Do Inclusionary Zoning Laws Violate *Nollan, Dolan,* and the Doctrine of Unconstitutional Conditions?

*By James S. Burling**

In most parts of the country, there is a shortage of low-income housing. Local governments realize that more must be made available. And, for some reason, it must be new.[1] The problem with alleviating a shortage of new low-income housing is that someone has to build it. But since government does not have a legacy of success in building public housing, taxpayers are reluctant to give more money for the construction of government housing projects. Hence, government planners have turned to inclusionary zoning.

In a nutshell, inclusionary zoning says that if a developer builds somewhere between five and ten homes for sale at market rates the builder has to build one that is "affordable" to the "workforce."[2] Or pay the local housing commissariat for a subsidized housing fund.

Who picks up the tab for the subsidized housing? Proponents suggest the builders or landowners will eat the costs. Such burden shifting, they claim, is only fair because permission to build requires a quid pro quo. Alternatively, advocates argue that the construction of market rate housing creates a need for more "affordable" housing units—either because land used for market rate housing will no longer be available for "workforce" housing, or because the families who dwell in market rate housing create a need for low-income service sector jobs such as gardeners, beauticians, and the people who clean government buildings.

The idea seems unlikely to fare well economically. Whether courts will find it unconstitutional as well is an open question. The Supreme Court has on several occasions, first in *Nollan v. California Coastal Commission*, held that the Takings Clause prohibits government from demanding exactions from builders unless the exaction served to relieve some actual harm caused by the development.[3] Moreover, in *Dolan v. City of Tigard*, the Court said the government proposing the exaction had the duty to demonstrate on an individualized basis that the exaction is "roughly proportional" to burdens created by the development.[4] Property owners and planners, however, do not agree on whether *Nollan* and *Dolan* applies to inclusionary zoning. There are disagreements as to whether these cases apply to legislatively mandated formulae rather than individualized exactions, and arguments over the degree of scrutiny courts should apply in determining whether proffered justifications for inclusionary zoning meet constitutional standards. And in the post-*Lingle* world there are disputes about the confluence of takings doctrine, substantive due process, and the doctrine of unconstitutional conditions.[5] Finally, there are uncertainties over the existence in some inclusionary zoning jurisdiction of "sweeteners" that take the form of density bonuses and the like. Are these valid forms of quid pro quo that avoid the constitutional infirmities, or are they illusory in that they rob out of one pocket in order to compensate the other?

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Despite the growth of inclusionary zoning laws, there has not been an accompanying rush by developers to bring constitutional challenges. Developers are, by and large, pragmatic business entrepreneurs. When confronted with what they perceive to be an obnoxious inclusionary zoning ordinance, they often see two stark choices. They may fight the exaction as being contrary to their constitutional rights. But such an endeavor may seem quixotic and insane. To bring such a challenge, a developer, in many jurisdictions, might have to forego the developing project while the dispute is being played out in the courts. The developer may suspect that courts likely to hear the dispute are not particularly hospitable to property rights claims. Moreover, most courts operate in a universe in which time means nothing; to developers, time is money. The developer may also harbor a well-grounded fear that there may be a direct relationship between the seriousness of the challenge and the time it will take to get other project permits approved for the foreseeable future. For these reasons, the second choice seen by developers may seem much more palatable: pay the freight, pass on the costs to the families who end up buying the homes (either through higher prices or reduced quality), and simply shut up. Developers almost universally choose the second alternative.

I. Exactions—From *Nollan* to *Lingle*

A. The Origins in Nollan and Dolan

The ability to make reasonable use of private property is a fundamentally important right that may not be burdened by unreasonable regulatory constraints. Two Supreme Court cases in particular illustrate this principle.

In *Nollan v. California Coastal Commission*, the Supreme Court was confronted with the California Coastal Commission's practice of demanding that landowners dedicate property for access to and along the coast in exchange for building permits.[6] In *Nollan*, the Commission demanded that the Nollans dedicate approximately one third of their property in order to be given a permit to replace a one-story home with a two-story home. The dedication would have given the public the right to cross back and forth along the dedicated property parallel to the ocean. The Commission justified the demand as a way of remedying the loss of ocean view of travelers along Highway 1, a loss the Commission characterized as a "psychological barrier."[7]

The Court was not persuaded and called this demand for an exaction an "out-an-out plan for extortion."[8] In doing so the Court established that a condition of this nature can be imposed only if certain conditions are present. First, the impact caused by the proposed development must be severe enough to justify a denial of the permit in the first place (a denial that would not itself rise to the level of a taking.) Second, a condition may instead be imposed so long as the exaction will actually serve to ameliorate the adverse impact which could have justified the denial of the permit in the first place.[9] Because forcing the Nollans to dedicate property parallel to the beach would do

nothing to ameliorate the lost view of drivers along Highway 1, the exaction was seen to lack the required nexus.

This standard was further refined in *Dolan v. City of Tigard*, where the owner of a hardware and plumbing store was told to dedicate and build a bicycle trail and give up land for public access in exchange for a permit to expand the business.[10] The justification for these demands was to ameliorate the impact of the expansion on traffic and flooding. The Supreme Court held that while there may be some nexus, Tigard had a duty to demonstrate that the exactions were "roughly proportional" to the impacts caused by the development.[11] The requirements of a nexus described in *Nollan* and the need for the government agency to prove rough proportionality in *Dolan* has been described as calling for "heightened scrutiny" of exactions.

B. Monetary and Legislative Exactions— Conflicts in the State and Lower Federal Courts

After *Nollan* and *Dolan* it should be plain that government cannot condition the exercise of the right to put property to economically beneficial use upon the forced payment of land, money, or labor when those exactions are not closely related to impacts caused by the use of the underlying property. What remains in some debate is whether there is a distinction between exactions of land and money, and between exactions imposed as part of an adjudicatory permit process and those enacted pursuant to a legislative process. In *Ehrlich v. City of Culver City*, for example, the California Supreme Court held that *Nollan* and *Dolan* applied heightened scrutiny to monetary exactions, but not to legislatively adopted exactions.[12]

Legal scholars, however, have opined that legislative enactments restricting property rights deserve heightened scrutiny. For example, Professor Doug Kmiec suggests that heightened scrutiny is appropriate for legislative enactments imposing public burdens on specific private uses.[13] Other scholars have noted the conflicts that exist among the lower federal and state courts, with some courts treating exactions very differently according to whether they are legislatively adopted or not, and whether the exaction is for money or land.[14]

The holdings of several states and the First Circuit confirm that generally applicable legislative enactments are subject to the standards established in *Nollan* and *Dolan*.

New York: Before *Dolan* was decided, but after *Nollan*, the New York Court of Appeals struck down a permit fee imposed on owners of single room occupancy hotels who wished to change the use of their property. In *Seawall Associates v. City of New York*,[15] the fee was designed to subsidize the City's low-income housing program and had been imposed by legislation and, as such, was uniformly applied[16]. The court focused on the lack of a nexus between the complex problem of low-income housing in New York City and the landowners' use of their property for other purposes[17], stating that "[s]uch a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem." The same court also struck down legislatively enacted rent control ordinances as being violative of the Takings Clause in *Manocherian v. Lenox Hill Hospital*.[18] That decision relied upon *Nollan* and *Dolan*.

Ohio: Home Builders Association of Dayton v. City of Beavercreek,[19] applied a "middle level of scrutiny" to legislatively adopted transportation impact fees imposed on subdivision approvals. The Court reasoned that a test that looks at both the need for the transportation project and the fairness of imposing the cost on developers is a test that will

> adequately balance the interests of local governments with those of property owners. The first prong of the test decides whether the ordinance is an appropriate method to address the city's stated interests, and the second prong assures that the city and developers are paying their proportionate share of the cost of new construction.[20]

The court upheld the fees in that case after noting that the trial court "reviewed volumes of evidence" and made the requisite factual findings regarding the necessity for the road projects and the impacts to be caused by subdivision development.[21]

Oregon: Citing to state supreme court precedent, the Oregon Court of Appeals has held in *J.C. Reeves Corp. v. Clackamas County* that " 'the character of the [condition] remains the type that is subject to the analysis in *Dolan*' whether it is legislatively required or a case-specific formulation.[22] The nature, not the source, of the imposition is what matters."[23]

Washington: In *Sparks v. Douglas County*,[24] the Washington Supreme Court applied *Dolan* to a legislatively adopted road dedication exaction. It upheld the exaction because there was evidence showing that the exaction was roughly proportional to the impacts of development. In *Trimen Development Co. v. King County,*[25] a developer had been given the choice of dedicating or reserving land for open space or paying a fee in lieu of such dedication. The court properly recognized the applicability of the *Dolan* test to these legislatively imposed fees.[26] The fees were upheld, incidentally, as the court found evidence to support the conclusion that the fees were "reasonably necessary as a direct result of Trimen's proposed development."[27]

Illinois: The Illinois Supreme Court in *Northern Illinois Home Builders Association, Inc. v. County of Du Page*,[28] applied *Dolan* to a legislatively enacted transportation district and impact fee enabling act. (The Court then proceeded to apply its even more exacting "specifically and uniquely attributable" rule in striking down part of the statute.) Similarly, an Illinois appellate court agreed in *Amoco Oil Co. v. Village of Schaumburg*[29] that

> [a]lthough not binding as precedent, we find Justice Thomas' comments [in *Parking Association of Georgia*] particularly persuasive and consonant with the rationale underlying *Dolan* and similar cases. Certainly, a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property.[30]

First Circuit: In *City of Portsmouth v. Schlesinger*,[31] the court reviewed a low-income housing fee that had been imposed when the owner of the site of some low-income apartments sought permission to replace the apartments with new condominiums.[32] While the challenge to the fee was saddled with a statute of limitations problem, the court noted that the facts were undisputed that "no rational nexus existed between the amount of the Developers'... [fee] and any burden imposed on the City due to the zoning change."[33] If not for a statute

of limitations problem, the court would have struck down the fee.[34]

New Jersey: The New Jersey Supreme Court has been particularly aggressive, not only in upholding inclusionary-zoning ordinances, but in actually mandating them. In *Holmdel Builders Association v. Township of Holmdel*, the New Jersey Supreme Court considered whether various municipal inclusionary zoning ordinances that required the payment of low-income housing fees were constitutional.[35] With respect to a challenge under the Takings Clause, the court merely observed that "[a]s long as the measures promulgated are not confiscatory and do not result in an inadequate return of investment, there would be no constitutional injury."[36] The court noted that it had earlier held in *Southern Burlington County NAACP v. Township of Mt. Laurel*,[37] that "municipalities [must] use affirmative inclusionary-zoning measures, including mandatory set-asides, to redress affordable-housing needs."[38] Interestingly, the court in *Mt. Laurel II* barely addressed a Takings Clause argument, dismissing with a single sentence that "mandatory set-asides keyed to the construction of lower income housing, are constitutional and within the zoning power of a municipality."[39] In *Holmdel Builders* the court ultimately concluded that "a residential developer could be required to set aside a percentage of units to be used for low- and moderate-income housing."[40] Since development fees perform an "identical function" they are permissible[41]. The difficulty with the court's analysis is that it completely ignores the "substantially advance" test of *Agins*, the nexus requirement of *Nollan*, and the rough proportionality standard of *Dolan*.[42]

North Dakota: In determining whether a drainage requirement could be applied to property of Burlington-Northern Railroad in light of *Dolan*, the Supreme Court of North Dakota held that it could because the duty "in this case arises not from a municipal 'adjudicative decision to condition,' but rather from an express and general legislated duty under a constitutional reservation of police power over a corporation." *Southeast Cass Water Resource District v. Burlington Northern Railroad Company*.[43]

Minnesota: In *Arcadia Development Corp. v. City of Bloomington*,[44] a Minnesota appellate court upheld the imposition of a tenant-relocation fee imposed on owners of mobile home parks in exchange for permission to go out of the mobile home park business. The appellate court rejected application of *Dolan* to tenant relocation fees because the fee was legislatively imposed. It found that "[o]nce legitimate governmental interests are identified, courts simply require a nexus between the local legislation and the legitimate governmental purposes."[45] Furthermore, "[b]ecause this case involves a challenge to a citywide, legislative land-use regulation, *Dolan*'s 'rough proportionality' test does not apply."[46]

Arizona: In Home Builders Association of Central Arizona v. City of Scottsdale,[47] the Arizona Supreme Court upheld the city's resource development fee that was imposed on land owners in order to build a new water supply infrastructure. The court found that *Dolan* did not affect the legality of the fee at issue and refused to apply heightened scrutiny because the fee was "legislatively" imposed: "Because the Scottsdale case involves a generally applicable *legislative* decision by the city, the court of appeals thought *Dolan* did not apply. We agree, *though the question has not been settled by the Supreme Court*."[48]

C. Exactions After Lingle

Up until *Lingle*, an oft-cited justification for the heightened scrutiny requirements found in *Nollan* and *Dolan* was a demand for an exaction that was insufficiently related to an adverse impact was a demand that "failed to substantially advance a legitimate governmental interest." This, of course, was the taking standard of *Agins*. Unlike most other takings, however, the usual remedy for a taking of this sort was not the payment of just compensation but invalidation of the exaction—as ultimately occurred in both *Nollan* and *Dolan*. With the rejection of the "substantially advance" standard as a *stand alone* takings standard in *Lingle,* some question could have been raised about the viability of these doctrines. However, the Court in *Lingle* also made it very clear that *Nollan* and *Dolan* retained their full vitality, repeating the formula of these cases, but noting instead that they fell under the rubric of "unconstitutional conditions" rather than "substantially advance" takings.

In *Lingle* the United States Supreme Court reaffirmed the vitality of the Doctrine of Unconstitutional Conditions. Citing to *Dolan v. City of Tigard*,[49] the unanimous Court wrote:

> As the Court explained in *Dolan*, these cases involve a special application of the "doctrine of 'unconstitutional conditions'" which provides that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."[50]

An important point of similarity between the exactions in *Nollan* and *Dolan* and the condition at issue in this case, is that in these cases all involve more than mere governmental benefits. As the Court pointed out in *Nollan*:

> But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange."[51]

II. The Meaning of the Doctrine of Unconstitutional Conditions, According to the Academy

The doctrine of unconstitutional conditions usually involves an exchange—the government gives a benefit to a person in exchange for something from the owner that the government would not ordinarily be entitled to. The lawfulness of the exchange is at the heart of the unconstitutional conditions doctrine. But to properly understand whether the exchange is lawful, it is important to understand the nature of the benefit and the condition being imposed.

However, many commentators do recognize the distinction between conditions placed upon the receipt of benefits and those placed upon the exercise of rights.[52] With respect to the doctrine of unconstitutional conditions, the analysis of "benefits" is pervasive. As Professor Kathleen Sullivan describes the doctrine, "unconstitutional conditions holds that

government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[53]

But there is a continuum of the degree to which a "benefit" is indeed a benefit, and when it is a right. Welfare benefits are an example of a benefit that the government is under no legal obligation to provide at all.[54] Of course, once the decision to provide such benefits is made, certain legal constraints must be employed so that benefits are not denied for unfair reasons and through unfair procedures. The right to develop property, on the other hand, involves the exercise of a right—albeit a right subject to regulation in order to prevent certain types of negative externalities. In *Nollan*, the Nollans had a right to put their property to an economically viable use. That right may be regulated in order to prevent external harms to neighbors and the public. In that case, the California Coastal Commission claimed that it could prevent the Nollans from adding a second story to their home in order to prevent a "psychological barrier" that would prevent people traveling on Highway 1 from realizing the presence of the ocean.[55] Assuming for the sake of argument the legitimacy of this justification,[56] the Court found that the condition sought by the Commission, the dedication of a lateral access path, had no relation to the alleged harm, and therefore could not be justified. Thus, while there were more than benefits at issue in *Nollan* the underlying leverage was on the exercise of a right, albeit a right subject to reasonable regulation.

Thus, when a court considers the theoretical justifications that have been put forth for the doctrine of unconstitutional conditions, it is important to bear in mind the nature of the "benefit" being sought from the government. The degree to which the "benefit" is a fundamental right, rather than an optional gift of the government, should influence the degree to which the government may condition the receipt of the benefit.

A. All Academic Theories, However Imperfect They May Be, Reject the Conditioning of Fundamental Rights

The doctrine of unconstitutional conditions is characterized by competing theoretical justifications, none of which is either universally accepted or in harmony with case law[57]. For example, Professor Kathleen Sullivan has described several such theories (e.g. coercion, corruption, and "commodification"), rejecting all of them in favor of her own systematic theory—even while noting that her theory is not consistent with recent Supreme Court precedent[58]. Likewise, Professor Richard Epstein's theory, based in part on law and economics, suggests that a robust doctrine of unconstitutional conditions is "second best" to a correct and limited view of the police power[59]. "But," as noted by Mitchell Berman, "these efforts, and those by other distinguished scholars, have left most observers unpersuaded."[60] However, Berman continues: "Very possibly, the Supreme Court has come closer to grasping the essential logic of coercion in its takings decisions than anywhere else."[61]

Theoretical justifications for the doctrine of unconstitutional conditions may involve debate on the margins and on questions of precisely when the doctrine should be invoked. This debate and uncertainty, however, is largely irrelevant in a case such as the present one. There is no exception to the requirement that government pays just compensation when property is taken.

To the extent that the ability to use private property is a fundamental right,[62] the requirement that a landowner seeking to develop property give up land or money in order to subsidize housing for unrelated third parties is a problematic proposition.

B. The Greater Power Includes the Lesser Power Theory

Sometimes, the doctrine of unconstitutional conditions is characterized as the right to exercise a "lesser power." That is, rather than denying a permit such as in *Nollan*, the government may instead grant the permit with conditions. Thus, Professor Sullivan describes the doctrine as:

> It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt. Consensus that the better view won, however, has not put an end to confusion about its application.[63]

But as Sullivan notes, not all jurists and scholars have accepted this rather facile view of the doctrine.[64] Professor Epstein, for example, suggests that a law and economics approach reveals that this "greater power/lesser power" distinction in fact "gives political actors a greater opportunity to extract economic rents."[65]

More importantly, this justification for imposing conditions must disappear when there is no "greater power" in the first place. Here, the government has no right to force an ordinary citizen to subsidize the housing of unrelated third parties and has no right to arbitrarily deny a building permit that will not cause external harms—such as decreasing the supply of affordable housing. *A fortiori*, the lesser power—here the power of conditioning the receipt of a building permit on the condition that third parties receive housing subsidies—cannot be justified under the doctrine.

C. Coercion Theory

Another justification for the unconstitutional conditions doctrine is that it reduces certain forms of "coercion" by the government. In other words, government cannot "coerce" people into agreeing to conditions to which it is not otherwise entitled. The theory suggests that people would rather not enter into a particular bargain with the government, but they feel compelled to do so in order to gain a benefit. Some believe, for example, that this theory explains the "out-and-out plan of extortion" rhetoric of the Court in *Nollan.*[66] But Professor Sullivan is less than satisfied with this explanation:

> Neither the Court nor the commentary, however, has developed satisfying theory of what is coercive about unconstitutional conditions. Conclusory labels often take the place of analysis—for example, conditioned benefits are frequently deemed 'penalties' when struck down and 'nonsubsidies' when upheld.[67]

Sullivan explicates at length why the coercion justification for the doctrine is inconsistent with both case law and theory, concluding:

> While unconstitutional conditions doctrine thus is hardly unique in deeming some offers of benefit coercive, the concept of coercion will depend just as inescapably on independent conceptions of utility, autonomy, fairness, or desert in the unconstitutional

conditions context as in other contexts. Coercion is a judgment, not a state of being.[68]

Professor Epstein articulates this problem in the coercion theory by saying, "the greatest difficulty with the coercion question is to identify the appropriate baseline against which the possibly coercive effects of government action must be evaluated."[69]

D. Maximization of Social Utility

Professor Epstein posits that a theory wherein only government conditions that maximize social utility can be justified under the doctrine[70]. Under this theory, a government bargain must be analyzed to determine whether it generates a net social utility. For example, when government condemns property for a highway and pays just compensation, there is net social utility: the government and the public gain a highway and its increased social and economic value, the landowner receives compensation *and* enjoys the social utility provided by the highway. However, in an unconstitutional conditions case, the government may try to put the receiver of a benefit in a worse position than before—which may result in a net social loss. In *Nollan*, for example, Epstein suggests that the Court's requirement of a nexus between the alleged public harm (the impact on the view) and the condition (the lateral easement), forces government to put some value on the two separate aspects of the bargain in order to prevent a net social loss[71]. In other words, if the value of the development is disproportionate to the value of the lateral easement, then the doctrine forces the government to make choices based on net social utility. It might not, therefore, require the lateral easement if that means the loss of the ability of development of beachfront lots. As will be shown later in this outline, there is serious doubt over whether inclusionary zoning mandates achieve any social utility—rather than providing more affordable housing they may be responsible for limiting the supply of such housing.

E. Government Overreaching and Other Theories

Other justifications for the doctrine of unconstitutional conditions abound. Professor Sullivan raises and, in turn, rejects theories of "germaneness,"[72] "corruption,"[73] and "commodification" (dealing with the supposed inalienability of certain rights)[74] before settling upon her own theory that concludes, "the doctrine guards against a characteristic form of government overreaching and thus serves a state-checking function."[75] And, more recently, Professor Berman raises and rejects all of these theories because none has garnered widespread academic support, and proceeds to posit his own theory that combines elements of each.[76] Notwithstanding his valiant attempt, this lack of settled understanding appears to be as true after Berman's attempt at a theory than it was before.

A hallmark of all of these academic treatments is that after positing a particular theory, they proceed to pick and choose amongst United States Supreme Court precedents, arguing that *this* case got it right, whereas *that* case got it wrong, or that *this* justice often gets it right and *that* justice rarely does, but most likely *these* justices are inconsistent. In other words, the utility of any of these grand unified theories is not particularly apparent in predicting real world outcomes.

Thus, the central difficulty with all of these recent attempts at a grand unified theory for the doctrine of unconstitutional conditions is that the Court has refused to play along. Academic uncertainty aside, it is clear that the Court in *Lingle* is untroubled by the assertion of the doctrine in the context of the Just Compensation and Takings Clauses. Moreover, while the government certainly had some discretion in *Dolan* to grant or deny the subject permits—depending on the degree and nature of the externalities caused by the development in those cases—that sort of discretion is lacking when it comes to questions of affordable housing and the development of new homes. That is because it is highly doubtful that a local government can ever prove that the externalities of new home construction include the exacerbation of a shortage of affordable housing.

III. Economic Analysis and Data Show that Regulatory Barriers are the Primary Cause of Shortages in Affordable Housing and That New Home Construction Reduces the Overall Price of Housing

To the extent that municipalities are required to justify the imposition of affordable housing mandates on the builders of market rate housing, then those municipalities ought to be able to demonstrate that the construction of market rate homes creates a need for more affordable housing. In many cases, local governments do little or nothing to justify the imposition of inclusionary zoning dictates. But where justifications are provided, they usually fall into two categories: (1) that the construction of market rate homes removes land from the inventory of land that might otherwise be used for affordable housing; and (2) the people who move into market rate homes often utilize the services of low-wage workers, such as gardeners, service-sector employees, and the like. If *Dolan* stands for the proposition that the government justifications for exactions are subject to heightened scrutiny, then in instances where local governments do provide one or both of these justifications, courts ought to consider what might be highly significant considerations.

Thus, where there is an alleged shortage of land inventory, a relevant consideration may be what caused the land shortage in the first place. It may be that the region is nearly all built-out. But it may also be that the government itself may be responsible for the shortage due to an aggressive campaign of *exclusionary* zoning, such as urban limit lines, large lot and setback requirements. Likewise, a court should consider whether the choice of developers to build market rate homes is in part due to government policies that force developers to build homes with higher prices. This could include the imposition of development fees and other exactions (paradoxically including workforce housing fees) that often add tens of thousands of dollars to the cost of housing. (In some parts of California, these fees exceed six figures).[77]

In situations where a municipality attempts to justify inclusionary zoning mandates with the explanation that purchasers of these homes employ lower wage workers, a court employing a heightened scrutiny analysis would be advised to consider whether the local government has examined whether these workers already exist in the community and, whether they are currently fully employed. By discouraging new families

from moving into an area and providing more employment opportunities, these lower-income workers would compete for fewer jobs and thus make it easier for employers to offer lower wages. In other words, rather than bringing more lower-income workers into a community, new growth might better employ those already in a community, making it easier for the employed to purchase or rent unsubsidized housing.

A court would also be well advised to consider where the families who move into the market rate housing otherwise live. In other words, it may well be that the construction of market rate housing does not itself create the families who move into these new homes; they might otherwise be competing with middle and lower income workers for the existing limited supply of housing, driving up costs even further.

The bottom line is that the law of supply and demand predicts that the greater supply of all housing, the lower will be the costs. Indeed, this is the near universal conclusion of economists who have studied the problem. For example, Edward L. Glaeser and Joseph Gyourko, in a comprehensive review of the zoning and housing affordability, lay the blame for higher home prices on zoning constraints.[78] Similar results were found in California in a study commissioned by the Reason Institute.[79]

The last major federal investigation into the causes of barriers to affordable housing concluded that

> government action is also a major contributing factor in denying housing opportunities, raising costs, and restricting supply. Exclusionary, discriminatory, and unnecessary regulations at all levels substantially restrict the ability of the private housing market to meet the demand for affordable housing, and also limit the efficacy of government housing assistance and subsidy programs.[80]

The Commission continued that large fees "have a regressive effect. Fees are generally fixed regardless of the cost of a new home. Thus, households that can only afford less expensive houses end up paying a higher proportion of the sales price to cover the cost of fees."[81] In examining the impacts of restrictive and exclusionary zoning in the suburbs the Commission found "[w]hen used in an exclusionary manner they have a notable impact on residential land costs, especially in preferred suburban locations.[82]

Another comprehensive collections of analyses was commissioned by the Pacific Institute for Public Policy Research.[83] In that study, Dr. Bernard Frieden, concluded:

> Freeing some land from development makes the remaining sites more expensive. Growth controls further increase the cost of land for each new home when they mandate large minimum-lot sizes.[84]

Reviewing the relationship between housing costs and growth controls in the Santa Barbara area, Lloyd J. Mercer and W. Douglas Morgan, authors of another report in the Pacific Institute study,[85] conclude: "To the extent that the 'housing crisis' on the South Coast is a lack of 'affordable housing'—that is, house prices have risen too much—that crisis has been exacerbated to a significant extent by exiting growth controls."[86]

There is an abundance of studies that demonstrate a causal connection between growth controls and a lack of affordable housing. For example, the Center for Urban and Regional Studies, of the University of North Carolina, concludes:

> As the cost of regulation drives up housing prices, demand falls and the bottom end of the housing market drops out, leaving mostly high-end houses in the building pipeline. Thus, lower- and middle-income households bear the burden, not simply through higher home ownership costs, but through the unavailability of homes in their price range."[87]

The lack of relationship between market rate housing and a shortage of affordable housing was described well in one study:

> [W]hile the development of market rate housing may generate a local need for new highway lanes or school rooms, it clearly does not create a need for more subsidized housing.[88]

Likewise, the contention that the construction of new homes creates a shortage of affordable housing has been said to contradict other economic studies that demonstrate that new home construction increases the supply of housing for lower-income persons through the "move-up" effect.[89] That is, when new housing is built and occupied by higher-income workers, there is a ripple effect whereby somewhat less well-off families move into the homes vacated by the higher-income workers, and the homes once occupied by the somewhat less well-off families are occupied by even less well-off families, and so on.

CONCLUSION

Because the economic theory and empirical economic data refute the connection between a shortage of affordable housing and the development of new market rate housing, communities wishing to impose inclusionary zoning mandates ought to have a high burden of persuasion when they try to justify such mandates with economic suppositions. Not only ought such a requirement be mandated by basic economic theory, but if the standards of *Nollan* and *Dolan* are to have any meaning, local governments must justify the imposition of inclusionary zoning mandates on developers with something more than mere pretense.

Endnotes

1 Of course, no one likes "public" or "low-income" housing, so planners renamed it "affordable housing" to make it more palatable to the middle class that ends up paying for and living next to it. More recently, planners, in a bow to the public's embrace of the value of something called "work," have renamed it yet again as "workforce housing."

2 The number varies by jurisdiction. In San Francisco, the City in early 2007 is considering lowering the threshold to two.

3 483 U.S. 825, 836-37 (1987).

4 512 U.S. 374, 385 (1994).

5 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

6 483 U.S. 825 (1987).

7 *Id*. at 838.

8 *Id.* at 837.

9 *Id.* at 836-37.

10 512 U.S. 374 (1994).

11 *Id.* at 385.

12 911 P.2d 429 (Cal. 1996).

13 Douglas W. Kmiec, *The "Substantial Advance" Quandary: How Closely Should Courts Examine the Regulatory Means and Ends of Legislative Applications?*, 22 Zoning & Plan. L. Rep. 97, 102-04 (1999).

14 *See, e.g.*, James E. Holloway & Donald C. Guy, *A Limitation on Development Impact Exactions to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities*, 9 Dick. J. Envtl. L. & Pol'y 1, 1 & 8 n.12 (2000); Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 Harv. J.L. & Pub. Pol'y 233, 283 (1999) ("Even in the states, where a unified interpretation [of *Nollan*] might be expected to center around a leading state supreme court case, there are often multiple contradictory decisions; at the level of federal circuits, this inconsistency becomes chronic.").

15 542 N.E.2d 1059 (N.Y. 1989).

16 *Id.* at 1061-62.

17 *Id.* at 1069.

18 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995).

19 729 N.E.2d 349 (Ohio 2000).

20 *Id.*

21 *Id.* at 358.

22 887 P.2d 360, 365 (Or. Ct. App. 1994).

23 (Citation omitted) (quoting Schultz v. City of Grants Pass, 884 P.2d 569, 573 (Or. 1994)).

24 904 P.2d 738, 746 (Wash. 1995).

25 877 P.2d 187 (Wash. 1994).

26 *Id.* at 194.

27 *Id.*

28 649 N.E.2d 384, 390 (Ill. 1995).

29 661 N.E.2d 380 (Ill. App. Ct. 1995), *cert. denied*, 519 U.S. 976 (1996).

30 *Id.* at 390.

31 57 F.3d 12 (1st Cir. 1995).

32 *Id.* at 13.

33 *Id.* at 14.

34 Similarly, the Virginia Supreme Court found a legislatively enacted inclusionary zoning law to violate the Virginia Constitution's Takings Clause in *Bd. of Sup'rs of Fairfax County v. DeGroof Enters.*, 198 S.E.2d 600, 602 (Va. 1971).

35 583 A.2d 277 (N.J. 1990).

36 *Id.* at 293.

37 456 A.2d 390 (N.J. 1983) (*Mt. Laurel II*).

38 *Holmdel Builders*, 583 A.2d at 294 (citing *Mt. Laurel II*, 456 A.2d at 436).

39 456 A.2d at 448.

40 583 A.2d at 294.

41 *Id.*

42 Indeed, a few courts have even found that development fees are not subject to Nolan's nexus test or Dolan's rough proportionality standard. *See, e.g.,* McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995). This is not only in conflict with the holdings from some of the states described in Part I(A)(3), *infra*, it is even in conflict with California. *See* Ehrlich v. City of Culver City, 911 P.2d 429, 450 (Cal. 1996), *cert. denied*, 519 U.S. 929 (1996) (finding that Dolan applies at least to individually applied fees). Furthermore, many of the state cases relied upon by the *Dolan* majority in formulating its "roughly proportional" test involved fees. As noted by Justice Stevens:

> All but one of the cases involve challenges to provisions... requiring developers to dedicate either a percentage of the entire parcel... or an equivalent value in cash... to help finance the construction of... parks, and playgrounds. In assessing the legality of the conditions, the courts gave no indication that the transfer of an interest in realty was any more objectionable than a cash payment.

Dolan, 512 U.S. at 400 (Stevens, J., dissenting).

43 Se. Cass Water Res. Dist. v. Burlington N. R.R. Co., 527 N.W.2d 884 (N.D. 1995).

44 552 N.W.2d 281 (Minn. Ct. App. 1996).

45 552 N.W.2d at 287.

46 *Id.* at 286.

47 930 P.2d 993 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997).

48 930 P.2d at 1000 (emphasis added).

49 512 U.S. 374 (1994).

50 544 U.S. 528, 547-48 (2005) (quoting *Dolan*, 512 U.S. at 385).

51 Nollan v. Cal. Coastal Comm'n, 483 U.S. 826, 833 n.2 (1987).

52 Some commentators have argued for an erosion between the distinction between rights and benefits, but this approach is best confined to the extension of procedural due process. *See, e.g.,* Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964) (arguing for due process rights for welfare benefits, as later held in cases like *Goldberg v. Kelly*, 397 U.S. 254 (1970). *Cf.* Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69 (1982); *with* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

53 *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989).

54 Goldberg v. Kelley , 397 U.S. at 263 n.8.

55 483 U.S. at 835.

56 Epstein, in fact, posits that such cost-free regulatory restrictions that would impose the costs of a social benefit (the view) entirely on the permit seeker exceeds the scope of the police power. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 63 (1988). This may not be the prevailing viewpoint today, but there must certainly be a point where the costs of a marginal social benefit cannot be justified, say, for example, if the Coastal Commission had placed restrictions on landowners based on impacts on the views *from* ocean-going vessels rather than Highway 1.

57 For those with an aversion to academic theory, the remainder of this section may be skipped after recognizing that the academics have provided the practitioners and the courts with no universal or practical theory of the doctrine of unconstitutional conditions.

58 *See* Sullivan, *Unconstitutional Conditions*, *supra* note 53, at 1413.

59 *See* Epstein, *Unconstitutional Conditions*, *supra* note 56, at 28. *See also* Richard A. Epstein, Bargaining with the State (1993).

60 Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 Geo. L.J. 1, 5 (2001).

61 *Id*. at 89.

62 Proponents of the modern progressive regulatory state may differ. *But see* David Thomas, *Why the Public Plundering of Private Property Rights is Still a Very Bad Idea*, 41 Real Prop. Prob. & Tr. J. 25 (2006); James S. Burling, *The Theory of Property and Why it Matters*, American Law Institute - American Bar Association Continuing Legal Education January 8-10, 2004 Eminent Domain and Land Valuation Litigation, SJ051 ALI-ABA 491; David A. Thomas, *Is the Right to Private Property a Fundamental or an Economic Right?*, American Law Institute – American Bar Association Continuing Legal Education January 4-6, 2007 Eminent Domain and Land Valuation Litigation, SM006 ALI-ABA 33.

63 Sullivan, *Unconstitutional Conditions*, *supra* note 53, at 1415.

64 *Id*. at *passim*.

65 Epstein, *Unconstitutional Conditions*, *supra* note 56, at 31. *See also,* Berman, *Coercion*, *supra* note 60, at 111 (calling the greater power/lesser power rationale "concededly thin").

66 483 U.S. at 837.

67 Sullivan, *Unconstitutional Conditions*, *supra* note 53, at 1420.

68 *Id*. at 1450.

69 Epstein, *Unconstitutional Conditions*, *supra* note 56, at 13.

70 *Id*. at passim.

71 *Id*. at 62-63.

72 The conditions in this case fail under the germaneness theory because there is no intrinsic condition between the right to just compensation and the right to challenge a governmental action.

73 It should be self-evident that if government can withhold the fundamental right of just compensation (or any other necessary right) in exchange for an agreement not to sue, then the government will obtain an unwarranted immunity for its bad acts.

74 A strong argument can be made for the case that these two bedrock rights (just compensation and petition) are too fundamental to be bargained away. Not only will the affected individuals lose, but all of society as well. The cliche that there is no price too high for freedom has some validity when one is confronted with forced bargains of fundamental rights.

75 Sullivan, *Unconstitutional Conditions*, *supra* note 53, at 1506.

76 Berman, *Coercion*, *supra* note 60, at 3 ("Regrettably, more than a century of judicial and scholarly attention to the problem has produced few settled understandings.").

77 Indeed, one study posits that inclusionary zoning mandates exacerbate housing affordability problems. *See* Robert C. Ellickson, "The Irony of 'Inclusionary' Zoning," *in* Pac. Inst. for Pub. Policy Res., Resolving the Housing Crisis (M. Bruce Johnson, ed.) 19-33 (1982) (*hereinafter* Resolving the housing Crisis).

78 Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability, Harvard Institute of Economic Research*, Discussion Paper No. 1948 (2002) (finding that zoning constraints are the cause of the lack of affordable housing in those regions with a housing crisis), *available at* http://post.economics.harvard.edu/hier/2002papers/HIER1948.pdf.

79 *See, e.g.*, Benjamin Powell & Edward Stringham, *Housing Supply and Affordability: Do Affordable Housing Mandates Work?*, Reason Policy Study No. 318, at 8-9 (Apr. 2004) (arguing that affordable housing mandates have not worked in practice and should not work in theory).

80 Advisory Commission on Regulatory Barriers to Affordable Housing, "Not in My Back Yard" Removing Barriers to Affordable Housing, 3 (1992).

81 *Id.* at 5.

82 *Id.* at 2-5. *See also* 2-1 through 2-18 (discusses in more detail the relationship between suburban land use controls and housing affordability).

83 Dr. Bernard Frieden, "The Exclusionary Effect of Growth Control," *in* Resolving the Housing Crisis, at 19-33.

84 *Id.* at 27-28.

85 Lloyd J. Mercer & W. Douglas Morgan, "An Estimate of Residential Growth Controls' Impact on House Prices," *in* Resolving the Housing Crisis, at 189-215.

86 *Id.* at 214.

87 Ctr. for Urban and Reg'l Studies, Univ. of N.C., Regulation and the Cost of New Residential Development 7 (1999). *Accord* John A. Landis, *Land Regulation and the Price of Housing: Lessons from Three California Cities*, 52 J. of Am. Planning Ass'n. 98 (1986) (examining relationship between land supply policies and price); Stephen Malpezzi, *Housing Prices, Externalities, and Regulations in the U.S. Metropolitan Areas*, 7 J. of Housing Research, 209, 236 (1996) ("regulation raises housing rents and values and lowers home ownership rates"); John Landis, et al., *No Vacancy: How to Increase the Supply and Reduce the Cost of Rental Housing in Silicon Valley*, Working Paper 96-251, at 13 (Fisher Ctr. for Real Estate and Urban Econs., U.C. Berkeley 1996) ("higher levels of apartment construction help to moderate rent increases").

88 Altshuler & Gomez-Ibanez, Regulation for Revenue: The Political Economy of Land Use Exactions 5 (1993).

89 *See also generally* John B. Lansing, et al., Inst. for Soc. Res., New Homes and Poor People, *passim* (1969).