state courts have similarly held that state law preempted local attempts to impose IZO requirements. In *Town of Telluride v. Lot Thirty-Four Venture LLC*,[113] the town's "affordable housing mitigation" ordinance required property owners to create affordable housing for at least 40% of the employees generated by new development, set low base rental rates, and controlled the ensuing rental rates on the new housing created under the ordinance. The Colorado Supreme Court held that the ordinance was a form of "rent control" which was inconsistent with state law prohibiting municipalities from enacting rent control over private residential property. Similarly, in *Apartment Ass'n. of So. Central Wisconsin v. City of Madison*, the Wisconsin Court of Appeals held that a local inclusionary housing ordinance, which required that developments with 10 or more rental dwelling units provide at least 15% of the total units subject to restricted rental limits, was preempted by a state statute prohibiting local governments from regulating residential rents.[114]

Inclusionary Zoning and Other Legislative and Monetary Exactions, 28 STAN. ENVTL. L. J. 397 (2009).

[111] A recent federal court decision in Hawaii illustrates the many due process and equal protection issues inherent in inclusionary zoning. *Kamaole Point Dev., L.P. v. County of Maui*, 573 F. Supp. 2d 1354, 1372 (D. Haw. 2008) (rejecting facial equal protection and due process challenges to a county's "workforce housing" ordinance, but finding triable issues of fact on as-applied equal protection and due process claims); *see also* Joseph A. Dane, *Maui's Residential Workforce Housing Policy: Finding the Boundaries of Inclusionary Zoning*, 30 U. HAW. L. REV. 447 (2008).

[112] Costa-Hawkins Act, CAL. CIV. CODE §§ 1954.50 *et seq.*; *cf.* Housing Element Law, CAL. GOV'T. CODE § 65584; Density Bonus statutes, CAL. GOV'T. CODE § 65915 *et seq.*; State Planning and Zoning Code, CAL. GOV'T. CODE §§ 65000 *et seq.*; Nadia L. Mallakh, *Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs?*, 89 CAL. L. REV. 1847 (2001).

[113] 3 P.3d 30 (Colo. 2000).

[114] 722 N.W.2d 614 (Wisc. App. Ct. 2006).

IV. CONCLUSION

For nearly four decades, the public policy questions raised by mandatory inclusionary zoning have generated heated debates over a myriad of issues, ranging from the economic impacts of such policies on market rate housing, to the supply of affordable housing, to the fairness and social justice of privatizing housing subsidies. Courts and legislatures, however, have provided little in the way of authority, limitation, or direction regarding the lawful application of the distinctive private subsidization of affordable housing known as "inclusionary zoning." Even the significant appellate decisions in 2009 in *Patterson* and *Palmer* leave many critical aspects of inclusionary zoning unresolved. Some jurisdictions appear to have suspended their inclusionary rules on for-rent housing following *Palmer*, waiting for a legislative response. And, following *Patterson*, some cities and consultants are trying to see if a credible nexus justification can be created for inclusionary housing exactions on new residential development. Such unresolved legal questions, combined with the pressure of overtaxed public revenues and the tightened economics of the new housing marketplace, will likely result in more intense scrutiny of all governmental conditions of approval for new residential development — including inclusionary zoning mandates.[115]

[115] "Mandatory inclusionary zoning programs will face considerable judicial scrutiny and raise a panoply of questions that most local governments are not prepared to answer." *E.g.*, Mandelker, *supra* note 5 ("In spite of its popularity among housing advocates and policymakers and steady opposition from critics, we know relatively little about the effects of inclusionary zoning policies."); Marshall & Rothenberg, *supra* note 105.