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Brian R. Lerman

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MANDATORY INCLUSIONARY ZONING—THE ANSWER TO THE AFFORDABLE HOUSING PROBLEM

Brian R. Lerman*

Abstract: Affordable housing has always been a problem in the United States. Cities and towns originally engaged in forms of discrimination through exclusionary zoning to exclude low-income residents. While many of the social attitudes persist today, the question is how to encourage new affordable housing development. This Note introduces the concept of inclusionary zoning as a successful method for creating affordable housing. The Note examines the constitutional analyses used for land use ordinances. Then, the Note evaluates existing affordable housing programs, distinguishing between the eastern approach and the western approach. The eastern approach—represented by New Jersey, Massachusetts, and Montgomery County, Maryland—is based upon a "fair share" of affordable housing but lacks any planning requirement. The western approach, as illustrated by Oregon and California, is based upon community planning of all necessary elements including affordable housing, and have successfully required affordable housing development. Ultimately, the Note adopts a perspective that mandatory inclusionary zoning in all communities is the best option and should be valid under an impact fee-like analysis.

Introduction

Mr. and Mrs. Smith live with their three children on two incomes—totaling less than thirty thousand dollars—in the Seattle area.[1] The Smiths spend nearly two-thirds of their income on rent in a community where they fear for their family's safety.[2] After much effort, the Smiths have qualified for the purchase of affordable housing in a new

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[1] This hypothetical is adapted from a profile of a family benefiting from affordable housing in Good Neighbors, Affordable Family Housing, *Meet Your Neighbors: Resident Profile* (on file with author).

[2] *Id.*; *see also* California Budget Project, *Locked Out: California's Affordable Housing Crisis*, *in* California Inclusionary Housing Reader 3, 4 (Inst. for Local Self Gov't ed., 2003) [hereinafter Reader] (discussing enormous burden of rising rents).

development.[3] The home has a yard and offers ample light and ventilation.[4] It is near the children's schools and the parents' workplaces.[5] The new home will allow the Smiths to recuperate some of the money previously lost to rent and will make family life more enjoyable.[6]

Families throughout this country are in need of an opportunity such as this.[7] The California Supreme Court in *Home Builders Ass'n of Northern California v. City of Napa* may have paved the way for courts nationwide to hold as constitutional inclusionary programs like the one described above—thus providing these types of opportunities to more Americans.[8]

This Note addresses why, from a policy perspective, mandatory inclusionary zoning is the optimal approach to affordable housing. This Note will also examine how, from a legal perspective, inclusionary zoning, because of its similarity to an impact fee, is constitutional. Part I examines the basics of inclusionary zoning—what inclusionary programs are, why they are necessary, and how they differ. Part II focuses on the various constitutional arguments surrounding inclusionary zoning and illustrates how a constitutional determination depends upon how the ordinance is classified. It then examines the constitutionality of an impact fee. Part III describes the approaches of several states in addressing affordable housing. Finally, Part IV evaluates the most effective program for providing affordable housing. After finding that a mandatory inclusionary zoning approach is most beneficial, this Note compares the constitutional analysis of inclusionary zoning with that of impact fees and concludes that both should be viewed as valid legislative actions.

I. What Is Inclusionary Zoning?

Zoning has been a fundamental concept in American society since *Village of Euclid v. Ambler Realty Co.*, which allowed cities and towns to plan for development.[9] A zoning regulation is constitutional,

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[3] *See* Good Neighbors, Affordable Family Housing, *supra* note 1.

[4] *Id.*

[5] *See id.*

[6] *See id.*

[7] *See* California Budge Project, *supra* note 2, at 4, 8, 10; Barbara E. Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. Rev. 971, 972–73 (2002).

[8] *See* 108 Cal. Rptr. 2d 60 (Ct. App. 2001).

[9] *See* 272 U.S. 365, 394–96 (1926) (establishing the police power to zone uses of property).

provided that it has a substantial relation to public health, safety, or welfare.[10] The substantial relation standard provides local government broad deference so long as the "validity of the legislative classification for zoning purposes [is] fairly debatable."[11]

Zoning generally regulates uses and provides spatial requirements; however, land use planning should also consider the community's need for affordable housing.[12] Through "inclusionary" zoning, governments require or encourage developers—both residential and commercial—to create affordable residential units as a part of any new development.[13] Typically, inclusionary zoning ordinances mandate a percentage of affordable units, designate an income level defined by median income, and provide for an affordable period—a required length of time for the units to remain affordably priced.[14] In return, inclusionary ordinances often provide developers with incentives, the most common of which is a density bonus.[15]

The advantage of an inclusionary system to a community is that it helps provide affordable housing without a major public financial

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[10] *See, e.g.*, Necktow v. City of Cambridge, 277 U.S. 183, 187–89 (1928); *Euclid*, 272 U.S. at 395.

[11] *Euclid*, 272 U.S. at 388; *see* Kautz, *supra* note 7, at 989.

[12] *See* Paul Davidoff, *Zoning as a Class Act*, *in* INCLUSIONARY ZONING MOVES DOWNTOWN 1, 2–3 (Dwight Merriam et al. eds., 1985). Zoning has the "goal of creating a balanced integrated urban community and the duty to address the pressing need of the poor, homeless, and underprivileged members of our society." *Id.* at 3.

[13] *See, e.g.*, Edith M. Netter, *Legal Foundations for Municipal Affordable Housing Programs: Inclusionary Zoning, Linkage, and Housing Preservation*, 10 ZONING & PLAN. L. REP. 161, 162 (1987). There are a variety of inclusionary zoning statutes, but the most effective are those that require set asides, preferably onsite. *See* KAREN D. BROWN, BROOKINGS INST., CTR. ON URBAN & METRO. POLICY, EXPANDING AFFORDABLE HOUSING THROUGH INCLUSIONARY ZONING: LESSONS FROM THE WASHINGTON METROPOLITAN AREA, 2 (2001), *available at* http://www.brook.edu/dybdocroot/es/urban/publications/inclusionary.pdf. Most programs provide the developer with the option of providing the affordable units off-site or to pay an in-lieu-of fee. *See id.* Commercial developers will more likely construct the units offsite or pay a fee in lieu of providing units. *See* Mary E. Brooks, *Housing Trust Funds: Lessons Learned from Inclusionary Zoning*, *in* INCLUSIONARY ZONING MOVES DOWNTOWN, *supra* note 12, at 7, 9; *see also infra* notes 52–74 and accompanying text.

[14] *See, e.g.*, BROWN, *supra* note 13, at 2; Robert W. Burchell & Catherine C. Galley, *Inclusionary Zoning: Pros and Cons*, *in* READER, *supra* note 2, at 27, 27; Kautz, *supra* note 7, at 980.

[15] *See* Burchell & Galley, *supra* note 14, at 27. Incentives can be in the form of waivers of zoning requirements, tax abatements, waivers of fees, expedited permitting, or subsidies for required infrastructure. *Id.* A density bonus is defined broadly to include when a municipality provides a developer additional square footage, permits more units per acre, or provides other benefits. *See* Susan M. Denbo, *Development Exactions: A New Way to Fund State and Local Government Infrastructure Improvements and Affordable Housing?*, 23 REAL EST. L.J. 7, 30 n.115 (1994).

commitment.[16] The developer, rather than the community, bears the cost of the affordable units.[17] Moreover, the program can successfully integrate populations, while reducing sprawl and encouraging mixed-use development.[18]

The original movement for inclusionary zoning began in the 1960s and 1970s.[19] Three forces—housing advocates fighting exclusionary zoning, a decrease in federal subsidies for affordable housing, and an increase in local governments' use of exactions[20]—encouraged the creation of the first inclusionary zoning programs.[21] Therefore, inclusionary zoning has only existed as a viable land use control for the past thirty years.[22] More recently, this movement has been aided by rapidly rising real estate prices that have closed the housing market to many.[23]

A. *The Problem of Exclusionary Zoning*

Many communities, especially affluent suburbs, have kept lower income families from moving into the community through "exclusionary" zoning by requiring large minimum lot sizes and large minimum floor areas,[24] prohibiting mobile homes,[25] and limiting multifamily residential areas.[26] These types of zoning practices, which were especially common in the 1960s and 1970s, continue to be major obstacles

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[16] *See* Burchell & Galley, *supra* note 14, at 28. When compared with public housing, inclusionary zoning offers affordable housing at a much lower cost to the community. *See id.*

[17] *See id.*

[18] *See* Brown, *supra* note 13, at 1; Burchell & Galley, *supra* note 14, at 28; Cecily T. Talbert & Nadia L. Costa, *Recent Development: Current Issues in Inclusionary Zoning*, 36 Urb. Law. 557, 557 (2004).

[19] Douglas R. Porter, *The Promise and Practice of Inclusionary Zoning*, *in* Growth Management and Affordable Housing: Do They Conflict? 212, 213 (Anthony Downs ed., 2004).

[20] Exactions are bargained-for exchanges between developers and local governments to provide for public needs. *See* Daniel J. Curtin, Jr. & Cecily T. Talbert, Curtin's California Land Use and Planning Law 291 (24th ed. 2004).

[21] *See* Porter, *supra* note 19, at 213.

[22] *See* Kautz, *supra* note 7, at 1025.

[23] Porter, *supra* note 19, at 213; *see* Peter W. Salsich, Jr., *Saving Our Cities: What Role Should the Federal Government Play?*, 36 Urb. Law. 475, 476–77 (2004).

[24] Julie M. Solinski, *Affordable Housing Law in New York, New Jersey, and Connecticut: Lessons for Other States*, 8 J. Affordable Housing & Community Dev. L. 36, 36 (1998).

[25] *See* Robert Cornish, Comment, *From Mt. Laurel to Montgomery: The Creation of Affordable Housing in Alabama*, 23 Cumb. L. Rev. 197, 204 (1993).

[26] *See* David L. Callies et al., Cases and Materials on Land Use 535 (4th ed. 2004); John M. Payne, *From the Courts: Exclusionary Zoning and the 'Chester Doctrine,'* 20 Real Est. L.J. 366, 366–67 (1992).

to affordable housing today.[27] Many communities disguise exclusionarv zoning practices as measures to preserve the community character.[28] However, the motivation behind exclusionary zoning is typically multifaceted—prejudice against those of lower income,[29] financial concern for the impact on property values, and fear of infrastructural costs caused by population increase.[30]

The concern over providing affordable housing for residents has led some courts to strike down exclusionary zoning and require offending cities or towns to provide inclusionary zoning.[31] Typically, to invalidate an exclusionary ordinance, a developer must show a denial of substantive due process or equal protection.[32] Courts have found a denial of substantive due process based upon the existence of a "regional general welfare."[33] Since regional general welfare extends beyond a municipality's boundaries, municipalities may not use the police power—the authorization for local zoning—to exclude.[34]

In addition to judicial action, many state legislatures have also tried to combat exclusionary practices.[35] For example, some states have flatly banned exclusionary and discriminatory zoning techniques; others have required cities and towns to affirmatively plan affordable housing pursuant to the police power.[36] The latter type of statewide legisla-

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[27] *See* Porter, *supra* note 19, at 213; Jennifer M. Morgan, Comment, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 Emory L.J. 359, 363 (1995).

[28] *See* Callies, *supra* note 26, at 535 (citing Simon v. Town of Needham, 42 N.E.2d 516 (Mass. 1942)); *see also* Johnson v. Town of Edgartown, 680 N.E.2d 37, 41–42 (Mass. 1997) (upholding three-acre minimum lot size for preservation of island qualities on Martha's Vineyard).

[29] *See* Morgan, *supra* note 27, at 361–63 (describing how exclusionary zoning techniques are used to increase the cost of housing and therefore suggesting these techniques discriminate based upon income level).

[30] *See* Callies, *supra* note 26, at 536–37 (illustrating the financial motivations for exclusionary zoning because "[g]rowth cuts two ways: it brings in revenues but it increases municipal costs."); Morgan, *supra* note 27, at 363 (explaining that exclusionary zoning protects cities and towns from the financial burden of development). Multifamily housing has a higher density, which means more children, and increased school costs. *See* Callies, *supra* note 26, at 537 (citing George Sternlieb, Ctr. for Urban Policy Research, Housing Development and Municipal Costs (1973)).

[31] *See, e.g.*, Britton v. Town of Chester, 595 A.2d 492, 497–98 (N.H. 1991); S. Burlington County NAACP v. Twp. of Mount Laurel (*Mt. Laurel II*), 456 A.2d 390, 489–90 (N.J. 1983).

[32] *See* Cornish, *supra* note 25, at 197–98.

[33] *See Mt. Laurel II*, 456 A.2d at 415.

[34] Porter, *supra* note 19, at 217; *see also* Payne, *supra* note 26, at 368–69 (discussing New Hampshire's use of a regional definition to strike down exclusionary ordinances).

[35] *See generally infra* Part III.

[36] *See* Inst. for Local Self-Gov't, *Legal Issues Associated with Inclusionary Housing Ordinances*, *in* Reader, *supra* note 2, at 101, 102.

tion—a form of inclusionary zoning—can effectively eliminate exclusionary ordinances by requiring cities and towns to integrate affordable housing.[37]

B. *Affordable Housing*

Although it is possible to remove exclusionary techniques without requiring inclusionary zoning, this will not necessarily result in affordable housing, because developers will still not be required to create affordable units.[38] Providing affordable housing is essential because it preserves housing for long-time residents,[39] encourages integration,[40] and protects the environment by decreasing suburban sprawl.[41] Affordable housing is lacking where communities have created exclusionary zoning or where real estate prices are escalating.[42] Climbing real estate prices have often occurred in areas with extreme job growth—causing longer commutes, more sprawl, and social and economic problems for lower income residents.[43] Therefore, inclusionary zoning is needed to address the severe housing shortage for these residents.[44]

Some advocates of inclusionary zoning argue that the creation of affordable housing alone is insufficient; rather, the housing must be strategically placed within the community to prevent segregation based on income level.[45] Segregated affordable housing can have a harmful effect on a neighborhood and thus has proven to be less effective than integrated units.[46]

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[37] *See* Talbert & Costa, *supra* note 18, at 557; *see also infra* Part I.C.

[38] *See* Talbert & Costa, *supra* note 18, at 557. Developers can fall on both sides of the affordable housing debate. Incentive programs can allow a developer to build more units, while mandatory programs create a cost to the developer. *See infra* Part I.C.

[39] *See* California Budget Project, *supra* note 2, at 10.

[40] *See* Kautz, *supra* note 7, at 973. By creating the affordable units in close proximity to jobs, schools, and transportation, the affordable units are more likely to be successful. *See* John A. Powell, *Opportunity-Based Housing*, 12 J. Affordable Housing & Cmty. Dev. L. 188, 189 (2003). In recent years, more Americans are unable to afford a home or pay their own rent. *See* Salsich, *supra* note 23, at 476. Residents unable to afford a home are at a severe disadvantage because "homeownership is the *primary source* of wealth for most Americans . . . ." Powell, *supra*, at 195 (emphasis added).

[41] *See infra* notes 47–49 and accompanying text.

[42] *See* California Budget Project, *supra* note 2, at 4.

[43] *See id.* at 8, 10. While job growth is a goal of many communities, it has harmed lower income residents by squeezing them out of their communities to make way for higher paid workers. *See id.* at 10.

[44] *See* Kautz, *supra* note 7, at 973.

[45] *See* Brown, *supra* note 13, at 1.

[46] *See id.*

Moreover, growth management—planning for all land use concerns, including affordable housing—offers the opportunity to both protect the environment and provide affordable housing.[47] By providing a developer with a density bonus, inclusionary zoning offers the potential of reducing suburban sprawl.[48] More residents reside in close proximity in affordable units, thus preserving open space and benefiting the environment.[49]

Ultimately, inclusionary zoning prohibits exclusionary zoning and effectively provides for affordable housing, even in areas suffering from escalating real estate prices.[50] To fill the void left in the absence of a constitutional right to housing, inclusionary zoning works toward providing affordable living spaces in otherwise unaffordable areas.[51]

C. *Inclusionary Zoning Programs: Mandatory Versus Voluntary*

There are two basic forms of inclusionary zoning statutes: mandatory and voluntary.[52] Mandatory inclusionary programs require that any developer constructing a project over a certain size reserve a portion of the units as affordable, commonly referred to as a "set-aside."[53] In effect, the mandatory approach creates affordable housing with any new development.[54] In return for the affordable units, these manda-

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[47] *See* Porter, *supra* note 19, at 246. *But see* Talbert & Costa, *supra* note 18, at 560, 561 (noting arguments that Massachusetts inclusionary zoning statute does not protect the environment).

[48] *See* Porter, *supra* note 19, at 246 (examining inclusionary zoning's impact on smart growth); Talbert & Costa, *supra* note 18, at 562.

[49] *See* Talbert & Costa, *supra* note 18, at 562.

[50] *See* Victor B. Flatt, *A Brazen Proposal: Increasing Affordable Housing Through Zoning and the Eminent Domain Powers*, STAN. L. & POL'Y REV., Spring 1994, at 115, 116, 118. Seattle has been able to extract affordable units in an extremely competitive housing market. *Id.* There is criticism that these inclusionary programs have failed to produce a sufficient number of affordable units; however, with the housing market remaining strong and the opportunity for federal and state subsidies, the success of recent inclusionary programs should continue. Porter, *supra* note 19, at 242.

[51] *See* D.C. OFFICE OF PLANNING, INCLUSIONARY ZONING: A PRIMER 15 (2002), http://planning.dc.gov/planning/ (follow "Publications" hyperlink; then follow "Inclusionary Zoning: A Primer" hyperlink) [hereinafter PRIMER]. The District of Columbia comprehensive plan reads, "all neighborhoods should share in the overall social responsibilities of the community, including, but not limited to, housing the homeless, feeding the hungry, accommodating the disabled, and welcoming residents of diverse backgrounds and needs." *Id.* (emphasis omitted).

[52] *See* Porter, *supra* note 19, at 221.

[53] *See id.*

[54] *See* Powell, *supra* note 40, at 205.

tory provisions often provide the developer with density bonuses,[55] which some commentators argue are necessary to avoid a takings challenge.[56]

Although incentives like density bonuses are not required for mandatory inclusionary zoning programs, the legislature must provide developers an "alternative" for the program to be upheld.[57] The alternative can be in the form of off-site housing or imposed fees in lieu of on-site affordable units.[58] Alternatives address developments where affordable units cannot be provided cost effectively.[59] These alternatives require the developer to build or pay for a greater number of affordable units than if the developer builds them on-site.[60] A mandatory program that provides developers with basic alternatives can survive both takings and due process challenges so long as there is a legitimate state interest.[61]

Mandatory inclusionary zoning has at least three important benefits. First, mandatory programs have been more successful than voluntary programs based upon the number of affordable units created.[62] Second, mandatory programs can alleviate social problems such as crime and unemployment by mandating integration of the community.[63] Third, an inclusionary program has the economic benefit of creating mixed income neighborhoods and decentralizing poverty—thereby reducing city expenditures—by providing affordable housing in otherwise gentrified areas.[64]

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[55] *See* Porter, *supra* note 19, at 217 (citing Jerold S. Kayden, *Inclusionary Zoning and the Constitution*, NHC Affordable Housing Pol'y Rev., Jan. 2002, at 10, 12). The programs that have created the most affordable units have provided developers with incentives such as density bonuses as a form of compensation. *See* Primer, *supra* note 51, at 11.

[56] *See* Daniel J. Curtin, Jr. & Elizabeth M. Naughton, *Inclusionary Housing Ordinance Is Not Facially Invalid and Does Not Result in a Taking*, 34 Urb. Law. 913, 913–14 (2002); Porter, *supra* note 19, at 229. However, in *Home Builders Ass'n of Northern California v. City of Napa*, a California appellate court validated an inclusionary zoning ordinance requiring ten percent affordable units without any incentives. *See* 108 Cal. Rptr. 2d 60, 67 (Ct. App. 2001).

[57] *See* Curtin & Naughton, *supra* note 56, at 914 (discussing *Home Builders*, 108 Cal. Rptr. 2d 60).

[58] *See id.*

[59] *See* Porter, *supra* note 19, at 229. Projects on a small site, for a high-rise building, or isolated from transportation or employment do not permit cost-effective on-site affordable housing; therefore, developers would provide off-site units or pay a fee in-lieu of development. *Id.*

[60] *Id.* at 229–30.

[61] *See* Curtin & Naughton, *supra* note 56, at 915 (discussing the *Home Builders* court's finding of a legitimate state interest).

[62] *See* Brooks, *supra* note 13, at 9; Kautz, *supra* note 7, at 974–75.

[63] *See* Primer, *supra* note 51, at 9.

[64] *See id.* at 9 (discussing social and economic benefits of an inclusionary program).

One major drawback of mandatory inclusionary programs is that states must have enforcement mechanisms, such as financial sanctions, to address any failure to comply with a statewide inclusionary program.[65] Another drawback is the strong resistance of the development community.[66] Because the burden of the program will fall on developers, they are likely to oppose any such mandatory program.[67]

Unlike mandatory programs, voluntary programs are dependent upon incentives provided to the developer, and therefore are devoid of much of the development community's opposition.[68] Moreover, voluntary programs provide developers with the element of choice, thereby avoiding a major obstacle of mandatory programs.[69] Additionally, voluntary programs do create affordable units if the program provides sufficient incentives to the developer.[70]

The major disadvantage of voluntary programs is that the incentives that have to be granted to entice a developer can be detrimental to the municipality by burdening the environment and local infrastructure.[71] Incentives that merely offset the cost of the affordable units may not be a sufficient inducement for developers.[72] Another disadvantage to voluntary programs is that developers are provided an element of choice: if the ultimate market-rate buyer is willing to pay a premium that exceeds the public incentives for affordable housing, the developer will forego the optional program.[73] On the other hand, mandatory programs require all developers to comply with the mandatory set-aside of affordable units regardless of incentives, and thus provide more benefits to the community than voluntary programs.[74]

[65] *See* Porter, *supra* note 19, at 248 (explaining that states could impose financial sanctions on communities failing to create sufficient shares of affordable housing or offer incentives to those communities that meet the requirement).

[66] Kautz, *supra* note 7, at 979 n.53.

[67] *See id.*

[68] *See id.* at 982.

[69] *See id.* at 989 (discussing challenges to an inclusionary ordinance).

[70] *See id.* at 1019.

[71] *See* Burchell & Galley, *supra* note 14, at 30.

[72] *See* Kautz, *supra* note 7, at 982 (explaining that the development community may have insufficient knowledge of the economics of inclusionary programs).

[73] *See* Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 Fordham Urb. L.J. 23, 65 (1996).

[74] *See* Kautz, *supra* note 7, at 982.

D. *Removing Local Politics from the Debate*

Another important benefit of mandatory inclusionary programs is that they provide affordable housing for the community without a large public financial investment.[75] By not placing an enormous burden on the community, affordable housing can be created quickly and efficiently.[76] Public officials and the community are more likely to support this type of program because the private developer pays for the affordable units.[77]

Local politics can be removed from the inclusionary zoning debate through the use of regional affordable housing planning. Zoning has substantial social and economic impacts in the area of affordable housing, which arouse public opinion.[78] Specifically, the public is likely to oppose inclusionary programs because the practice is counter to exclusionary zoning which preserves the status quo.[79] Although the public argument is often framed as a concern about financial or environmental costs, in reality much of the opposition to inclusionary programs is rooted in discriminatory intent.[80] One way to address this public concern is to apply inclusionary programs on a more regional level.[81] Regional affordable housing planning allows for collaboration between the inner city and suburban communities in establishing a plan for affordable housing.[82] In addition, it allows for a "fair share" approach; each municipality is obligated to provide its pro rata share of affordable units.[83] To be effective, regional planning requires the par-

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[75] *See* Burchell & Galley, *supra* note 14, at 28 (explaining that "[g]enerally, the provision of affordable housing units as part of an inclusionary program does not require significant expenditure of public funds."); Kautz, *supra* note 7, at 983 (claiming that "inclusionary zoning provides affordable housing at no public cost").

[76] *See* Powell, *supra* note 40, at 205.

[77] *See id.* at 206.

[78] *See* Davidoff, *supra* note 12, at 2; Daniel R. Mandelker, *The Constitutionality of Inclusionary Zoning: An Overview, in* INCLUSIONARY ZONING MOVES DOWNTOWN, *supra* note 12, at 31, 33.

[79] *See* Solinski, *supra* note 24, at 37–38.

[80] *See* Porter, *supra* note 19, at 214–15 (explaining the implications of inclusionary zoning on smart growth); Kautz, *supra* note 7, at 983 (discussing how inclusionary zoning provides affordable housing at no cost); Morgan, *supra* note 27, at 361–63; *see also supra* notes 28–31 and accompanying text.

[81] *See* Powell, *supra* note 40, at 202.

[82] *Id.* at 203.

[83] *Id.* at 205.

ticipation of all segments of the community.[84] When effective, regional planning results in the creation of successful affordable housing.[85]

E. *Challenges for Inclusionary Zoning Statutes*

The largest problem with both mandatory and voluntary programs is a seeming dependence upon a strong housing market.[86] Both programs presuppose that a developer will permit the community to extract affordable units in return for his right to develop.[87] To function properly, developers must be able to sell market-rate units before any affordable units will be developed.[88] Where market-rate housing is selling well, however, inclusionary ordinances have not brought an end to development in the area.[89]

II. The Constitutionality of Inclusionary Zoning

When a municipality is considering inclusionary zoning, it must carefully craft a program that passes a constitutionality review. A strong constitutional precedent will not only permit local government to adopt progressive inclusionary measures, but will also entice communities to adopt strict mandatory inclusionary programs.[90]

Inclusionary zoning statutes raise important constitutional issues: denial of due process and taking of private property without just compensation.[91] The determination of the constitutionality of these ordinances has been a product of whether the ordinance is characterized as

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[84] *See id.* at 203 (illustrating that effective regional planning requires a broad political coalition).

[85] *See id.*

[86] *See* Primer, *supra* note 51, at 10–11.

[87] Porter, *supra* note 19, at 214.

[88] Burchell & Galley, *supra* note 14, at 30.

[89] *See* Porter, *supra* note 19, at 220. "The proof that inclusionary programs can make economic sense for developers is that existing programs have not shut down housing development and that developers continue to plan and construct projects that include affordable housing within affordable and mixed-income projects." *Id.*

[90] *See* Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 62–63 (Ct. App. 2001) (discussing the program adopted by the City of Napa to address its need for affordable housing); Brown, *supra* note 13, at 30 (discussing concerns surrounding Montgomery County's inclusionary zoning ordinance); Curtin & Naughton, *supra* note 56, at 917–18.

[91] *See* Mandelker, *supra* note 78, at 32 (discussing substantive due process and takings issues); C.E. "Ted" Parker, *Inclusionary Zoning—A Proper Police Power Function or a Constitutional Anathema?*, 9 W. St. U. L. Rev. 175, 188 (1982) (discussing rent control challenges).

a traditional land use ordinance, an exaction, or an impact fee.[92] A land use ordinance is given substantial deference by the courts, and will most likely be upheld.[93] However, an exaction does not receive the same judicial deference because exactions are based on adjudicative discretion.[94] Courts require exactions to have a sufficient nexus or proportionality between the impact of the development and what is taken from the developer.[95] Courts provide impact fees with more deference than exactions because they are legislative rather than adjudicative, and therefore apply to all developments.[96]

A. *Traditional Land Use Ordinance Analysis*

Developers will often challenge inclusionary zoning ordinances characterized as a traditional land use ordinance as a denial of due process,[97] or a taking of private property.[98] The legislature is provided broad deference in relation to due process concerns; the law is upheld so long as it is to "achieve a legitimate public purpose . . . and . . . the ordinance [is] a reasonable means to accomplish this purpose."[99] In practice, any due process concern is likely satisfied because the creation of affordable housing has been approved by the courts as a legitimate state interest.[100] More important, developers argue that the ordinance is a transfer of property from the developer to lower in-

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[92] *See* Netter, *supra* note 13, at 163; Kautz, *supra* note 7, at 989 ("The judicial scrutiny applied to inclusionary ordinances—and hence their ability to survive a legal challenge—depends significantly on how they are characterized. . . . [T]he courts have applied a deferential standard to requirements that can be characterized as generally applicable land use regulations . . . .").

[93] *See* Kautz, *supra* note 7, at 989. Many zoning ordinances are upheld based upon a finding of implied powers even where the legislature has not given municipalities the specific power. *See* Netter, *supra* note 13, at 164.

[94] *See* Kautz, *supra* note 7, at 989; *see also infra* Part II.B.

[95] *See* Kautz, *supra* note 7, at 989.

[96] *See* Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996) (discussing why impact fees should not be subject to the same analysis as an exaction); Curtin & Talbert, *supra* note 20, at 301–02 (discussing *Ehrlich v. City of Culver City*).

[97] Developers have attempted to raise equal protection claims. However, these claims are usually unsuccessful in the land use context. *See* Curtin & Talbert, *supra* note 20, at 288. The analysis requires a rational relationship between the ordinance and its objective, similar to a due process analysis. *See id.*; Netter, *supra* note 13, at 165.

[98] *See* Primer, *supra* note 51, at 9.

[99] Netter, *supra* note 13, at 165 (citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Bd. of Appeals v. Hous. Appeals Comm., 363 Mass. 339 (1973)). "Courts will presume the ordinance is valid and the burden of proving otherwise will fall on the challenger." *Id.*

[100] *See* Curtin & Naughton, *supra* note 56, at 915 (discussing how the City of Napa's inclusionary ordinance substantially advanced a legitimate state interest).

come individuals and, therefore, is a taking.[101] To avoid this challenge, the legislation must advance a legitimate state interest and the developer must not be denied substantially all economically viable use of the property.[102]

As mentioned above, the basic adoption of inclusionary zoning statutes causes the creation of affordable housing to be viewed as a legitimate state interest.[103] Once the local ordinance is proven to be a legitimate state interest, the question becomes whether the developer can be forced to provide the required affordable units.[104] Although a developer may argue that the affordable units deny value to his property, the required inclusion of these units does not create a total diminution in value of the developer's property.[105] Under an inclusionary zoning regime, the developer still profits completely from the market-rate units and partially on the affordable units.[106] Therefore, the developer is not entitled to compensation.[107]

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[101] *See, e.g.*, CURTIN & TALBERT, *supra* note 20, at 63 (explaining that an inclusionary ordinance is, in effect, a transfer of "property from developers to less materially advantaged households"); Porter, *supra* note 19, at 217 (recognizing that the takings claim is the strongest argument against an inclusionary zoning ordinance).

[102] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). The *Agins* decision came after the noted Supreme Court takings decision, *Penn Central Transportation Co. v. City of New York*, which included similar factors in the takings analysis. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The takings argument can be eliminated by providing the developer with incentives. *See* Porter, *supra* note 19, at 217.

[103] *See* Curtin & Naughton, *supra* note 56, at 915. A legitimate state interest can be determined based upon both judicial precedent and legislative action. *See* Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 64–65 (Ct. App. 2001). The court in *Home Builders* stated:

> Our Supreme Court has said that the "assistance of moderate-income households with their housing needs is recognized in this state as a legitimate governmental purpose." This conclusion is consistent with repeated pronouncements from the state Legislature which has declared that "the development of a sufficient supply of housing to meet the needs of *all Californians* is a mater of statewide concern," and that local governments have a "responsibility to use powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of *all economic segments of the community*."

Id. (citations omitted).

[104] *See* Parker, *supra* note 91, at 185.

[105] *See* Mandelker, *supra* note 78, at 35.

[106] *See id.* Some developers argue that a "fair return on investment" is required for the affordable units; however, the Supreme Court has not required a fair return for municipalities to avoid a taking. Parker, *supra* note 91, at 185–86; *see also* Mandelker, *supra* note 78, at 35.

[107] *See* Mandelker, *supra* note 78, at 35. Some scholars argue that to avoid these concerns, a community should provide a developer with compensation in the form of an in-

B. *Exaction Analysis—The* Nollan/Dolan *Test*

If an inclusionary zoning ordinance is characterized as an exaction, the analysis differs.[108] The takings analysis under exactions is less deferential to the legislature than for a traditional land use ordinance because it applies an intermediate level of scrutiny.[109] Under such an analysis, a court will examine whether the municipality has asked for something "bear[ing] the required relationship to the projected impact of . . . [the] development."[110] The exaction doctrine exists to protect a developer from either paying for a public benefit that should be paid for by the public,[111] or providing a benefit in excess of his impact on the community.[112]

The analysis used for an exaction should not be applied to inclusionary zoning.[113] First, the exaction analysis applies only in the special permit setting, not to a generally applicable statute or ordinance.[114] Second, the analysis is aimed at protecting a developer from bearing a cost that should be paid for publicly.[115] Therefore, because an inclusionary statute is both generally applicable and does not provide some-

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centive such as a density bonus. *See* Kayden, *supra* note 55, at 12–13. However, these incentives are not required. *See Home Builders*, 108 Cal. Rptr. 2d at 64–66 (upholding an inclusionary ordinance without any incentive provided to the developer).

[108] *See generally* Thomas Kleven, *Inclusionary Ordinances and the Nexus Issue*, *in* INCLUSIONARY ZONING MOVES DOWNTOWN, *supra* note 12, at 109. Stoebuck and Whitman define development exactions as "dedications of land to the public, installation of public improvements, and exactions of money for public purposes that are imposed by governmental entities upon developers of land as conditions of development permission." WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 9.32 (3d ed. 2000).

[109] *See* Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186, 214–23 (1991); Kautz, *supra* note 7, at 989. *See generally* Dolan v. City of Tigard, 512 U.S. 374, 388 (1994); Nollan v. California Coastal Commission, 483 U.S. 825 (1987). "[E]xactions may be subject to an intermediate level of scrutiny developed by the United States Supreme Court, or to various levels of scrutiny developed by state courts. However, there is no settled jurisprudence regarding precisely which regulations are subject to intermediate scrutiny." Kautz, *supra* note 7, at 989.

[110] *Dolan*, 512 U.S. at 388.

[111] *See* Mandelker, *supra* note 78, at 35.

[112] *See id.*

[113] *See id.*

[114] *See* CURTIN & TALBERT, *supra* note 20, at 64 (discussing *Home Builders* where the ordinance was examined under "the more deferential standard of scrutiny . . . 'because the heightened risk of the extortionate use of the police power to exact unconstitutional conditions is not present.'" (quoting Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 66 (Ct. App. 2001) (internal quotation marks omitted)).

[115] *See* Mandelker, *supra* note 78, at 35.

thing for which the public would ordinarily bear the cost, the exaction analysis should not apply.[116]

C. *Impact Fee Analysis*

Some states impose an impact fee on developers.[117] Impact fees are assessed at the time of building to pay for the infrastructure needed because of the new development.[118] Similar developments in a community—both in size and impact—are required to pay the same impact fee.[119] To validly enact impact fee ordinances, municipalities must create a comprehensive plan representing the needs of the community in terms of capital improvements with regard to future development.[120] Fees are then assessed in accordance with that plan; any new project is charged a fee that represents a proportionate share of the capital costs.[121]

The state has the power to authorize municipalities to impose impact fees.[122] The development community, however, frequently challenges municipal impact fees, arguing that they are an unauthorized tax.[123] An impact fee, however, is distinguishable from a tax for

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[116] *See* CURTIN & TALBERT, *supra* note 20, at 64; Mandelker, *supra* note 78, at 35.

[117] *See* Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation.* 25 URB. LAW. 491, 491 (1993).

[118] *See* CURTIN & TALBERT, *supra* note 20, at 320; Charles J. Delaney & Marc T. Smith, *Development Exactions: Winners and Losers*, 17 REAL EST. L.J. 195, 197 (1989); Leitner & Schoettle, *supra* note 117, at 491; Arthur C. Nelson, *Development Impact Fees: The Next Generation*, 26 URB. LAW. 541, 541 (1994).

[119] Michael H. Crew, *Development Agreements After* Nollan v. California Coastal Commission. *483 U.S. 825 (1987)*, 22 URB. LAW. 23, 25 (1990).

[120] *See* Leitner & Schoettle, *supra* note 117, at 505–07 (listing several general factors used by states within their impact fee legislation, including "use of a citizens' advisory committee, accounting requirements, and time limits for expenditures" and other state-specific requirements).

[121] *See* Michael B. Dowling & A. Joseph Fadrowsky III, Casenote, Dolan v. City of Tigard*: Individual Property Rights v. Land Management Systems*, 17 U. HAW. L. REV. 193, 259–60 (1995) (discussing Hawaii impact fee legislation that requires a needs assessment of what public facilities will be impacted by new development, a substantial relation between the needs and the new development, a calculation of the pro rata share of the improvements, and the return of the fees to the developer if the improvements are not completed within six years).

[122] *See* Leitner & Schoettle, *supra* note 117, at 492. In 1993, twenty states had adopted impact fee legislation. *Id.* An impact fee differs from a user fee which does not require state authorization. *See* Richard G. Huber, *Low- and Moderate-Income Housing: The Anti-Snob Zoning Act, Linkage, Inclusionary Zoning and Incentive Zoning, in* MASSACHUSETTS ZONING MANUAL § 5.10 (Mass. Continuing Legal Educ., Inc. ed., 2000) (discussing impact fee ordinances and user fees).

[123] *See* Henderson Homes, Inc. v. City of Bothell, 877 P.2d 176, 180 (Wash. 1994) (holding that mandatory fees are illegal in Washington).

several reasons.[124] In determining whether a municipality has assessed a fee or a tax, courts examine several factors, such as the purpose of the fee, and the connection between the need for the development and public facility.[125] Perhaps the most important characteristic of an impact fee is that, unlike a tax, it is allocated to a fund separate from the general fund.[126] Additionally, an impact fee must be used for a specific service required by the development and not, as a tax would be, for a general public benefit.[127] Finally, the fee must still be tailored to the impact of the development on the community to avoid being considered a tax.[128]

Moreover, an impact fee authorized by the state is legislative rather than adjudicative, and therefore is given greater deference by courts.[129] A municipality can defend its particular fee through a plan that demonstrates the cost to the community of new development.[130] An inclusionary zoning ordinance deserves similar judicial deference to an impact fee, provided that the program addresses a lack of af-

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[124] *See* Curtin & Talbert, *supra* note 20, at 319–20.

[125] *See id.* at 307 (explaining California's requirement for impact fees); Leitner & Schoettle, *supra* note 117, at 495 (discussing six factors a court will consider). In California, a municipality must identify the purpose of the fee and how it will be used, demonstrate a reasonable relationship between the fee and the type of development and between the need for the public facility and the type of the development, and deposit the fees in a separate account for the purpose of constructing the facilities. *See* Curtin & Talbert, *supra* note 20, at 307.

[126] *See* Leitner & Schoettle, *supra* note 117, at 495.

[127] *See, e.g.*, Collier County v. State, 733 So. 2d 1012, 1017 (Fla. 1999) (holding that the county's impact fee ordinance fails to provide a direct benefit to the properties burdened by it); Daniels v. Borough of Point Pleasant, 129 A.2d 265, 267 (N.J. 1957) (holding that the municipality's impact fee ordinance has no relation between the impact of the development and the burden on public facilities).

[128] *See* Leitner & Schoettle, *supra* note 117, at 494; Powell, *supra* note 40, at 207.

[129] Inst. for Local Self Gov't, *supra* note 36, at 105; *see* San Remo Hotel L.P. v. City of San Francisco, 41 P.3d 87, 105 (Cal. 2002) (discussing that impact fees are restricted by the political process). Impact fees that are user fees can be adopted by municipalities without state legislation; however, the fee can be challenged on constitutional grounds as ultra vires. *See* Leitner & Schoettle, *supra* note 117, at 493. Impact fees in Florida have been upheld without specific legislation based upon case law. *Id.* at 508. Impact fees have generally been analyzed under three different tests: "specifically and uniquely attributable," "rational nexus." and "reasonable relationship." *Id.* at 494 (internal quotation marks omitted).

[130] *See* Leitner & Schoettle, *supra* note 117, at 495 (explaining techniques used by municipalities to show the program is reasonable, such as: (1) geographic areas to show the benefits of the additional facilities, or (2) a method whereby the cost of the additional facilities is determined and then the development is apportioned pro rata). Each state that authorizes an impact fee has different requirements for substantiating the impact fee. *Id.* at 496, 504–07.

fordable housing at a level proportionate to each development and it can be defended through sufficient planning by each municipality.[131]

III. Inclusionary Zoning in Practice

Although, the discussion above provides a broad overview of inclusionary zoning, it is important to examine specific programs states have implemented across the country. "Eastern" states are generally non-plan states that have attempted to use non-plan inclusionary remedies to address the affordable housing problem, but have been unable to create concrete planning requirements.[132] "Western" states are plan states, and thus are more progressive with respect to land use; they have taken advantage of planning in creating affordable housing programs.[133] In addition to looking at specific inclusionary zoning programs, this Part examines several states which have not adopted inclusionary measures.[134] These states are instructive because they suggest the possibility of adopting statewide inclusionary zoning.[135]

A. *Eastern Approach*

Most of the eastern states have not, as of yet, implemented statewide inclusionary zoning programs.[136] Instead, each state's program is tailored to a specific problem; either, exclusionary zoning[137] or a lack of affordable housing.[138] New Jersey and Massachusetts—leaders in eastern state affordable housing—have permitted developers to chal-

[131] *See* Kayden, *supra* note 55, at 13 (explaining the arguments in favor of upholding an inclusionary ordinance, including that market-rate development directly or indirectly creates a need for affordable units). In addition, many inclusionary ordinances provide an in-lieu-of fee option when it is impossible or impractical to build the affordable units on site that are similar to an impact fee. *See, e.g.*, Holmdel Builders Ass'n v. Twp. of Holmdel, 583 A.2d 277, 282 (N.J. 1990) (discussing the town's passing of an impact-fee ordinance because it had no room for inclusionary development); Curtin & Talbert, *supra* note 20, at 320; Leitner & Schoettle, *supra* note 117, at 491; Nelson, *supra* note 118, at 541; *see also supra* notes 57–60 and accompanying text.

[132] Examples of the eastern state approach are New Jersey, Massachusetts, and Montgomery County, Maryland. *See infra* Part III.A.

[133] Examples of western states are Oregon and California. *See infra* Part III.B.

[134] *See infra* Part III.C.

[135] *See infra* Part III.C.

[136] *See* Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 1–29 (2004); Montgomery County, Md., Code § 25A (2004); *Mt. Laurel II*, 456 A.2d 390 (N.J. 1983).

[137] *See infra* note 144 and accompanying text.

[138] *See infra* notes 157–78 and accompanying text.

lenge local zoning as a bar to development.[139] New Jersey, for example, created a "fair share" obligation—requiring each municipality to provide its fair share of affordable housing—through the courts.[140] In contrast, Massachusetts has legislatively provided developers with a process for developing affordable housing that reduces the obstacles of local regulation through simple permitting and an easy appellate process for any local denial.[141] The system used by Montgomery County, Maryland resembles a plan state because it legislatively requires planning of affordable housing through a mandatory inclusionary zoning measure, but the program only applies to a limited number of developments through size constraints.[142]

1. New Jersey—Judicial Intervention

New Jersey originally had prohibited exclusionary zoning in *Southern Burlington County NAACP v. Township of Mount Laurel* (*Mt. Laurel I*).[143] However, when striking the exclusionary ordinances failed to create affordable housing, eight years later in *Mt. Laurel II*, the New Jersey Supreme Court imposed a "fair share" obligation on each community, and permitted municipalities to adopt inclusionary measures to meet that fair share.[144] In response to *Mt. Laurel II*, the state legislature adopted the Fair Housing Act.[145] The act instituted fair share housing and created an administrative agency, the Council on Affordable Housing (COAH), to oversee the program.[146]

COAH operates by establishing a fair share for each community.[147] Each community must conduct a study to determine present and fu-

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[139] *See* Mass. Gen. Laws ch. 40B, § 22; *Mt. Laurel II*, 456 A.2d at 483.

[140] *See Mt. Laurel II*, 456 A.2d at 449–50.

[141] *See* Mass. Gen. Laws ch. 40B, § 22; Katherine L. Melcher, Note, *Changes in the 40B Landscape: Assessing the Need for Reform*, 38 New Eng. L. Rev. 227, 228 (2003). Both Connecticut and Rhode Island have adopted inclusionary programs similar to Massachusetts. *See* Conn. Gen. Stat. Ann. § 8-30g (West 2004); The Holders of Low and Moderate Income Housing Restrictions Act, R.I. Gen. Laws § 34-39-1 (2004).

[142] *See infra* Part III.A.3.

[143] 336 A.2d 713 (N.J. 1975).

[144] 456 A.2d at 449–50. "[W]here the *Mount Laurel* obligation cannot be satisfied by removal of restrictive barriers, inclusionary devices such as density bonuses and mandatory set-asides keyed to the construction of lower income housing, are constitutional and within the zoning power of a municipality." *Id.* at 448. "The very basis for the constitutional obligation underlying *Mount Laurel* is a belief, fundamental, that excluding a class of citizens from housing on an economic basis . . . distinctly disserves the general welfare." *Id.* at 449.

[145] Solinski, *supra* note 24, at 52–54; *see* N.J. Stat. Ann. §§ 52:27D-301 to 52:27D-329 (West 2004).

[146] Solinski, *supra* note 24, at 53.

[147] *Id.*; *see* N.J. Admin. Code § 5:92 (2004).

ture affordable housing needs based upon factors such as employment opportunities and area income.[148] Each municipality is then required to submit a housing plan to COAH to ensure compliance with the community's fair share.[149] Although the New Jersey program attempts to plan on a regional level, COAH has no authority to enforce the fair share requirements should a community propose a housing plan that does not meet minimum standards.[150] Therefore, the program is solely voluntary, and the primary benefit to a communitv is that it protects the municipality from an exclusionary zoning suit.[151]

Moreover, New Jersey's fair share program is insufficient at providing affordable housing.[152] The courts provide the only remedy for a citizen who believes a community is engaging in exclusionary zoning.[153] The administrative mechanism of COAH does little to protect the individual's right to housing because it is voluntary.[154] In summary, New Jersey requires an individual developer to pursue costly litigation to achieve a victory on affordable housing without the help of COAH.[155]

2. Massachusetts—"Anti-Snob" Zoning Act

Unlike the New Jersey approach, which requires municipal action, Massachusetts has adopted a program that permits a developer to initiate the affordable housing process.[156] The Massachusetts Comprehensive Permit Law (40B) was adopted in 1969 to address a divide between the urban poor and the suburban wealthy.[157] The law permits a developer to submit a proposal to a local zoning board of appeals

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[148] Solinski, *supra* note 24, at 53; *see* N.J. ADMIN. CODE § 5:92.

[149] Solinski, *supra* note 24, at 53; *see* N.J. STAT. ANN. § 52:27D-309.

[150] Solinski, *supra* note 24, at 54 (quoting Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1136 (1995)).

[151] *Id.*

[152] *See Mt. Laurel II*, 456 A.2d at 449; Solinski, *supra* note 24, at 54.

[153] *See Mt. Laurel II*, 456 A.2d 390, 449 (N.J. 1983).

[154] *See* Solinski, *supra* note 24, at 54 (explaining that the Fair Housing Act does not "'empower the agency to enforce the fair-share requirements proactively'" (quoting Note, *supra* note 150, at 1136)).

[155] *See id.* Ultimately, "enforcement of the Act still depends upon individually initiated litigation. In the end the *Mt. Laurel* doctrine serves as the enforcement." *Id.* (citing Note, *supra* note 150, at 1136).

[156] *See* Massachusetts Comprehensive Permit Act, MASS. GEN. LAWS ch. 40B, § 21 (2004).

[157] *See* Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509, 527 (2003) (explaining that the adoption of 40B involved elements of racism and arrogance).

for an affordable development.[158] A developer need not comply with local regulations, including density, setback, and wetland protection requirements, if the municipality has not provided sufficient affordable housing, thus penalizing the municipality.[159]

If a development is denied or is approved with conditions that the developer considers impractical, 40B permits the developer to appeal the local zoning board of appeals decision to the Housing Appeals Committee (HAC), an administrative court.[160] The decision of the HAC is dependent upon whether the town has adequately provided for affordable housing, generally defined as ten percent of its housing stock; if the town has not so provided, the developer will almost certainly prevail.[161] The remedy in Massachusetts belongs exclusively to developers, and therefore does not necessarily result in the construction of affordable units.[162]

The number of affordable units created by 40B—in a process that penalizes municipalities for lacking affordable developments—has been rather small.[163] Moreover, those units have been swayed toward two segments of the population, the elderly and current residents of the community, thus failing to provide affordable housing for the lar-

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[158] *See* MASS. GEN. LAWS ch. 40B, § 21. The developer must qualify as a public agency, or a limited dividend or nonprofit organization. *Id.* However, the definition of limited dividend organization is any developer who agrees to limit his profit margin to twenty percent. Melcher, *supra* note 141, at 236.

[159] Witten, *supra* note 157, at 529–30.

> In exchange for selling or renting twenty-five percent of the dwelling units in a development project at eighty percent of the median income for the community, 40B permits a developer of raw, under-developed, or previously-developed, land to force the approval of a development density unconstrained by any local rule, regulation, ordinance, or policy.

Id.

[160] MASS. GEN. LAWS ch. 40B, § 22; *see* Witten, *supra* note 157, at 532.

[161] MASS. GEN. LAWS ch. 40B, § 23 (establishing that the standard of proof for the HAC is whether the decision of the local zoning board of appeals is reasonable and consistent with local needs). Consistent with local needs is defined as either exceeding 10% of housing within the city, or construction of affordable housing within one year, on, more than the greater of 1/3 of 1% of land in the municipality or ten acres. *Id.* § 20. Therefore, at the HAC. the developer is almost assured of victory over the municipality. *See id.* §§ 20, 23.

[162] *See* Porter, *supra* note 19, at 233.

[163] *See id.* Many Massachusetts communities have adopted goals or policies, but very few have adopted a mandatory program to create affordable units. *Id.* Those that have done so have seen very limited results, as only one thousand units of affordable housing between 1990 and 1997 have been created by communities adopting inclusionary ordinances to achieve 40B goals. *Id.*

ger population.[164] Therefore, the Massachusetts program fails to encourage diverse and integrated affordable housing.[165]

3. Montgomery County, Maryland—Moderately Priced Dwelling Unit Program

Montgomery County has one of the more successful affordable housing programs in the country.[166] The program, referred to as the "Moderately Priced Dwelling Unit Program," was passed in 1974 in an effort to meet the public policy goal of providing housing for every person who worked within the community.[167] The program addressed potential takings arguments by providing the developer with incentives to comply.[168] The program applies to all residential developments between thirty-five and fifty units.[169] Developers are required to reserve between 12.5% and 15% of the units as affordable, and in return receive up to a 22% density bonus.[170] The units are then restricted—to keep them affordable—for ten years for owner-occupied units, and for twenty years for rental units.[171]

The success of the Maryland approach has been in the integration of affordable units into the community.[172] The county has only in very limited cases allowed developers to build off-site units in place of the on-site affordable units, thus placing affordable units in the same areas as market-rate housing.[173] By placing the affordable units in areas of market-rate housing, the projects place a minimal burden on the local government and therefore generate the support of local officials.[174]

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[164] *See id.* at 244.

[165] *See id.*

[166] *See* BROWN, *supra* note 13, at 2. Montgomery County has created over eleven thousand units during the course of the last twenty-five years. *Id.*

[167] PRIMER, *supra* note 51, at 7, 11.

[168] *Id.* at 7.

[169] *See* MONTGOMERY COUNTY, MD., CODE § 25A-5 (2004). The exemption for large developments is based on the county requiring a development of that size to provide its own infrastructure; thus it is deemed inequitable to also require such a developer to provide affordable units. *See* BROWN, *supra* note 13, at 5.

[170] MONTGOMERY COUNTY, MD., CODE § 25A-5.

[171] BROWN, *supra* note 13, at 5.

[172] *See* Powell, *supra* note 40, at 206.

[173] BROWN, *supra* note 13, at 6. "Between 1989 and 1999, only 10 requests to provide affordable units in other locations were approved, and only in cases where homeowner association or condominium fees were unusually high." *Id.*

[174] *See* Powell, *supra* note 40, at 206. Powell explains that "[i]t is also significant that elected officials view the program favorably. This is in part because every jurisdiction

However, one difficulty with the Montgomery County approach is that there remain only 3805 units designated as "affordable" within the inclusionary zoning system.[175] The limited duration of affordability—ten to twenty years—creates a constant need for new affordable units.[176] Another difficulty is that the program applies to fewer new projects because it only pertains to developments between thirty-five and fifty units.[177] Thus, because the program only applies to a select group of developments, the program cannot provide as much affordable housing as a mandatory inclusionary zoning program that applies to all developments.[178]

B. *Western Approach—Planned Inclusionary Zoning*

In general, western states have taken a planning approach to affordable housing by zoning through a comprehensive plan.[179] These western states require more from municipalities in their planning and zoning and therefore can easily implement affordable housing requirements.[180] In these states, mandatory planning for affordable housing benefits from preexisting enforcement mechanisms that are used for other statewide planning and zoning requirements.[181] Oregon's program demonstrates the benefit of a strong planning approach, but also illustrates how the development community, even in a plan state, can create major obstacles to mandatory inclusionary programs.[182] California has a similar planning approach—without being derailed by the development community—that has effectively permitted mandatory inclusionary programs and thus created affordable housing.[183]

1. Oregon

Oregon's program requires municipalities to ensure housing opportunities exist for those who work in the community when creating a

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within Montgomery County is impacted by the policy and because creating the affordable housing is not financially burdensome to local governments." *Id.*

[175] *See* Brown, *supra* note 13, at 5.

[176] *See id.*

[177] *See id.*

[178] *See* Montgomery County, Md., Code § 25A-5 (2004); Brown, *supra* note 13, at 5.

[179] *See* Porter, *supra* note 19, at 233, 237.

[180] *See id.* at 237 (explaining how states require municipalities to "prepare, as part of required comprehensive plans, a housing element consistent with the state housing goal").

[181] *See* Curtin & Talbert, *supra* note 20, at 20–21.

[182] *See* Porter, *supra* note 19, at 237; *infra* notes 187–89 and accompanying text.

[183] *See infra* Part III.B.2.

local comprehensive plan.[184] The program provides that when an income level appears to have insufficient housing within a community, the local government must create adequate housing opportunities.[185] For example, a municipality may be required to alter zoning from single family to multifamily to permit lower income residents to find affordable housing.[186]

One major difficulty in the creation of affordable housing in Oregon is a statute passed in response to lobbying by the development community that prohibits mandatory set-asides.[187] The statute provides that developers cannot be required to allocate a percentage of their units as market-rate housing.[188] Therefore, the Oregon program does not have the tools necessary to require developers to incorporate affordable housing within their market-rate developments.[189]

2. California

California state law requires housing to be included as part of each municipality's comprehensive zoning plan—referred to as the "housing element."[190] The housing element must analyze a municipality's current housing situation, set forth goals, policies, and objectives, and provide a method of implementation through zoning and land use controls.[191] The adoption or amendment of a municipality's housing element must first be approved by the state's Department of Housing and Community Development.[192] The local government, in implementing the housing element, is further required to work with the state and other local governments to meet its goals.[193] The system becomes one of "fair share," requiring each community to provide housing for its share of low- and moderate-income individuals.[194] It also permits the

[184] OR. REV. STAT. § 197.307 (2003).

[185] *Id.*

[186] *Id.*

[187] *Id.* § 197.309. *See* Porter, *supra* note 19, at 237. "[T]he Oregon Building Industry Association successfully lobbied the state legislature to adopt a law forbidding local jurisdictions and metro from requiring mandatory set-asides of for-sale affordable housing in market-rate developments." *Id.*

[188] OR. REV. STAT. § 197.309.

[189] *See* Porter, *supra* note 19, at 237. Ultimately, the state prohibition of mandatory set-asides will likely limit the creation of affordable housing throughout Oregon. *See id.*

[190] CAL. GOV'T CODE § 65,583 (West 1997); *see* Gary Binger, *Inclusionary Housing Policy Background Paper*, *in* READER, *supra* note 2, at 15, 16.

[191] CAL. GOV'T CODE § 65,583.

[192] *Id.* § 65,584(a), (b); *see* CURTIN & TALBERT, *supra* note 20, at 12.

[193] CAL. GOV'T CODE § 65,580; *see* CURTIN & TALBERT, *supra* note 20, at 12.

[194] *See* CAL. GOV'T CODE § 65,583.

temporary transfer of the share of one municipality to another which can reduce community resistance to the program overall.[195]

In addition to the housing element, California has successfully created affordable housing through the California Coastal Commission and the California Redevelopment Law.[196] The California Coastal Commission successfully encouraged municipalities within its jurisdiction to adopt ordinances requiring twenty-five percent of the municipality's housing stock to be affordable housing.[197] The California Redevelopment Law created affordable units by requiring that tax benefits of any redeveloped area be spent on affordable housing.[198]

Although each municipality in California makes a determination about what type of affordable housing program is necessary, the state has encouraged a form of inclusionary zoning.[199] In crafting an affordable program, the municipality decides to whom the affordable ordinance will apply, what income level will be included, and whether the developer will be offered density bonuses.[200] The state law also prohibits the denial of permitting to an affordable developer without satisfactory findings for the denial.[201]

One mandatory inclusionary program in California—the City of Napa's—has been upheld as a constitutional land use ordinance.[202] The progressive program requires a mandatory set-aside of ten percent affordable units for all new developments without any incentives provided to the developer.[203] The success of Napa's ordinance may have

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[195] *Id.* § 65,584.5. The transfer can only occur once every five years. *Id.* § 65,584.5(a)(3).

[196] *See* Porter, *supra* note 19, at 234.

[197] *Id.*

[198] *Id.*; Talbert & Costa, *supra* note 18, at 564.

[199] *See* Kautz, *supra* note 7, at 978. "The California legislature required that each municipality adopt a housing element that calculated each city's share of the regional housing need and required each city to 'make adequate provision' for that need." *Id.* (quoting CAL. GOV'T CODE § 65,583(c) (West Supp. 2001)). Therefore, many communities adopted inclusionary ordinances to meet that requirement. *See id.*

[200] *See id.* at 980–81. California does have a mandatory density bonus law of up to 25% if the developer provides 20% of the units to lower income families, 10% to very low income families, or 50% to seniors. *Id.* at 981 n.62.

[201] CURTIN & TALBERT, *supra* note 20, at 13 (discussing part of state law that "prevent[s] a city from rejecting or making infeasible residential development for the use of very low, low-, or moderate-income households, unless the city makes a series of written findings based on substantial evidence").

[202] Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 67 (Ct. App. 2001); Curtin & Naughton, *supra* note 56, at 913, 916 (explaining that "inclusionary land-use ordinances, such as in the *Napa* situation, as legislative acts are entitled to deference from the courts and to be judged under a deferential standard").

[203] *Home Builders*, 108 Cal. Rptr. 2d at 62–63. The ordinance did provide for two alternatives for the developer: off-site dedication of land or payment of fees in lieu of building,

opened the door for this type of mandatory program to be used more frequently because of its proven constitutionality.[204]

Western states, given their planning approach to zoning, have had more success in implementing inclusionary programs. The western states' approaches, especially that of the City of Napa, illustrate the potential for inclusionary programs.[205]

C. *Judicial Trends Toward Inclusionary Zoning*

While imposing a "fair share" requirement on municipalities successfully creates affordable housing, some courts have also suggested that it may be possible to implement inclusionary zoning without this imposition.[206] New Hampshire courts have provided such a remedy to developers.[207] The New York judiciary has gone further in requiring zoning to consider regional needs.[208] These types of programs suggest the opportunity for more widespread inclusionary zoning, but only at the request of the development community.[209] Thus, it appears that developers may have an opportunity to challenge zoning as an obstacle to affordable housing.[210]

1. New Hampshire

New Hampshire has addressed one of the more difficult problems for developers challenging exclusionary zoning ordinances.[211] The court has permitted a constitutional attack without finding a due process or equal protection violation.[212] These challenges have been allowed based upon a definition of the general welfare that extends beyond the community—similar to the definition in New Jersey—but without requiring municipalities to provide a fair share of affordable housing.[213] For example, the court in *Britton v. Town of Chester* held that once the zoning ordinance is found suspect, the developer is entitled to

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both at the sole discretion of the city council. *Id.* at 62. The ordinance also gave the city council the ability to exempt the project from the inclusionary program if the requirement lacked a rational relationship for the particular project. *Id.*

[204] *See id.* at 66; Curtin & Naughton, *supra* note 56, at 918.

[205] *Home Builders*, 108 Cal. Rptr. 2d at 66; Curtin & Naughton, *supra* note 56, at 918.

[206] *See supra* notes 144–55 & 190–204 and accompanying text.

[207] Britton v. Town of Chester, 595 A.2d 492, 497 (N.H. 1991).

[208] Berenson v. Town of New Castle, 341 N.E.2d 236, 241–43 (N.Y. 1975).

[209] *See* Britton, 595 A.2d at 497–98; Berenson, 341 N.E.2d at 242–43.

[210] *See* Britton, 595 A.2d at 497–98; Berenson, 341 N.E.2d at 242–43.

[211] *See* Cornish, *supra* note 25, at 202–03.

[212] *Id.* at 202 (citing Town of Chesterfield v. Brooks, 489 A.2d 600, 604–05 (N.H. 1985)).

[213] *See Britton*, 595 A.2d at 497.

construct his development provided it is reasonable and creates low- or moderate-income housing.[214]

The New Hampshire court held that it will not accept exclusionary zoning measures.[215] Drawing conclusions from *Britton*, it appears that the state has adopted a general welfare concept that extends beyond the individual municipality to the community at large without mandating a fair share approach.[216]

2. New York

Although New York has not created a "fair share" approach, the test for reasonableness for zoning ordinances has contributed to creation of affordable housing.[217] In *Berenson v. Town of New Castle*, the Court of Appeals of New York required that municipal zoning "provide for the development of a balanced, cohesive community which will make efficient use of the town's available land" and that each municipality consider regional affordable housing needs.[218]

The benefit of the position that the New York court has taken is that it allows a developer to challenge a zoning ordinance as unreasonable for not providing for the municipality's fair share of community housing.[219] However, the flaw of the approach is that each municipality is not affirmatively required to provide its fair share of affordable housing without a reasonableness challenge—unlike in New Jersey.[220] The developer's challenge becomes an essential element in proving that the

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[214] *Id.* at 497–98. Reasonableness is defined as "consistent with sound zoning concepts and environmental concerns." *Id.*

[215] Payne, *supra* note 26, at 366 (discussing *Britton* where the Town of Chester had created exclusionary zoning through large lot sizes and limited multifamily development).

[216] *See id.* at 369.

> *Chester*, combined with the constitutional theory espoused by the *Mount Laurel* cases . . . confirms what amounts to a consensus among courts that have faced exclusionary zoning/affordable housing claims. The concept of a "regional general welfare" that must be served by the assemblage of land use controls has become so well established as to make it an easy doctrinal call for courts in other states who must make similar decisions.

Id.

[217] *See* Solinski, *supra* note 24, at 42.

[218] 341 N.E.2d 236, 241–42 (N.Y. 1991).

[219] *See* Solinski, *supra* note 24, at 42–43 (explaining that the New York courts have chosen to assess the reasonableness of what the municipality has done in consideration of present and future housing needs).

[220] *See id.* The New York requirements of a municipality are much more passive than the New Jersey courts, which "require municipalities to act affirmatively and aggressively to ensure the construction of lower income units." *See id.* at 42.

municipality has not provided its share of regional affordable housing.[221]

IV. Statewide Mandatory Inclusionary Zoning Is Constitutional Under an Impact Fee Analysis

Mandatory inclusionary zoning approaches offer developers, municipalities, and low- and moderate-income residents advantages over other inclusionary zoning techniques. The optimal approach is state legislation requiring mandatory inclusionary zoning by every municipality—permitting the municipality to determine the proper set-asides through general statewide guidelines—based upon a municipal comprehensive plan.[222] Because all municipalities will have an affordable requirement, developers will have little incentive to take development elsewhere, thus preventing a race to the bottom.[223]

The fundamental element of such an approach is state adoption of an affordable housing planning requirement for each municipality.[224] This approach recognizes that some land use concerns extend beyond the municipality and therefore should be planned for accordingly.[225] All states, including non-plan states, should require comprehensive planning of affordable housing.[226] A plan for affordable housing

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[221] *See id.* at 43.

[222] *See* Powell, *supra* note 40, at 202. This approach can create difficulties in the context of a weaker real estate market; however, by requiring this program everywhere, affordable housing becomes integrated into the community and thereby protected. *See* Primer, *supra* note 51, at 10–11; Powell, *supra* note 40, at 202. Traditional zoning is no longer sufficient to provide the affordable housing needed today. *See* Brian W. Ohm & Robert J. Sitkowski, *Integrating New Urbanism and Affordable Housing Tools*, 36 Urb. Law. 857, 865 (2004).

[223] *See* Morgan, *supra* note 27, at 383–84. Critics may argue that development within the state will cease, but this argument seems unlikely to prevail. *See* Porter, *supra* note 19, at 220; *supra* Part I.E.

[224] *See* Witten, *supra* note 157, at 552 (arguing that Massachusetts must adopt a planning approach similar to California to provide affordable housing). A planning requirement helps to insulate the program from judicial intervention because the plan will support the ordinance as rational. *See* Netter, *supra* note 13, at 167, 168. The program will require revision on a continual basis, similar to California's requirement that each municipality update its housing element once every five years. *See* Curtin & Talbert, *supra* note 20, at 23; Netter, *supra* note 13, at 167.

[225] *See* Morgan, *supra* note 27, at 372–73 (explaining that environmental concerns and the need for affordable housing was the motivation behind states adopting comprehensive planning).

[226] *See* Witten, *supra* note 157, at 552. Witten sets forth five steps to solve the affordable housing crisis in Massachusetts. *See id.* at 552–53. First, the state must adopt mandatory planning that resembles California. *Id.* at 552. Second, there must be a statewide housing plan. *Id.* Third, cities and towns must be given time to comply with the statewide and municipal housing plans. *Id.* Fourth, the state must authorize impact fees and mandatory

should consider present and future needs based upon factors outlined in the statute, including population, housing supply, and buildable land.[227]

In addition to creating a plan, municipalities should be required to legislatively enact an inclusionary program, specifying the "percent of units required, affordability level, resale provisions, deed restrictions, physical standards for the affordable units, price and rent levels, [and] selection of tenants and buyers."[228] This municipal legislation should include goals and policies for the creation of affordable housing.[229]

Ultimately, this type of program has the benefit of providing affordable housing at a low cost to the general public.[230] In addition, the program ensures the creation of a "fair share" of affordable units by all municipalities,[231] provides adequate enforcement techniques,[232] and is constitutional based upon an impact fee-like analysis.[233]

A. *A "Fair Share"—The Creation of Real Affordable Housing*

All inclusionary programs have some relationship to a community providing its "fair share" of affordable housing.[234] The benefit of a mandatory approach is that the fair share must be part of the planning of each community—not something judicially imposed without sufficient enforcement mechanisms.[235] This planning, which has proven successful in California, requires municipalities to submit affordable housing plans to state and regional government for approval.[236] A coordinated effort ensures that affordable needs are con-

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inclusionary zoning. *Id.* at 553. Fifth, an enforcement mechanism must be put in place should a municipality fail to comply with the state requirements. *Id.*

[227] Morgan, *supra* note 27, at 373; *see* CAL. GOV'T CODE § 65,584 (West 1997).

[228] Kautz, *supra* note 7, at 1022. Often the inclusionary zoning ordinances do not fall within the purview of traditional zoning, which is entitled to deference under a general zoning enabling law. *See* Netter, *supra* note 13, at 164.

[229] *See* Morgan, *supra* note 27, at 374.

[230] Burchell & Galley, *supra* note 14, at 28.

[231] *See* Witten, *supra* note 157, at 552 (discussing the inadequacy of Massachusetts quota of ten percent as planning for affordable housing). The "fair share" approach is much less arbitrary and more universal, and thus is entitled to more judicial deference. *See id.*

[232] *See* Porter, *supra* note 19, at 248; Witten, *supra* note 157, at 553.

[233] *See infra* Part IV.C.

[234] *See, e.g.*, CAL. GOV'T CODE § 65,583 (West 1997) (requiring each municipality to plan for affordable housing); MASS. GEN. LAWS ch. 40B, § 20 (2004) (requiring ten percent affordable housing within municipality to be "consistent with local needs"); *Mt. Laurel II*, 456 A.2d 390, 421–22 (N.J. 1983) (creating an objective fair share requirement to determine whether *Mt. Laurel* obligation is met).

[235] *See* Powell, *supra* note 40, at 202–03.

[236] *See* CURTIN & TALBERT, *supra* note 20, at 12–13.

sidered together with other land use needs.[237] Therefore, the planning process for affordable housing becomes part of the municipality's land use plan, not superior to other land use concerns.[238]

Unlike the eastern state approaches, which have enacted programs whereby a developer can reduce the obstacles to affordable housing, a widespread solution should create affordable housing with any new development.[239] The inclusionary program of each municipality should require contributions from both residential and commercial development.[240] For commercial development, the program should require creation of affordable housing off-site sufficient to house employees from the jobs created by the development.[241]

For residential units, the program should model Napa, California's program, whereby the units are built on-site absent special approval.[242] In the event that the developer is able to obtain this special approval, the city must require additional off-site units or a fee in excess of the cost of on-site units.[243] This type of program will encourage on-site development that has the benefit of integrating the community, and therefore provides significant economic and sociological benefits.[244]

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[237] *See id.* at 13.

[238] *Cf.* Witten, *supra* note 157, at 530 (explaining that the Massachusetts program permits developers that provide twenty-five percent affordable units to exempt their project from any local regulation).

[239] *See* Primer, *supra* note 51, at 11; Kautz, *supra* note 7, at 974–75.

[240] *See* Dowling & Fadrowsky, *supra* note 121, at 212–13.

[241] *See* Holmdel Builders Ass'n v. Twp. of Holmdel, 583 A.2d 277, 284 (N.J. 1990) (discussing in-lieu-of fees and commercial developments).

[242] *See* Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 62–63 (Ct. App. 2001); Curtin & Naughton, *supra* note 56, at 914. Napa's program requires special approval from the city council to not build the affordable units on-site, but the planning board may be capable of making a sufficient finding. *See id.* San Mateo, California has a similar approach to Napa, but without any alternatives—on-site affordable units must be constructed with any new development. *See* Kautz, *supra* note 7, at 1019–20. The approach is similar to traditional zoning regulation because just as developers must comply with zoning, they must comply with the inclusionary requirement. *See id.* at 1020.

[243] *See* Porter, *supra* note 19, at 229 (explaining that although off-site units or a fee in-lieu-of development may increase the number of affordable units, "it tends to defeat the goal of distributing affordable housing throughout the community and increasing neighborhood housing diversity").

[244] *See* Burchell & Galley, *supra* note 14, at 28 (explaining that the integration "avoids the problems of over-concentration, ghettoization and stigmatization generally associated with solely provided and isolated affordable housing efforts"); Talbert & Costa, *supra* note 18, at 557–58; Morgan, *supra* note 27, at 379 (illustrating sociological benefits, including "better educational and employment opportunities"). In addition, on-site units generally have higher quality construction because they are constructed together with market-rate units. *See id.* (claiming that integrated affordable units encourage better construction be-

Unlike the Maryland approach—which limits its affordable housing program to specific lot and project sizes—a mandatory inclusionary zoning program should not have exclusions that permit a developer to construct outside of the inclusionary requirements.[245] The program should require that the construction of even single family residential units require a fee to be paid toward the creation of affordable housing.[246] By requiring municipalities to adopt mandatory inclusionary zoning based on a comprehensive plan, the program can effectively create affordable housing with any new development.

B. *Enforcement Mechanisms*

While the creation of an inclusionary program may be possible in every state, there must be a way to enforce such a program for it to be effective.[247] The difficulty with eastern programs is that they are based upon regional planning of affordable housing—originating from a "regional general welfare."[248] This regional planning is especially difficult when these states have no existing regional planning structure.[249] Without adequate planning, the only remedy to provide affordable housing in these eastern states is through lawsuits by would-be developers.[250]

A mandatory, statewide, inclusionary zoning program, however, would resolve these enforcement difficulties. Inherent in state government is a preexisting structure to enforce statutes on municipalities: administrative agencies and the courts.[251] Currently, many inclusionary statutes require municipalities to submit their affordable housing plans

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cause the "marketability of conventional units is likely to be affected by the appearance of nearby low income units").

[245] *See* Brown, *supra* note 13, at 24; *supra* notes 177–78 and accompanying text.

[246] *See* Cecily T. Talbert & Nadia L. Costa, *Inclusionary Housing Programs: Local Governments Respond to California's Housing Crisis*, 30 B.C. Envtl. Aff. L. Rev. 567, 575 (2003) (discussing the City of Napa ordinance that requires contributions from single family developments).

[247] *See* Powell, *supra* note 40, at 202–03.

[248] *See id.* at 202.

[249] *See* Witten, *supra* note 157, at 523 n.59 (naming the limited number of regional planning agencies).

[250] *See* Porter, *supra* note 19, at 232 (explaining that the remedy in Massachusetts belongs solely to the developer); Solinski, *supra* note 24, at 54 (discussing the expense of challenging a municipality in New Jersey for violating the "fair share" requirement).

[251] This is the Massachusetts approach to inclusionary zoning. *See* Witten, *supra* note 157, at 532; *see also supra* Part III.A.2.

to a regional or state administrative agency for review.[252] California, as illustrated earlier, uses such an arrangement, whereby the Department of Housing and Community Development must approve any new or modified municipal housing plan.[253] This type of built-in enforcement allows the state to retain a check on local government housing policy.[254] However, in the absence of local inclusionary zoning, alternate enforcement can be achieved through an override of local land use regulation,[255] financial sanctions,[256] or judicial action.[257] The most effective solution seems to be empowering municipalities with the ability to plan for affordable housing in conjunction with state oversight.

C. *The Impact Fee Analysis Answer to Inclusionary Zoning Challenges*

The difficulty with these programs, as discussed above, is courts' unwillingness to see these mandatory inclusionary zoning ordinances as traditional land use ordinances that deserve broad deference.[258] However, the problem can be solved through state authorization of mandatory set-asides of affordable units which should be given deference by the courts.[259] Although the development community will likely continue to argue that such a program violates due process and affects a taking, both analyses are dependent upon whether the ordinance implicates a legitimate state interest.[260] As we have seen, affordable housing can be justified as a legitimate state interest.[261] When a court

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[252] *See* Morgan, *supra* note 27, at 374–77 (discussing approaches of Oregon, Florida, California, and Washington that require municipalities to have their affordable housing plans reviewed).

[253] *See* Curtin & Talbert, *supra* note 20, at 12–13.

[254] *See id.*

[255] *See* Witten, *supra* note 157, at 553 (arguing that the use of enforcement techniques should be a last resort).

[256] *See* Porter, *supra* note 19, at 248.

[257] *See Mt. Laurel II*, 456 A.2d 390, 467 (N.J. 1983); *see also supra* Part III.A.1.

[258] *See* Kautz, *supra* note 7, at 989; *see also* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). Some courts have seen inclusionary zoning as outside the scope of a traditional land use ordinance—outside of "home rule" which is the grant of the police power in many states—and, therefore requires an authorizing statute. *See* Netter, *supra* note 13, at 166 (discussing Massachusetts Supreme Judicial Court finding of inclusionary zoning to be outside the scope of home rule).

[259] *See* Kautz, *supra* note 7, at 1006 (explaining that an inclusionary ordinance will not be subject to the same judicial scrutiny as an exaction).

[260] *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Primer, *supra* note 51, at 9–10 (illustrating that once a finding of a legitimate state interest is reached, there is no taking). The first prong of *Agins* requires that to have a taking, there must be no legitimate state interest. *See Agins*, 447 U.S. at 260.

[261] *See supra* notes 99–102 and accompanying text.

applies an impact fee analysis to a mandatory inclusionary ordinance, it will likely find that the ordinance passes constitutional muster.[262] Both impact fees and mandatory inclusionary ordinances attempt to compensate a community for the impact of development.[263] From a constitutional analysis, both are legislative actions and therefore are entitled to deference by the courts.[264]

Having found the ordinance constitutional, the only remaining analysis for a court would be whether the municipality complies with the statutory requirements.[265] The rationale for providing substantial deference to impact fees is that they are legislative and based upon a plan created with regard to the impact of development.[266] Inclusionary zoning ordinances that are authorized by the state legislature deserve the same general deference because they are also legislatively enacted.[267] The municipality must be able to demonstrate that the inclusionary ordinance is based upon the need for affordable housing in the community.[268] To determine whether an inclusionary zoning ordinance is constitutional, the court need only consider whether the municipality has acted within the scope of its authority.[269] If the law is outside the scope of the authority it will be found to be arbitrary or capricious and therefore void.[270]

In addition, the similarities between an impact fee and mandatory inclusionary zoning illustrate why an exaction analysis is mis-

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[262] *See* Netter, *supra* note 13, at 167 (explaining that formal requirements are more likely to be upheld).

[263] *See* Curtin & Talbert, *supra* note 20, at 320. The impact fee compensates the community for the increased cost of infrastructure with money while the inclusionary zoning ordinance compensates a community for all development with affordable housing, a public need. *See id.*

[264] *See* Curtin & Naughton, *supra* note 56, at 916; Leitner & Schoettle, *supra* note 117, at 492 (discussing impact fee enabling legislation).

[265] *See* Netter, *supra* note 13, at 167.

[266] *See, e.g.*, San Remo Hotel v. City of San Francisco, 41 P.3d 87, 111 (Cal. 2002) (holding that legislative impact fees are entitled to broad deference); Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996); Ayres v. City Council, 207 P.2d 1, 7–8 (Cal. 1949); Krughoff v. City of Naperville, 369 N.E.2d 892, 895–96 (Ill. 1977); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910, 914–15 (R.I. 1970).

[267] *See* Curtin & Talbert, *supra* note 20, at 64.

[268] *See* Netter, *supra* note 13, at 167; Kautz, *supra* note 7, at 1021–22 (describing various ways that states demonstrate a relationship between the affordability requirement and the needs of the community).

[269] *See* Curtin & Talbert, *supra* note 20, at 307; Leitner & Schoettle, *supra* note 117, at 495 (discussing analysis for determining whether an impact fee is within the power of a municipality).

[270] *See* Talbert & Costa, *supra* note 246, at 578.

placed in this context.[271] Exactions require closer scrutiny because of the potential for abuse when a decision applies exclusively to a single landowner.[272] Unlike an exaction, both mandatory inclusionary ordinances and impact fees are not adjudicative but rather are legislative.[273] Therefore, unlike exactions, both impact fees and inclusionary zoning ordinances deserve broad deference by the courts.[274]

Finally, neither impact fees nor mandatory inclusionary zoning ordinances are takings because they do not deny developers substantially all economic use of their property.[275] Both programs require developers to pay for the public costs of their development—in money or affordable housing.[276] Rather than being denied their right to develop, developers are forced to pay a fee for that right.[277] Similar to rent control, developers are not being denied their investment by mandatory inclusionary ordinances.[278]

Conclusion

To effectively create affordable housing, a community should adopt a mandatory inclusionary zoning regime. Each community should create a comprehensive plan for the provision of this affordable housing based upon a "fair share" of the regional need for such housing. The program would create affordable housing with any new development.

Many states have already authorized some type of inclusionary zoning. However, even in states that have yet to enact such legislation, the judiciary seems to provide room for inclusionary approaches. In addition, the *Home Builders Ass'n of Northern California v. City of Napa* decision further illustrates that the constitutional rights of developers will not bar inclusionary programs.

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[271] *See* Kleven, *supra* note 108, at 112; *see also*, Kautz, *supra* note 7, at 1006 (discussing how courts are finding that generally applicable fees are not considered under an exaction analysis).

[272] *See* Dolan v. City of Tigard, 512 U.S. 374, 389 (1994).

[273] *See* Curtin & Naughton, *supra* note 56, at 914.

[274] *See* Talbert & Costa, *supra* note 246, at 578.

[275] *See* San Remo Hotel L.P. v. City of San Francisco, 41 P.3d 87, 111 (Cal. 2002) (providing impact fee ordinance broad deference); *see also supra* notes 122–31 and accompanying text.

[276] *See* Leitner & Schoettle, *supra* note 117, at 492; Parker, *supra* note 91, at 186 (explaining that a developer can be required to provide affordable housing because the property still has value).

[277] *See* Mandelker, *supra* note 78, at 35.

[278] *See* Kautz, *supra* note 7, at 1012–13. The difference with an inclusionary ordinance is that a developer, unlike a landlord, is not entitled to a fair return on affordable units. *See id.*

Any legislative affordable housing program deserves broad judicial deference. Like an impact fee, once the program is authorized it should be considered constitutional. Therefore, in looking to the future, the *Home Builders* argument should be advanced in favor of inclusionary programs; inclusionary programs are legislative, like an impact fee, and therefore deserve deference by the courts. This constitutional analysis will permit these programs to address a serious social concern—providing affordable housing to Americans nationwide.