

## WHEN ARE AFFORDABLE HOUSING EXACTIONS AN UNCONSTITUTIONAL TAKING?

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Many of the country's most desirable communities are "scrambling to address skyrocketing housing prices, workforce displacement, and increasing homelessness."<sup>1</sup> Silicon Valley in California was recently dubbed an "affordability wasteland" when the median home price reached \$800,000.<sup>2</sup> Two islands in Hawaii are not far behind, with Kauai's median home costing \$785,000 and Maui's \$734,000 in 2006.<sup>3</sup> Quickly rising housing prices make the lack of affordable housing a growing crisis. For example, the median price for a single family home in Honolulu rose 74% in the last three years; in comparison, wages grew just 9%.<sup>4</sup> The problem is not isolated to affluent and resort areas. In fact, one out of every seven households in the United States pays more than half of its gross income for housing, while the Department of Housing and Urban Development suggests that a family should spend no more than 30% of their gross monthly income on housing.<sup>5</sup>

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1. A. Bernard Bays & Michelle DaRosa, *The Scramble to Protect the American Dream in Paradise: Is Affordable Housing Possible in Hawaii?* Haw. Bar J. Vol. 10, No. 13, 37 (2007).

2. Broderick Perkins, *Silicon Valley's Median Home Price? \$800,000!*, REALTY TIMES, June 8, 2006 available at [http://realtytimes.com/printpages/20060608\\_medianpriceeight.htm](http://realtytimes.com/printpages/20060608_medianpriceeight.htm).

3. See Nina Wu, *Neighbor island home sales cooled in May*, STAR BULLETIN, June 9, 2006 available at <http://starbulletin.com/2006/06/09/business/story01.html>.

4. See U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, NOTICE PDR-2003-01 *Estimated Median Family Incomes for FY 2003* (Feb. 20, 2003) (setting Hawaii's average median income for 2003 at \$62,200) available at <http://www.huduser.org/Datasets/IL/FMR03/HUD-Mediansa.pdf>; U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, NOTICE PDR-2006-011 *Estimated Median Family Incomes for FY 2003* (Mar. 8, 2006) (setting Hawaii's average median income at \$67,600) available at <http://www.huduser.org/Datasets/IL/FMR03/HUD-Mediansa.pdf>.

5. See, e.g., KAUAI COUNTY HOUSING AGENCY, AFFORDABLE FOR-SALE HOUSING PRICES (2006) (table of average median income of different sized families and price of home affordable for them, in income brackets; for example, a family of four earning 100% of Kauai's

One increasingly popular response to the affordable housing crisis is to levy exactions on developers of residential projects as conditions for zoning changes, or to require plan approval or building permits.<sup>6</sup> Governments often view conditional exactions on private developers as a socially responsible way to encourage home ownership.<sup>7</sup> Admittedly, it is easier to pass the problem created by complex market forces onto the private sector than for the government to find ways to facilitate and encourage workforce housing to be built.<sup>8</sup>

This article explores whether these types of affordable housing requirements constitute constitutional takings that warrant due compensation. It explores where to draw the line between the proper exercise of the state's police power to regulate land use and development and the unconstitutional shifting of a social burden onto the shoulders of the few by exacting their property, with primary focus on developers that are building residential units. Because Hawaii is actively grappling with proposed affordable housing legislation, and the four counties (City and County of Honolulu/Oahu (*hereinafter* "C&C"), Kauai, Maui, and Hawaii) presently utilize or are considering a panoply of exaction regimes, this article will examine Hawaii's present and proposed approaches to developer assessments in light of existing Fifth Amendment takings law to predict whether affordable housing exactions, in various forms and variations, would pass constitutional muster and under what circumstance.<sup>9</sup> In their present form, some affordable housing regulations may result in unconstitutional takings.

First, the article briefly describes the variations of affordable housing regimes in Hawaii's counties. A basic primer in takings jurisprudence then lays the foundation for an exploration of how the Supreme Court's takings tests for zoning ordinances and conditional exactions on entitlements may be applied to affordable housing

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AMI can afford to purchase a home at \$235,900, which a family earning 140% AMI or \$76,750 can afford a home costing \$349,000) available at <http://www.kauai.gov/Government/Departments/CommunityAssistance/HousingAgency>.

6. See, e.g., Bays & DaRosa, *supra* note 1, at 40-47.

7. See generally JOINT LEGISLATIVE HOUSING AND HOMELESS TASK FORCE, REPORT TO HAW. STATE LEGISLATURE (Jan. 2006), available at [http://www.capitol.hawaii.gov/session2006/studies/Joint\\_Homeless\\_Task\\_Force.pdf](http://www.capitol.hawaii.gov/session2006/studies/Joint_Homeless_Task_Force.pdf); Bays & DaRosa, *supra* note 1, at 42.

8. See JOINT LEGISLATIVE HOUSING AND HOMELESS TASK FORCE, *supra* note 7.

9. See, e.g., *id.* I do not take up the issue of rent controls, which has been thoroughly discussed in many articles on the topic, even though workforce housing ordinances typically include rent control provisions.

exactions. Finding that some types of affordable housing exactions may qualify as takings under the nexus and rough proportionality tests of *Nollan* and *Dolan*, the final part of the article describes how some courts and commentators have suggested avoiding the heightened scrutiny that *Nollan* and *Dolan* apply to conditional exactions. In conclusion, the article suggests some ways to insulate affordable housing exactions from constitutional challenge and, on the other side of the coin, ways that developers who have suffered a taking might successfully bring a takings challenge. In the end, creating incentives for developers to build affordable housing will both protect exactions from a takings challenge and increase the likelihood that the housing supply will actually grow for working families.

#### I. AFFORDABLE HOUSING REGULATION BASICS<sup>10</sup>

Affordable Housing regulations are subject to various nomenclatures, but “inclusionary zoning” is assuredly the name of the day.<sup>11</sup> Inclusionary zoning is so named because its advocates see it as a remedy for exclusionary zoning practices.<sup>12</sup> Exclusionary zoning in many of the country’s communities has restricted land use so as to exclude the possibility of affordable housing units (especially housing

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10. For a more thorough discussion of the various components and variations on affordable housing ordinances in Hawaii’s four counties, see Bays & DaRosa, *supra* note 1.

11. Inclusionary zoning is used in a variety of communities around the country. Fairfax County was the first to institute inclusionary zoning in 1971, with Montgomery County, Maryland in 1973. Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S. F. L. REV. 971, 977 n. 42 (2002). Montgomery County currently requires a 12.5% to 15% assessment on projects of 20 units or more. MontgomeryCountyMD.gov, *Summary and History of the Moderately Priced Dwelling Unit (MPDU) Program in Montgomery County, Maryland* (April, 2005) available at [http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing\\_P/Summary\\_and\\_History.asp#Summary](http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_P/Summary_and_History.asp#Summary). Inclusionary zoning is used extensively in California. Kautz, *supra*, at 1026-31. Of thirty different cities or counties with such ordinances, nearly half had a 10% assessment, and many require a range, depending on the incoming level targeted, typically from 5-15%. *Id.* Only Davis, Irvine, and W. Hollywood require 25%, 21%, and 20% assessments, respectively, for units targeted to moderate income earners, with lower percentages for low income units. *Id.* In comparison, all of the Hawaii counties’ requirements are quite aggressive, demanding between 20% and 30%, with the Land Use Commission typically requiring 20% affordable units whenever a developer applies for a zoning change. *Infra*, notes 16-18 and accompanying text.

12. The origins of inclusionary zoning reside, in part, in the Mount Laurel cases, where the New Jersey Court attempted to solve economic segregation of New Jersey’s residents through judicially imposed inclusionary zoning. *S. Burlington County N.A.A.C.P. v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983). For an interesting discussion of the legacy of the cases, see Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 Neb. L. Rev. 186 (1991).

in high-density configurations), primarily in earmarked regions of the suburbs.<sup>13</sup> To shed any pejorative associations with low-income, government-owned housing projects, increasingly affordable housing regulatory regimes are now called “workforce housing” ordinances.<sup>14</sup> This nomenclature also addresses the problems shared by many communities whose necessary workforce cannot afford to live near where they work and the increasing concerns about the effects of commuting on workers’ families, their ability to make a living, and even the environment.<sup>15</sup>

Like other jurisdictions, the Hawaiian Islands use a mix of inclusionary zoning ordinances and impact fees.<sup>16</sup> In Maui, for example, the exaction is generally a portion of the total project, typically known as “fair share mandatory set-asides” or “inclusionary zoning”; however, in Honolulu, like on the Big Island, the county may require 30 *more* houses to be built if the developer plans to build 100 market homes, especially if he chooses to build them off-site.<sup>17</sup> This kind of exaction is known as a linkage or impact fee.<sup>18</sup>

Affordable housing exactions in Hawaii are a hybrid of “linkage fee” (impact fee) and “fair share” (inclusionary zoning) techniques. With linkage fees, the developer must either build or pay for the construction of affordable housing or offsite infrastructure. With fair share mandatory set-asides or inclusionary zoning, the developer must market a given percentage of the units he builds at prices affordable to specified income groups of the population.<sup>19</sup>

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13. See, e.g., Amy C. Brandt, Comment, *Sedona’s Sustainable Growth Ordinance: Testing the Parameters of Dolan v. City of Tigard*, 28 ARIZ. ST. L.J. 1297, 1298-99 (1996) (describing how suburban municipal governments gradually invented ways to preserve the rural character of their towns to prevent the blights of urban life from creeping into their suburban neighborhoods, primarily by limiting new development and high density affordable housing—a phenomenon often called NIMBY (“Not in My Back Yard”).

14. See, e.g., Hawaii Workforce Housing Ordinance, (2005), available at <http://www.hawaii-county.com/countycode/chapter11.pdf>.

15. See, e.g., Bays & DaRosa, *supra* note 1, at 38. For an alternate view, see Berger, *supra* note 12, at 221-23. In the author’s opinion this a somewhat out-dated and short-sighted view. Prof. Berger probably over-estimates the filter-down effect of vacancy provided by middle-class homeowners moving to better pastures, and under-estimates the problems that presuming commuting is doable and reasonable has created for workers all over the country. These problems have become much more acute since Prof. Berger wrote in 1991.

16. Bays & DaRosa, *supra* note 1, at 44-52.

17. *Id.*

18. See, e.g., JOINT LEGISLATIVE HOUSING AND HOMELESS TASK FORCE, at 40 (Haw. 2006) available at [http://www.capitol.hawaii.gov/session2006/studies/Joint\\_Homeless\\_Task\\_Force.pdf](http://www.capitol.hawaii.gov/session2006/studies/Joint_Homeless_Task_Force.pdf).

19. *Id.* In addition to affordable housing exactions, the government may also require

Typically, affordable housing exactions are stipulated in terms of a portion of the total number of market or rental units a developer intends to build. The exactions require housing to be affordable within a certain range of average median income (AMI).<sup>20</sup> Hawaii uses the federal Housing and Urban Development (“HUD”) county by county median income statistics to determine what is affordable. HUD’s parameters for how much households at a given income level in a given county can afford for rent or house payments provide the backdrop for the price a developer may charge for the “affordable” set-asides.<sup>21</sup> The AMI index generally stipulates that housing is affordable if it costs 30% or less of a family’s monthly gross income.<sup>22</sup>

Affordable housing ordinances are usually creatures of local government. In Hawaii, each county has its own policies and requirements. Maui, Kauai, and Hawaii all have housing agency guidelines or workforce housing ordinances that are designed to uniformly apply affordable housing requirements on proposed residential projects.<sup>23</sup> C & C, on the other hand, uses a system of Unilateral Agreements, based on bargained for proposals between the developer and the county which, once approved and recorded, run

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developers to dedicate relatively large portions of their land that have development potential for residential units, parks, or schools as conditions on their permits or zoning change request. *See, e.g.*, *City of Monterey v. Del Monte Dunes of Monterey*, 526 U.S. 687 (1999). This may be either in addition to building the units (sometimes called concurrent development—requiring a developer to contemporaneously create infrastructure traditionally developed by local government, like building schools, regional roads, and sewer lines, even beyond the boundaries of the development itself along with the construction of residential units), or in-lieu of building affordable units. *See id.* This is increasingly common in Hawaii. *See* JOINT LEGISLATIVE HOUSING AND HOMELESS TASK FORCE REPORT, *supra* note 18, at Appx. C (testimony of Henry Eng, Director Dept. of Planning & Permitting).

20. Proposed Metropolitan Area Definitions for FY2006 Income Limits and Estimates of Median Family *Income*, 70 Fed. Reg. 74988 (Dec. 16, 2005); Bays & DaRosa, *supra* note 1, at 39.

21. COUNTY OF HAWAII CODE, § 11-4,5 (2005); KAUAI COUNTY HOUSING AGENCY, PROPOSED POLICY DRAFT 5, § III(A)-(C) (Jan. 2, 2002); COUNTY OF MAUI, A BILL FOR AN ORDINANCE ESTABLISHING A RESIDENTIAL WORKFORCE HOUSING POLICY, HHS-4 PLANNING COMMISSION DRAFT, § 2.96.060(B) (Rev. Jan. 6, 2006).

22. *See, e.g.*, HAWAII COUNTY, AFFORDABLE GUIDELINES FOR THE COUNTY OF HAWAII, *Sales Guidelines* (2006) available at <http://www.hawaii-county.com/ohcd/guidelines06.pdf>; KAUAI COUNTY HOUSING AGENCY, AFFORDABLE FOR-SALE HOUSING PRICES (2006).

23. COUNTY OF HAWAII CODE, § 11-4,5 (2005); MAUI COUNTY ADMINISTRATIVE HOUSING RECOMMENDED GUIDELINES, § IV (A) (Rev. May 5, 2005); COUNTY OF MAUI, A BILL FOR AN ORDINANCE ESTABLISHING A RESIDENTIAL WORKFORCE HOUSING POLICY, HHS-4 PLANNING COMMISSION DRAFT, § 2.96.060(B) (Rev. 2006).

with the land.<sup>24</sup> “For instance, if a developer has plans to build one hundred homes, under the 2005 County of Hawaii Workforce Housing ordinance, the developer must build twenty houses that are affordable, or earn credits equal to that number.”<sup>25</sup> On Kauai, the proportion is 15% for projects with 5-19 units, and 25% for projects with 20 or more units. Of the full number of affordable units required, 20% must be targeted toward families earning 50-80% median income, 30% for those earning 80-100% median, 30% for 100-120% median, and the last 20% of the exaction must be affordable to families in the 120-140% median income range, the so called “gap income earners.”<sup>26</sup>

In all of Hawaii’s affordable housing regimes, a developer may choose how to meet affordable housing requirements: dedications of buildable lots and in-lieu fees paid to the county or non-profit developers are typical options provided by the counties’ affordable housing ordinances.<sup>27</sup> For instance, on the Big Island, a developer could build the affordable units on or off-site within fifteen miles, pay an in-lieu fee equal to 25% of the average market prices less the affordable price for 120% median income, or supply infrastructure within fifteen miles for future affordable housing.<sup>28</sup> Maui provides additional options. Its current Housing Administration Guidelines allow a developer to upgrade existing affordable housing (presumably owned by the county) or, under its current proposal, to pay an in-lieu fee equal to half of the average market price of the homes to be sold

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24. See Bays & DaRosa, *supra* note 1, at 44; HONOLULU CITY COUNCIL POLICY RES. 80-239 (1980), available at <http://www.honolulu.gov/refs/cclpol/80-239.htm> (providing that to achieve affordable housing “[t]he private sector shall be encouraged to prepare and submit proposals to the Department of Housing and Community Development on both existing City-owned land or land that shall be acquired.”). Unilateral Agreements are a policy of the C & C’s Planning Department that is governed by what is known to be customary and usual. Telephone interview, with Don Clegg, Land Use Consultant, in Honolulu, Haw. (June 9, 14, 2006) (on file with the author).

25. Bays & DaRosa, *supra* note 1, at 44; HAW. COUNTY CODE §§ 11-4, 11-5 (2005), available at <http://www.hawaii-county.com/countycode/chapter11.pdf> (requiring 20% of all residential developments of five or more residential units or lots, and for resort or hotel uses generating more than 100 full-time employees the developer has to earn one housing credit for every four full-time equivalent jobs created, or a very high in-lieu fee). This supplanted a former policy of a 10% assessment and relatively low in lieu fee. See COUNTY OF HAWAII BILL NO. 25, DRAFT 3 (effective Feb. 2005).

26. KAUAI COUNTY HOUSING AGENCY, PROPOSED POLICY DRAFT 5, § III.(A)-(C.) (Jan. 2, 2002).

27. *Id.*; HAW. COUNTY CODE §§ 11-4 to 11-6.

28. HAW. COUNTY CODE, §§ 11-4, 11-5.

in the proposed development.<sup>29</sup>

Low income families are not the only families eligible for affordable housing units. In fact, affordable market units are targeted to moderate income earners. Approximately 80% of Maui's total population would be eligible for developer subsidized housing units under its current workforce housing ordinance proposal.<sup>30</sup> In 2006, a family of four earning a little less than \$100,000 could afford a \$405,300 home—less than the average-priced condominium on Kauai and less than half the median priced single family home.<sup>31</sup> In another example, if a builder was building median market homes priced between \$750,000 and \$800,000 on Kauai, he would have to subsidize each set aside unit in excess of \$400,000 to make it affordable to a family earning 140% of AMI, or \$85,300.<sup>32</sup> On Oahu, as another illustration about how expensive these exactions have the potential to be, Honolulu's Affordable Housing Advisory Committee reported to the Mayor and City Council this year that if the land was virtually free and excise and real estate taxes were waived, a three bedroom rental unit would need a minimum subsidy of \$205,000 to make it affordable to a family earning 50% AMI, or about \$35,000.<sup>33</sup>

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29. MAUI COUNTY ADMINISTRATIVE AFFORDABLE HOUSING RECOMMENDED GUIDELINES § IV(A) (Rev. May 5, 2005); COUNTY OF MAUI, A BILL FOR AN ORDINANCE ESTABLISHING A RESIDENTIAL WORKFORCE HOUSING POLICY, HHS-4 PLANNING COMMISSION DRAFT, § 2.96.060(A)(5) (Rev. 2006) [hereinafter MAUI WORKFORCE HOUSING DRAFT 2006].

30. This was the conclusion of the Affordable Housing Strategic Study conducted in Maui in July, 2006 that was sponsored by the Kihei Community Association, and reported at the Urban Land Institute (ULI) Conference on Affordable Housing, Honolulu, Hawaii (July 24, 2006). URBAN LAND INSTITUTE HAWAII DISTRICT COUNCIL, *ULI Takes Maui's Workforce Housing Crisis Head On*, 5 (Sept. 2006) available at [www.uli.org](http://www.uli.org) (last visited Mar. 19, 2007).

31. See KAUAI COUNTY HOUSING AGENCY, AFFORDABLE FOR-SALE HOUSING PRICES (2006) available at <http://www.kauai.gov/Government/Departments/CommunityAssistance/HousingAgency> (last visited Mar. 19, 2007).

32. Obviously, no developer would choose to do this with multiple units. The in-lieu fee options might be cheaper for the developer, depending on the county. This begs the question of whether exactions will, in fact, result in the construction of more affordable units. See, e.g., KAUAI COUNTY HOUSING AGENCY, AFFORDABLE FOR-SALE HOUSING PRICES (2006) available at <http://www.kauai.gov/Government/Departments/CommunityAssistance/HousingAgency> (last visited Mar. 19, 2007).

33. AFFORDABLE HOUSING ADVISORY COMMITTEE, REPORT & RECOMMENDATIONS, V. (City and County of Honolulu, Apr. 2006). In a state where land, entitlement, and infrastructure costs run as high as Hawaii, it is not uncommon for these costs to exceed a few hundred thousand dollars for a relatively modest single-family residence. See Bays & DaRosa, *supra* note 1, at 52; see also Benjamin Powell, Edward Stringham, *Housing Supply and Affordability: Do Affordable Housing Mandates Work?* (Apr. 2004) (finding that in

That affordable housing requirements may reach deep into the pockets of a few private citizens begs the takings question.

## II. BASIC TAKINGS PRINCIPLES

As part of the inherent power of a sovereign, both the federal government and the individual states have the power of eminent domain.<sup>34</sup> Eminent domain power is only properly exercised in the service of other enumerated powers.<sup>35</sup> In the case of exacting affordable housing requirements from developers, the state is using its police power to promote social welfare by creating a supply of housing that working families can afford. The power of eminent domain, however properly motivated and authorized, is limited by the Fifth Amendment, which provides that no private property may be taken by the government for public use without just compensation.<sup>36</sup> One of the primary purposes of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole.”<sup>37</sup>

There are several permutations of constitutional analysis in the arena of regulatory takings.<sup>38</sup> The Supreme Court has not ruled on a case involving affordable housing assessments specifically, so this article explores how existing takings law may apply to affordable housing exactions. Takings challenges focus on (1) deprivation of property rights without compensation, (2) failure to use appropriated property<sup>39</sup> for public use, or more rarely, (3) failure to demonstrate a

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California's Bay Area the cost associated with selling an inclusionary unity with a market value with a \$500,000 value—which is already below median price—exceeds \$340,000 available at <http://www.reason.org/ps318.pdf> (last visited Mar. 27, 2007).

34. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, 505 (7th ed. 2004).

35. *Id.* at 507.

36. U.S. CONST. amend. V. The compensation clause of the Fifth Amendment is incorporated into the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897). “[N]or shall any State deprive any person of life, liberty, or property without due process of law.” U.S. CONST. amend. XIV, § 1.

37. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836 n.4 (1987) (quoting *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960)).

38. The Supreme Court’s approach to takings cases has been anything but clear; takings law was once aptly described as a “crazy-quilt pattern of Supreme Court doctrine.” NOWAK & ROTUNDA, *supra*, note 34, at 506 (citing Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63).

39. Takings clause protection is based upon the presumption that, in the first instance, the individual has a property right that could be taken. ERWIN CHEREMINSKY,

legitimate purpose for the taking. This article will focus on the first challenge because public use and legitimate purpose are unlikely to be an issue with affordable housing exactions. The matter of public use, when property is taken from one citizen and given to another, was settled in Hawaii by *Hawaii Housing Authority v. Midkiff*.<sup>40</sup> There is no doubt that government has a legitimate purpose when it tries to solve housing supply problems that leave large numbers of people financially stretched or homeless.<sup>41</sup>

A constitutional challenge to a taking without due compensation always focuses on the unfairness of a burden placed on an individual citizen for the benefit of the citizenry. Generally, compensation is due if the government taking has gone “too far” in appropriating a citizen’s property right.<sup>42</sup> As Justice Holmes explained, the takings issue is “a question of degree and therefore cannot be disposed of by general propositions.”<sup>43</sup> Therefore, my analysis will attempt to illuminate how much is “too far” with various affordable housing exactions by utilizing the tests for regulatory takings as defined by the Supreme Court.

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CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 633 (3d. ed. 2006). An exercise of eminent domain requiring compensation occurs only upon deprivation of existing property rights. *Id.* at 633-635. This could become an issue in Hawaii, because affordable housing exactions are generally triggered by requests for zoning adjustments. An adjustment would allow a property owner to use her land in a way not previously allowed; thus, the question could arise as to whether affordable housing exactions were just another fee in exchange for a benefit granted by the government.

40. 467 U.S. 229 (1984). Since *Midkiff* was decided and the transfer of trust property made and compensated, the case rarely registers in the discussion of affordable housing. In all of the interviews with land use consultants, attorneys, developers, policy analysts, and affordable housing consultants that I spoke with had regarding the affordable housing issue, and pending legislation, *Midkiff* did not seem to cast a shadow that seemed to effect how affordable housing issues play out in Hawaii.

41. In *Hawaii Housing Authority v. Midkiff*, the Court affirmed the constitutionality of The Land Reform Act of 1967. 467 U.S. 229, 244. “[G]overnment does not itself have to use property to legitimate the taking; it is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.” *Id.* Like affordable housing requirements, the Land Reform Act’s purpose was to make a market correction in Hawaii’s unique real estate market; therefore, under *Midkiff*, that affordable housing benefits are subsidized by developers then directly transferred to other private citizens will not make such requirements unconstitutional for lack of public use. *Id.* at 233. Thus, it is unlikely that public use would ever be a serious point of contention regarding affordable housing ordinances.

42. *See, e.g., Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

43. *Id.* at 416.

### A. *Land Use Regulation*

In its most banal form, a taking is government's physical appropriation of private property. The Supreme Court, however, has recognized as takings a variety of both acquisitive and non-acquisitive regulatory actions that deprive owners of some or all of their property rights.<sup>44</sup> Although the state possesses the power to regulate property without payment of compensation, if the regulation goes too far, a taking may be found.<sup>45</sup>

At the head of the regulatory takings line of cases is *Pennsylvania Coal Co. v. Mahon*.<sup>46</sup> The Supreme Court found a taking that warranted compensation when a Pennsylvania law deprived the coal company of mining all of the coal under Mahon's house that had been conveyed to it, requiring the coal mining company to leave some of its coal in the ground to prevent subsidence.<sup>47</sup> This prohibition was a taking under the Court's reasoning because "[w]hat makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."<sup>48</sup> Regulatory takings were thus born. Many hybrids of regulatory takings challenges have since emerged, though few cases have been as generous to property rights as *Mahon*. In the context of affordable housing requirements, the line of cases dealing with land use regulations will be applicable. I will address each of these in turn, because depending on how the courts characterize the affordable housing regulations and their impact on developers, they may fall under one takings test or another.

#### 1. *Zoning Ordinances*

A ubiquitous subsection of regulatory ordinances, zoning ordinances typically reflect a broadly applied land use plan legislated by the local or state government. As a blanket prohibition, they restrict tracts of land to particular uses and prohibit other uses.

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44. *Id.* at 415-16.

45. *See, e.g., id.* at 415; *City of Monterey, v. Del Monte Dunes*, 526 U.S. 687, 705 ("We all accept that in today's society, cities and counties can tell a land owner what to do to some reasonable extent with their property.").

46. 260 U.S. 393 (1922).

47. *Id.* at 414-15.

48. *Id.* at 414.

Because the Court has given tremendous deference to the strong police purpose in zoning regulations, a takings challenge based on lost property value or restricted use because of a legislated zoning ordinance is almost sure to fail. *Euclid v. Amber Realty Co.* was one of the first challenges to a zoning ordinance, though it involved a due process claim.<sup>49</sup> *Euclid* demonstrates that, because of the compelling legitimacy of a government purpose, the government can go very far in depriving a landowner of value and use before a taking will be found.<sup>50</sup> Amber Realty owned a tract of commercial land that had a market value of about \$10,000 per acre.<sup>51</sup> After the land was rezoned for residential use only, its value was substantially reduced to about \$2,500 an acre.<sup>52</sup> Though the land's value was reduced by 75%, the Court found it did not constitute a taking.<sup>53</sup> Thus, zoning ordinances that amount to persistent land use restrictions are generally given a great deal of constitutional latitude so long as they fit within a community's general land use plan.

Through a series of cases leading up to and including *Penn Central Transportation Co. v. City of New York*, the Court identified critical factors used to determine "when 'justice and fairness' require economic injuries caused by public action be compensated by the government, rather than remain concentrated on a few persons."<sup>54</sup> Applying three factors, the *Penn Central* Court found no taking when a historical preservation zoning restriction did not allow the owner to build a sky scraper over the famous train station.<sup>55</sup> The three factors for individually applied zoning regulations are: (1) the "economic impact of the regulation on the claimant," (2) the extent to which the regulation has "interfered with distinct investment-backed expectations," and (3) the "character of the government action."<sup>56</sup> The owners of Penn Central Station were able to transfer their denied right to expand to other property they owned, so the Court found that their investment-backed expectations had not been disturbed so much that compensation would be due.<sup>57</sup> In any case, however, the

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49. 272 U.S. 365 (1926); CHEMERINSKY, *supra* note 39, at 650-651.

50. *Id.*

51. *Id.* at 384.

52. *Id.*

53. *Id.*

54. 438 U.S. 104, 124 (1960).

55. *Id.* at 137-38.

56. *Id.* at 124.

57. *Id.* at 137.

compensation clause does not require that a landowner be permitted to make the most profitable use of his property.

Two years later, in *Agins v. Tiburon*, the Supreme Court established the test for facial challenges of zoning ordinances.<sup>58</sup> The Court rejected a takings clause challenge to a zoning ordinance that stripped a piece of property of its multi-dwelling residential zoning and changed it to single family residence zoning.<sup>59</sup> The Court essentially applied a slightly heightened rational basis review, requiring the regulation to “substantially advance [the] legitimate state interest[]” the government sought to achieve.<sup>60</sup> The second part of the *Agins*’ test is whether the owners were left with any viable economic use of their property.<sup>61</sup> First, based on the legitimate purpose for the state to plan and regulate land use and the likelihood that the zoning change would substantially advance that interest by preventing over-crowding, the action passed the first test.<sup>62</sup> Second, similar to *Penn Central*, because the owner still had some reasonable economically viable use of the property, the Court found the zoning ordinance was not facially unconstitutional under the takings clause.<sup>63</sup>

## 2. *Conditional Exactions on Development Entitlements*

As a subsection of zoning ordinances, conditional exactions are not persistent land use restrictions; rather, they are triggered by an owner’s application for entitlements to develop her land.<sup>64</sup> The Court has developed a heightened standard of review for conditional

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58. 447 U.S. 255, 260 (1980).

59. *Id.* at 261-62.

60. *Id.* at 260.

61. *Id.*

62. *Id.* at 261.

63. *Id.* at 262.

64. In Hawaii, in the case of a boundary adjustment in a county planning map, or a zoning change, a developer will have to gain approval from the Land Use Commission at the state level, and then through the county council or planning department. *See, e.g.*, HRS § 46-15.1(Housing, county powers); HRS § 36-16.7 (concurrent processing, which provides that when amendments to a county plan or zoning map are necessary to the development of a housing project, requests may be concurrently processed with the state LUC and the county, and provides for any affordable housing component that may be required by the county council). During this double-deep entitlement process, affordable housing requirements will be levied by the state, typically for 20% of the proposed number of residential units, and then at the county level in accordance with their individual affordable housing regimes. *See* HRS § 205-4(g) (2006); *also* AFFORDABLE HOUSING ADVISORY COMMITTEE, REPORT & RECOMMENDATIONS, v. (City and County of Honolulu, Apr. 2006); *see generally* Bays & DaRosa, *supra* note 1, at 43-44.

exactions, largely due to the possibility of “taking by subterfuge.”<sup>65</sup> The two leading conditional exaction cases, *Nollan v. California Coastal Commission*<sup>66</sup> and *Dolan v. City of Tigard*,<sup>67</sup> both involved the application of legislated land use regulations. In both cases, the government’s action originated in broadly applicable land use planning policies or codified ordinances that were applied to individual petitions for development entitlements.<sup>68</sup> In both cases, the government placed conditions on granting permits to build a home or expand a business, respectively, that involved an actual appropriation of physical property and traditional property rights to which the owners consented as a condition upon their development permits.<sup>69</sup>

In *Nollan*, the California Coastal Commission required the owners of beachfront property to make a public easement to the beach as a condition to the permit for rebuilding their home.<sup>70</sup> The Commission argued that the easement was “a mere restriction of use” and did not constitute the taking of a property interest.<sup>71</sup> The Commission’s stated purpose for imposing the condition was to protect the public’s ability to see the beach, “assisting the public in overcoming the ‘psychological barrier’ to using the beach created by a developed shorefront, and prevent congestion on the public beaches.”<sup>72</sup>

The U.S. Supreme Court rejected the Court of Appeal’s application of the *Agins*’ test that led it to find that no taking had occurred because: (1) the condition advanced a legitimate state interest, and (2) it did not deprive the owners of all reasonable use of their property, though it considerably diminished the property’s value.<sup>73</sup> The Court assumed, without deciding, that the purpose was legitimate, and that if the Commission had wanted to, it could have denied the Nollans their permit if it had found that the Nollans’ new

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65. See *Berger*, *supra* note 12, at 211-12.

66. 483 U.S. 825 (1987).

67. 512 U.S. 374 (1994).

68. See, e.g., *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841 (1987) (relating the Commission’s justification that the access required as a condition on the permit was part of a comprehensive program to provide continuous public access along Faria Beach as the lots were individually undergoing development or redevelopment).

69. *Id.* at 828; *Dolan*, 512 U.S. at 379-80.

70. *Nollan*, 512 U.S. at 828.

71. *Id.*

72. *Id.* at 835-36.

73. *Id.* at 830, 834.

house substantially impeded the Commission's purposes, so long as it did not deprive the owners of all viable use of the property.<sup>74</sup> That the Nollans had agreed to the condition in order to get the building permit was inconsequential to the takings analysis.<sup>75</sup>

The Court developed a new test for situations like the Nollans': proper exercise of the state's police power allows for conditioning a permit so long as there is a "nexus between the condition and the original purpose of the building restriction."<sup>76</sup> "The evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition" itself.<sup>77</sup> In the Nollans' case, the lack of a nexus between the condition and the original purpose of the building restriction "convert[ed] that purpose to something other than what it was."<sup>78</sup> The Court was concerned that such conditions could be nothing more than a disguise for the government's "out and out plan of extortion," not a valid regulation of land use.<sup>79</sup> In a constitutional action with a nexus, it is as if the government is saying: "We will let you develop your land, a special fiat of government, so long as we get some of what we would have achieved by prohibiting the use for which you have petitioned." The failure to demonstrate the nexus indicates that the conditions are, in fact, premised on *another* motive of the government altogether, a situation the Court found unacceptably suspect.<sup>80</sup> Under this test, the Court found that the Commission's stated purposes for the condition—preserving the view of the beach for the public and overcoming the "psychological barrier" to its use—was not sufficiently connected to the easement for public access to the beach the Commission demanded.<sup>81</sup> The nexus needs to be close, and it needs to be related to the purpose behind the prohibition—not a post hoc justification for the condition—in order

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74. *Id.* at 835-36.

75. *Nollan*, 512 U.S. at 836.

76. *Id.* at 837.

77. *Id.*

78. *Id.*; *but see id.* at 846-47 (Brennan, J., dissenting) (condemning such precision in the equivalency of burden on access that the new house would impose and the public access demanded as a condition of the right to build the new home, and emphasizing the government's legitimate power to preserve overall public access to the California coast line pursuant to the State Constitution and state legislature's charge to the Commission).

79. *Id.* at 837 (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

80. *Id.* at 837, 841.

81. *Id.* at 836-39.

for it to comply with the policy prohibiting takings by subterfuge.<sup>82</sup>

The Court further clarified the proper analysis for takings challenges regarding conditions on developer entitlements in *Dolan v. City of Tigard*.<sup>83</sup> Dolan, the owner of a hardware store, wanted to nearly double the size of her building and install a parking lot.<sup>84</sup> The City of Tigard's permit conditions were imposed pursuant to Tigard's Community Development Code, a generally applicable ordinance, which in turn, was consistent with requisite statewide planning goals.<sup>85</sup> Tigard granted the owner's permit on the condition that Dolan dedicate land for a public greenbelt to handle run-off that the parking lot would exacerbate and a bicycle path to relieve traffic the store's expansion was expected to create.<sup>86</sup> The land dedications amounted to approximately ten percent of the total property.<sup>87</sup> After failing to gain a variance, Dolan claimed these conditions were an unconstitutional taking.<sup>88</sup>

In evaluating Dolan's takings claim, the Court first characterized the conditions as an adjudicatory action, not as generally applicable legislation.<sup>89</sup> Second, the Court did not think these permit conditions were directly akin to zoning ordinances, to which takings law gives considerable deference.<sup>90</sup> Once the species of action was thus identified, the Court applied the nexus test from *Nollan* and found that the permit conditions had an "obvious" relationship with the state's legitimate interest in their regulation objectives.<sup>91</sup> Then the Court expanded the test and evaluated whether the exactions on the

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82. See *Berger*, *supra* note 12, at 211-12.

83. 512 U.S. 374 (1994).

84. *Id.* at 378.

85. *Id.* at 377-78.

86. *Id.* at 379-80.

87. *Id.* at 380.

88. *Dolan*, 512 U.S. at 382. Under city ordinances, variances were granted only where it could be shown that, "owing to special circumstances related to a specific piece of the land, the literal interpretation of the applicable zoning provisions would cause 'an undue or unnecessary hardship' unless the variance is granted." *Id.* at 380.

89. *Id.* at 385 (distinguishing *Pa. Coal and Agins v. City of Tiburon*, 447 U.S. 255 (1980), because those cases involved "essentially legislative determinations classifying entire areas of the city, where as [with Dolan] the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."). The Court also distinguished Dolan's situation because the city had not just restricted her use of her property, but required her to deed portions to the city. *Id.*

90. *Id.*

91. *Id.* at 386-88 (finding nexus between permit conditions and city's interest in controlling runoff and relieving traffic congestion).

proposed development were roughly proportional to the impact that the building's expansion would have.<sup>92</sup> The question the Court asked was "whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of the petitioner's proposed development."<sup>93</sup> In this inquiry, the Court found that the conditions were neither related in nature nor in extent to the impact of the proposed development.<sup>94</sup> In other words, the burden on the developer was not commensurate with the evil the development would create. The majority was particularly concerned with the extent of exaction of real property when a takings-free solution seemed possible.<sup>95</sup> The Court disapproved that Dolan had to give the city ten percent of her land when logic demonstrated that at least the drainage issues could be resolved without taking property from Dolan.<sup>96</sup> The Court placed the burden on the city to justify the required dedication and indicated that more than generalized rationales were required,<sup>97</sup> while in rational basis level scrutiny, the burden of proof falls on the plaintiff, not the government. Clearly, the rough proportionality test raises the level of scrutiny to which a conditional exaction should be subjected.

Because the issue was not before the Court, it did not indicate how far the *Dolan* two-part test should be applied to a takings challenge regarding conditions on permits that do *not* require a dedication of property but only monetary exactions or price controls, like many of Hawaii's affordable housing exaction options.<sup>98</sup> In a subsequent takings case regarding a takings challenge from a developer who was effectively denied permits through a decade of

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92. *Id.* at 388.

93. *Id.*

94. *Dolan*, 512 U.S. at 394-95.

95. *Id.* at 393 ("[T]he city demanded more—it not only wanted petitioner not to build in the flood plain, but it also wanted petitioner's property . . . for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.").

96. *Id.*

97. *Id.* at 391, n.8. This was a point of contention in Justice Stevens' dissent, because Stevens believed the conditions should be evaluated like most generally applicable zoning regulations where the challenging party must prove "that it constitutes an arbitrary regulation of property rights." *Id.*

98. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999) (stating that the Court "has not extended the rough-proportionality standard of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use" and finding that the standard was not readily applicable to cases of denial of development like *Del Monte's*.).

delays, the Court admitted that it has not provided a “thorough explanation of the nature of applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions.”<sup>99</sup> Oddly, the Court, in *City of Monterey v. Del Monte Dunes at Monterey*, cited *Dolan*,<sup>100</sup> though clearly the “substantially advances” test was *not* used in *Dolan*.<sup>101</sup> The states are left to struggle with whether and how to apply the nexus and rough proportionality tests to affordable housing requirements as challenges come up. Additionally, they must judge for themselves whether “dedications *or* exactions”<sup>102</sup> are two different ways to levy a taking or, whether *Dolan* applies only to the “special context of exactions-land-use decisions conditioning approval of development on the dedication of property to public use.”<sup>103</sup>

Soon after *Dolan*, California was faced with a takings challenge to a conditional developer exaction in the form of a recreation fee in *Ehrlich v. City of Culver City*.<sup>104</sup> Though it was not an affordable housing exaction, the recreation fee levied on the plaintiff was similarly motivated; the community had a quality of life need, and the city looked to a developer of a residential subdivision to help mitigate that need.<sup>105</sup> Because of the similarity between the nature of the exaction to affordable housing requirements, the recreation fee could serve as a predictor of how an affordable housing exaction might be analyzed under the *Dolan* two-step analysis.

In *Ehrlich*, the California Supreme Court considered the challenge to a \$280,000 recreation fee exaction levied as a condition for residential development entitlements and a \$32,000 “art in public places” exaction under the then new *Nollan* and *Dolan* tests for conditional regulatory takings.<sup>106</sup> The court remanded the issue of the recreation fee to the city to determine what fee the “evidence might justify,” but found that the art fee was not subject to the *Nollan-Dolan* analysis because it was merely an aesthetic condition “well within the

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99. *Id.* at 704.

100. *Id.* at 702.

101. *Dolan v. City of Tigard*, 512 U.S. 374, 385-386 (1994) (distinguishing cases that use the “substantially advances” test and citing to the “essential nexus” test used in *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 828 (1987)).

102. *Del Monte Dunes*, 526 U.S. at 704 (emphasis added).

103. *Id.* at 702 (citing *Dolan* 512 U.S. at 385).

104. 911 P.2d 429 (Cal. 1996).

105. *Id.*

106. *Id.* at 433-35.

authority of the city to impose.”<sup>107</sup>

Ehrlich owned a private health club for several years when it started losing money.<sup>108</sup> Having been denied a land use change in 1981 for building an office building on the site, in 1988 Ehrlich applied for a zoning change and permits so that he could build a thirty plus unit condominium complex valued at \$10 million.<sup>109</sup> He had to close the fitness club the same month as a result of continuing financial losses.<sup>110</sup> Culver City initially expressed interest in buying the property itself in order to remedy its lack of public recreational facilities, but decided that operating the facility would not be financially viable for the city.<sup>111</sup> Because the city was already lacking public tennis courts, and Ehrlich’s residential development would result in the demolition of the fitness center’s courts, it conditioned Ehrlich’s permits on building four tennis courts.<sup>112</sup> However, the city decided during a closed-door meeting to grant Ehrlich’s application on the condition that he pay certain monetary exactions, instead of requiring him to build the tennis courts.<sup>113</sup> Ehrlich challenged the exaction, alleging that the imposition of the fees resulted in an unconstitutional taking without just compensation.<sup>114</sup>

The court characterized Culver City’s action as a form of regulatory “leveraging.”<sup>115</sup> The court cited Justice Scalia’s logic in the *Nollan* opinion: “One would expect that a [permit] regime in which this kind of *leveraging* [i.e., the imposition of *unrelated* exactions as condition for granting permit approval] of the police power is allowed would produce stringent land-use regulation which the state then waves to accomplish other purposes . . . .”<sup>116</sup> In dicta, California surmised that *Dolan*’s heightened scrutiny was particularly apt where a developer bargained with government to surrender benefits “which *purportedly* offset the impact of the proposed

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107. *Id.* at 449-50.

108. *Id.* at 434.

109. *Id.*

110. *Ehrlich*, 911 P.2d at 434.

111. *Id.* The plaintiff got a permit to demolish the building, and he donated all of the useful equipment to the city. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 435.

115. *Id.* at 438.

116. *Ehrlich*, 911 P.2d at 438, n.5 (quoting *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (italics added)).

development.”<sup>117</sup>

California’s court applied the nexus and rough proportionality test to Ehrlich’s situation though he was not dedicating land but paying a fee.<sup>118</sup> The court determined that the recreational exaction, as an alternative to denying a proposed use, logically furthered the same regulatory goal as would outright denial of Ehrlich’s development permit.<sup>119</sup> In the case of total prohibition to the residential development, the city argued the tennis court would still be there<sup>120</sup> (though oddly, there was no prohibition of Ehrlich’s destruction of them, but the recreation fee would certainly help the city to replace the ones Ehrlich had destroyed). Thus, the court found an “essential nexus” between the exaction and the city’s purpose to enhance its supply of tennis courts.<sup>121</sup>

Then the court applied *Dolan*’s rough proportionality test. It characterized the analysis as “an effort to balance the government’s legitimate need to impose reasonable exactions against the property owner’s right to be free of undue burdens.”<sup>122</sup> In *Dolan*, the Supreme Court had recognized that the city’s exaction of land would have mitigated some of the identifiable negative impacts of the proposed development, but found that the balance tipped too strongly toward the government’s favor.<sup>123</sup> The cost to the landowner in *Dolan* was too great compared to the government’s gain, particularly since it could have been achieved largely without the appropriation of the green space.<sup>124</sup>

Likewise, the California court in *Ehrlich* found a poor fit between the exaction fee and the negative impact of the Ehrlich’s proposed development.<sup>125</sup> According to the Court, the city had wrongly characterized the impact as the loss of \$800,000 in recreational improvements that were formerly located on the plaintiff’s property.<sup>126</sup> The city essentially argued that the impact being addressed by the exaction was the “loss” of four tennis courts

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117. *Id.* at 438.

118. *Id.* at 447-50.

119. *Id.* at 447-48.

120. *Id.* at 448.

121. *Id.* at 882.

122. *Ehrlich*, 911 P.2d at 882-83.

123. *Id.* at 883.

124. *Id.*

125. *Id.*

126. *Id.*

that would have been built had the land use change not been granted.<sup>127</sup> But the court found this logic specious and reasoned instead that the city would be receiving, “ex gratia,” \$280,000 worth of recreational facilities “the cost of which it would otherwise have to finance . . . .”<sup>128</sup> The court suggested that a recreation fee that more closely reflected actual costs for the city to find another site would be constitutional.<sup>129</sup> The court emphasized that the city would need actual evidence about the estimation of their financial impact to levy an exaction in a proportional amount against the private landholder that would pass the rough proportionality test.<sup>130</sup>

Though it concluded that *Dolan* applied to monetary exactions in the *Ehrlich* case, the court expressly limited the application to those land use situations “which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation.”<sup>131</sup> This was part of Justice Scalia’s concern with what he characterized as the discretionary context of California’s Coastal Commission’s conditional demands in *Nollan*.<sup>132</sup> This limitation of the application of *Dolan*’s two-part test to only non-legislated governmental action was not suggested by the Supreme Court, but a conclusion of the California Supreme Court under *Ehrlich*’s facts. I disagree that *Nollan*’s nexus test is so limited.

In *Ehrlich*, the California court found that what matters is not the way an exaction is paid, but the level of discretion behind the permit condition where “legislative and political processes are absent or substantially reduced” and the possibility of “distributive injustice in the allocation of civic costs” was high.<sup>133</sup> It was behind closed doors that Napa’s city council came to the “deal” with *Ehrlich*, by passing what amounted to a private bill.<sup>134</sup> In fact, as to the community art exaction that was persistent and uniformly applied, the court did not

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127. *Id.*

128. *Ehrlich*, 911 P.2d at 883.

129. *Id.* at 884 (citing evidence the city had presented regarding the expense involved in rezoning and public hearings in order to permit that type of development in a another location).

130. *Id.* at 872 (quoting *Dolan*, 512 U.S. at 389) (emphasizing how the *Dolan* court indicated that more is needed than “generalized statements as to the necessary connections between the required dedication and the proposed development” to be constitutionally sufficient).

131. *Id.* at 868.

132. *Id.* at 869.

133. *Id.* at 876.

134. *Ehrlich*, 911 P.2d at 862.

find an unconstitutional taking.<sup>135</sup> In contrast, the condition demanded by City of Culver City for \$280,000 for public tennis courts was not based on pre-existing legislated zoning ordinances like those in *Dolan* and *Nollan*, though it is unclear that the legislative/no legislative process consideration mattered to those decisions as the California Supreme Court assumed.<sup>136</sup> Indeed, in both cases, a substantial degree of discretion was still exercised when the agencies *applied* the pre-existing ordinances at issue.<sup>137</sup> California ignored this fact when limiting the application of *Dolan* to non-legislated exactions. The real issue is not the distinction between legislative or non-legislative origins of the government actions, but possible subterfuge by the appropriating governmental body, where one action is disguised as another.<sup>138</sup>

### III. TAKINGS LAW APPLIED TO AFFORDABLE HOUSING REQUIREMENTS

Because affordable housing requirements are regulatory actions that condition approval of development on land dedication or other exactions, the *Nollan* and *Dolan* test should apply.<sup>139</sup> The Supreme Court has not ruled on an affordable housing ordinance takings challenge, either in a facial challenge or as applied, and the two state supreme court cases that examined affordable housing exactions in the residential development context were decided before *Nollan* and *Dolan*.<sup>140</sup> However, the appellate court in California recently

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135. *Id.* at 862-63.

136. Some commentators strongly disagree, and claim that so long as exactions are legislatively derived and uniformly applied, they will never be found to unconstitutional under takings law on their face. *See, e.g.,* Kautz, *supra*, note 11.

137. *Dolan*, 512 U.S. at 392. For example, in *Dolan*, the city decided that a public greenway was needed over a private one, so Dolan should convey some of her property to the city. *Id.* at 393.

138. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *see generally* *Berger*, *supra* note 12, at 214-15.

139. *See* *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (dealing with a takings claim for denial of building permits after nearly a decade of proceedings with the City of Monterey, as a result of which the developer had agreed to dedicate nearly 50% of his property to public use, but was ultimately disallowed to develop homes on 5.1 acres of the total 37.6 acre property.). “In *City of Monterey*, the Solicitor General asked the Court to address the question ‘[w]hether a land use restriction that does not substantially advance a legitimate public purpose can be deemed, on that basis alone, to effect a taking of property requiring the payment of just compensation.’” R.S. Radford, *Of Course a Land Use Regulation that Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 FORDHAM ENVTL. L. REV. 353, 371 (2004).

140. *Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc.*, 198 S.E. 2d 600 (Va. 1973); *S. Burlington County N.A.A.C.P. v. Twp. of Mount Laurel*, 456 A.2d 390

considered a facial challenge to a Napa Valley's inclusionary zoning ordinance.<sup>141</sup> It refused to apply *Nollan* and *Dolan*'s tests, side-stepping the heightened scrutiny by categorizing inclusionary zoning ordinances as land use restrictions that operated according to a city's general land use plan.<sup>142</sup> The court therefore applied the *Agins*' "substantially advanced" test.<sup>143</sup> For the sake of analysis, I will look at affordable housing requirements under the *Dolan* test first. Then I will look at the alternative arguments for relying on the more general regulatory takings criteria, especially the difference between the *Agins*' test for facial challenges, and the *Penn Central* test for applied challenges that looks at the following three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with reasonable investment backed expectations; and (3) the character of the government action.<sup>144</sup> Because the characterization of affordable housing exactions will channel a case into one takings test or another, the characterization is generally outcome determinative.

The first step with *Nollan* and *Dolan* is to examine whether the condition has a nexus with the state's legitimate purpose for prohibiting the development.<sup>145</sup> With affordable housing requirements, there is little doubt that the state has a legitimate interest in providing housing for its citizens.<sup>146</sup> And it is probably true that making developers pay for affordable housing units helps increase the affordable housing supply.<sup>147</sup> But the nexus required by

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(N.J. 1983).

141. *Home Builders Ass'n of N. California v. City of Napa*, 90 Cal. App. 4th 188 (2001).

142. *Id.* at 196.

143. *Id.* (finding the *Nollan* and *Dolan* heightened scrutiny inapplicable because the court opined that those tests were only applicable to address "land use 'bargains' between property owners and regulatory bodies—those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development"). *Id.*

144. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986); *see also Pa. Cent.*, 438 U.S. at 124; Radford, *supra* note 139, at 365-366.

145. *See Regulatory Takings—"Substantially Advances" Test*, 110 HARV. L. REV. 297, 298 (2005) (quoting *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2084 (2005)) (suggesting that like other takings tests, the nexus consideration is less about the efficiency of the means-ends fit, but about the magnitude or character of the burden placed on private property rights).

146. *See, e.g., City of Napa*, 90 Cal. App. 4th at 194.

147. Although many communities around the country have experimented with affordable housing exactions for over three decades, one proponent of inclusionary zoning reports that these regulations have resulted in just 50,000 units being built over more than 25 years. Kautz, *supra* note 11, at 971. Kautz commends the fact that 50,000 families have been

*Nollan* engages in a more searching inquiry. Applying the nexus test, it is likely that most affordable housing exactions (whether requiring a developer to build affordable units alongside his market units, or to pay for someone else to build them, or to dedicate buildable lots to the government), would not achieve the same purpose as the outright prohibition of a residential development to the degree that the nexus test requires.

The point of affordable housing requirements is to increase the supply of housing that moderate and lower income families can afford. Denying a residential development permit out of hand may achieve other purposes: protection of the environment, preservation of a “view shed,” preservation of a neighborhood’s character or available infrastructure, for example. But prohibiting a residential development certainly does nothing to increase the supply of affordable housing.<sup>148</sup> Thus framed, under the nexus test, there seems to be a constitutional disjuncture between the conceivable legitimate purposes for denying a developer building permits for a residential development and the purpose for affordable housing conditions a permit on the developer’s entitlements.

On the other hand, if the purpose of an outright prohibition were the preservation of precious land suitable for residential development for affordable housing, say instead of luxury homes, then a nexus could be present with certain kinds of exactions. Oddly, though land dedication is the one exaction that would undoubtedly be subject to heightened scrutiny, it may well pass muster if the legislative purpose were stated to be the preservation of residentially zoned land for housing for moderate and lower income developments. In this scenario, the dedication of buildable lots would have the same purpose as prohibiting non-affordable developments: to preserve the land for affordable homes. This argument, however, does not so

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helped by these exactions; but 50,000 is miniscule compared to the *present* demand nationwide for affordable housing. *Id.* For instance, in Hawaii alone, 30,000 affordable units (including 17,000 rentals) are needed immediately. Andrew Gomes, *Affordable housing project advances*, HONOLULUADVERTISER.COM (Jun. 17, 2006), available at <http://the.honoluluadvertiser.com/article/2006/Jun/17/bz/FP606170314.html> (last visited Mar. 13, 2007).

148. See Berger, *supra* note 12, at 214-15, 221-22 (concluding that under the nexus text “to sustain the constitutionality of the set-aside, one would have to show that construction of new housing in a subdivision itself creates the need for more housing for poor and moderate income persons” if the legislations purpose was to increase housing for the poor and for workers); see also Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167, 1170 (1981).

easily apply to in-lieu fees, whether paid to the county or to non-profit developers, because the relationship between land preservation for affordable housing and the exaction is more obviously disjointed. Likewise, requiring a developer to subsidize the price of market housing and eat the loss seems to lose the direct association between purpose of prohibition and purpose of exaction.

A nexus might also be achieved if the zoning ordinance prohibiting a residential development and affordable housing exactions looked like this: if every lot in the jurisdiction that had multi-residential zoning was zoned for either low to moderate income units alone, or only mixed income developments, then most of the affordable housing exactions would serve the same purpose as a prohibition. Any residential development that did not include affordable housing units would be prohibited.<sup>149</sup> If this were the case, placing affordable housing conditions on entitlements would have the required nexus with denying development altogether—no economically unmixed residential projects would be allowed. However, most general zoning plans do not read this way—they zone for density, type of residence, and other factors, but not socio-economic mixture. Short of a significant change in how affordable housing exactions are promulgated, most affordable housing exactions are triggered by the application for permits or other entitlements pursuant to regulations as they are presently written, are likely to be found unconstitutional because of their lack of nexus with the purpose for an outright prohibition or denial of entitlement.<sup>150</sup> Presently, only workforce housing ordinances and agency policies address the goal of socio-economically integrated housing. Were zoning ordinances themselves, under land use statutes that are traditionally separate and distinct from workforce housing ordinances, to provide integrated housing zoning, then a nexus would surely be present.

Assuming, for argument's sake, that an affordable housing condition passed the nexus test, the second test in the takings inquiry

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149. Realizing of course, that in Hawaii, a *luxury* home is a relative term—where the average condominium on Oahu is only a thousand square feet and two bedrooms or less, but costs more than \$300,000, like they do. See, e.g., *Quarter 2006 Residential Resales Statistics*, Honolulu Board of REALTORS, available at <http://www.hicentral.com/hbr-stat.asp> (last visited Mar, 28 2007).

150. Furthermore, as a practical matter, at least in Hawaii's current housing market, limiting any sizable development for market homes (not rentals) to only affordable housing would mean affordable housing are unlikely to be built. Gomes, *supra* note 147.

under *Dolan* is whether there is a rough proportionality between the exaction and the impact or burden to be created by the proposed development.<sup>151</sup> The Court indicated that the relationship would have to be shown by the municipality, not the plaintiff,<sup>152</sup> and that “generalized statements as to the necessary connection between the required dedication and the proposed development” are insufficient.<sup>153</sup>

In the context of affordable housing regulations, the relationship between the magnitude of the permit condition and its burden on the developer and a development’s evil impact on the community is a nebulous one, even though only a good fit will pass constitutional muster. In analyzing an affordable housing exaction’s proportionality with the evil impact of a residential development, first, it is helpful to make the distinction between affordable housing exactions and exactions for water, sewer, or even some dedications for the preservation of open or green space that the development is likely to impinge upon. When new houses are built, surrounding infrastructure may be stressed, open spaces lost, and schools crowded with young new residents. Exactions that directly relieve these identifiable burdens are rightly called “impact fees,” because in paying them, a benefit accrues to the developer, and the fees are designed to cover actual additional burdens placed on existing infrastructure.

In contrast to a developer paying fees that directly relieve impact on public systems and resources and buying the direct benefits that accrue to his development in return, affordable housing requirements are not generally proportional to the impact that residential developments are likely to create and no benefit accrues to the developer. The logic behind the exactions, at least as articulated by Hawaiian governmental entities, is that building residential projects creates a *need* for affordable housing, and that making developers subsidize affordable housing relieves that increased need.<sup>154</sup> While

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151. *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 872 (1996).

152. *Id.*

153. *Dolan v. City of Tigard*, 512 U.S. 374, 389 (1994).

154. Telephone interview with Don Clegg, land use consultant and Special Master, Honolulu, Haw. (June 12-13, 2006); *see* Berger, *supra* note 12, at 221-24 (disputing similar claims that moderate or high-end developments displace potential affordable housing with economic studies that have concluded the contrary: “The working of the market for housing is such that the poor will benefit from any actions which increase the supply in the total market”). Where supply is so tight, increasing the supply tends to slow the forces of unmet demand that impel prices higher on all housing units in a given locality. *Id.* at 222.

there is no doubt that exactions have the potential to result in a greater supply of affordable housing,<sup>155</sup> it is difficult to quantify how much, if any, an individual development negatively impacts the pre-existing need for affordable homes.<sup>156</sup> There is little doubt—in a land-scarce market like Hawaii’s—that when luxury homes are built en masse there is less land for affordable homes, and that developer exactions, especially land dedications of buildable lots, could be a way to maintain the availability of land for the construction of affordable homes. This argument gains more credibility when we consider that in Hawaii many zoning changes that enable residential development are converting agricultural or rural land to residential zones. When the community loses its agricultural land to houses, which usually comprises a more profitable use for a developer, it is hard to feel bad that a developer must mitigate the loss. However, the loss of agricultural land is not a loss of affordable homes—in fact, it is only the loss of *potential* affordable homes if a developer goes to the trouble and expense, which are typically considerable, to get the zoning changed or planning boundary adjusted. However, speculative impact is not good enough under *Dolan’s* rough proportionality test. So, unless it could be demonstrated that affordable homes would, in fact, be built on that land *but for* the impact of the developer’s project, the impact on the need for affordable housing is purely speculative.<sup>157</sup> It is hard to say a community has lost something because of residential development that it never had, like Culver City’s tennis courts its residents never enjoyed without paying private club costs, so the argument that any residential development creates a loss of affordable housing or increases the need for affordable housing is fairly weak, though in some circumstances it is conceivable that it could be proven due to land shortage.<sup>158</sup> Because of this disjuncture, like the *Ehrlich* court observed about the loss of private tennis courts that the city never owned, developers fulfilling their affordable housing requirements are being “asked to pay for something that

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155. See Kautz, *supra* note 11, at 971-72 (estimating that over three decades of all of the communities throughout the United States, 50,000 affordable housing units have been built as a result of affordable housing requirements).

156. See generally LAURA LINGLE, LINGLE-AIONA ADMINISTRATION, 2006 INITIATIVES—HOUSING OUR RESIDENTS (2006) (declaring that increasing the housing supply in general will help meet affordable housing needs).

<sup>157</sup> On agricultural land, little or no residential development is allowed. HRS §§ 205-2(d); 205-4.5 (2005); HAR § 15-15-25 (2000). On rural land, the rule is usually that only one residential unit may be built on a given rural parcel. HRS § 205-2(2).

158. See generally Ellickson, *supra* note 148, at 1184-87.

should be paid for either by the public as a whole, or by a private entrepreneur for a business profit.”<sup>159</sup>

Under *Dolan*, courts must consider the cost to the landowner compared to the government’s gain from the exaction. It looks like a taking when a government makes an entrepreneur subsidize affordable units when there is little or no hope of his making a profit on those units, even though the Fifth Amendment does not offer a “right” to use one’s property in the most profitable manner.<sup>160</sup> Subsidizing the price of affordable units can be a heavy burden, and the government would have to make actual findings of the impact to prove proportionality to the developer’s burden.<sup>161</sup> For example, in setting an affordable price, if the developer lost all hope of profit from the affordable units, a twenty percent exaction would result in roughly a twenty percent reduction of the gain the developer expected from “use” of his property, e.g. through developing it. The question is, is this too great of a burden? Or to ask Justice Holmes’s searching question, has the government gone too far?<sup>162</sup> Viewed as a partial deprivation of profit, this is probably not going too far. But viewed through the lens of a land dedication, because ten percent was too much in *Dolan*, surely twenty or thirty percent would be too much with Hawaii’s affordable housing exactions.

Since building residential projects generally do not create the

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159. Ehrlich v. City of Culver City, 911 P.2d 429, 448-49 (Cal. 1996).

160. Affordable housing requirements substantially increase the risk of losing money on a development, so that, even for non-profit developers, finding a way to subsidize affordable units becomes challenging. The recent situation with Maui Land & Pineapple (“ML & P”) and the Maui County Council offers a stark example. Harry Eager, *Maui Land & Pine balks at housing demand*, MAUI NEWS, June 15, 2006, at A1, available at <http://www.mauiland.com/pdf/MN06.15.06.pdf>. ML & P initiated the entitlement process for a not-for-profit housing development that would provide affordable homes for many of its employees. *Id.* When the county tried to increase the number of affordable units in the project from ML & P’s 50% to 65%, ML & P declared it could no longer afford to build the development. *Id.* The other half of the development’s units needed to be higher-end homes in order to offset the subsidies needed for the employee housing. *Id.* To keep the deal alive, the county agreed that ML & P could make 10% of 60% of the required affordable units for gap income earners, 140%-180% of AMI. *Id.*

161. Ehrlich, 911 P.2d at 447-49. In any case, if a developer were able to prove that an affordable housing requirement, as applied to his proposed residential project, would deprive him of all of his reasonable investment-backed expectations of economic viability of the project, even without heightened scrutiny, an unconstitutional taking could be found. *See id.* at 453-55. This is not a per se taking, however, because not all economically viable use would have been destroyed—a case by case analysis of the developer’s burden would be required. *See generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

162. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

impact that the affordable housing conditions are meant to relieve—namely the lack of affordable housing—the nature and extent of the exaction is not “roughly proportional” and affordable housing regulations do not fall free of a cognizable takings claim. However, some courts have found that the impact of *commercial* development does indeed impact the need for affordable housing, so that rough proportionality would be present.<sup>163</sup> It seems likely, therefore, that Hawaii’s twenty-five percent affordable housing exactions on hotel, resort, and industrial projects, which create more than a hundred jobs, would be more likely to pass the rough proportionality test than the residential developer exactions.<sup>164</sup> After all, workers have to live within a reasonable distance of their job location. Creating such jobs logically increases the need for affordable units around the proposed resort or industry. If the regulations were accompanied by government findings regarding this impact, the case for constitutionality would be stronger still. In a similar vein, if the government could find that building a residential development, especially a large one, will create the need for workers to provide services to new residents, this specified impact may be sufficient to demonstrate rough proportionality. Here, exactions in the form of in-lieu fees and construction of affordable units on site or nearby have the possibility of being found proportional to the specified impact. Thus, impact in the form of increasing workforce demand may be easier to quantify than other types of conceivable impacts from residential development.

Roughly proportional means that the exaction and the burden on the developer more or less fit the burden that the development will place on the community. To make the comparison, both burden and evil impact must be reliably quantified. Therefore, another reason affordable housing exactions are likely to fail the rough proportionality test is that under the *Dolan* test a *conceivable* impact is not sufficient for a comparison with the exaction’s burden on the

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163. *See generally* *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) (upholding an impact fee levied against commercial developers for construction of low-income housing); *Holmdel Builders Ass’n v. Twp. of Holmdel*, 583 A.2d 277 (N.J. 1990) (upholding inclusionary zoning requirements on the basis that the court found “a sound basis to support a legislative judgment that there is a reasonable relationship between unrestrained nonresidential development and the need for affordable residential development”).

164. *See* COUNTY OF HAW., ORDINANCES § 11-4(c)-(d) (Supp. 2006) *available at* <http://co.hawaii.hi.us/countycode/chapter11.pdf>.

land owner. It is conceivable that residential developments *do* increase the need for affordable housing units, because unaffordable residential developments use up precious land resources for the benefit of the very few, though some social economists have refuted this notion.<sup>165</sup> Non-affordable developments may result in greater scarcity and higher prices for land that could be used for affordable housing developments. But monetizing the property supply impact that a proposed residential development may have on the need for affordable housing seems at best speculative and at worst impossible to do. Nonetheless, having some proof is essential for passing the *Dolan* test, because the rough proportionality test is not satisfied by speculating that residential development *could* have an impact, and that affordable housing requirements *could* relieve some of the burden on the community.<sup>166</sup> Quantification is necessary for an accurate comparison of the evil impact with the amount of land or money to be exacted. Clearly, the burden to a developer can be reliably evaluated: by calculating a percentage of total or expected profits, or the amount a builder must pay out for each required affordable unit and how much of a burden the amount represents to the developer. This is a little tricky, because conceivably, courts would be asked to determine what is a fair burden on profit, and whether it would be measured unit by unit, or on the residential project as a whole.<sup>167</sup> While *what* should be measured may be debatable, actually quantifying the developer's cost of what is measured is fairly straightforward. On the other hand, quantifying how much a residential development exacerbates a preexisting need for affordable housing is difficult and must necessarily involve generalizations and speculative projections. The Court has rejected this type of generalization as inadequate justification for exactions of private property without compensation.<sup>168</sup> Nonetheless, because proportionality must only be "rough," not perfect, if government at least makes an effort to specifically identify the expected impact of a proposed development, its exactions are less likely to be found unconstitutional.

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165. See, e.g., Ellickson, *supra* note 148, at 1184-87.

166. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

167. This begs a similar denominator question as the per se taking rule in *Lucas*, e.g. whether exercising eminent domain over an entire piece of property is the only way to trigger a per se taking rule, or whether all of a particular portion of property will qualify as a per se taking—a question which has not been satisfactorily resolved. See generally *Lucas*, 550 U.S. 1003; also *NOWAK & ROTUNDA*, *supra* note 35, at 527.

168. *Dolan*, 512 U.S. at 391.

Currently, none of Hawaii's affordable housing regimes cite studies or findings regarding the evil impact that residential developments have on the need for affordable housing.<sup>169</sup> Generally, they just declare that the purpose of the ordinance is to make developers subsidize affordable housing.<sup>170</sup> Likewise, it is not customary for either the counties or the state Land Use Commission to offer any estimation of the actual impact expected from a proposed development on the existing need for affordable housing when they apply the exactions to individual entitlement applications.<sup>171</sup> *Dolan*, however, appears to require the government to make individualized determinations demonstrating that its requirements, as applied to an individual developer, are proportional in nature and extent to the harm created by a new residential development.<sup>172</sup> If generalizations will not steer clear of a takings problem as the *Dolan* court indicated, it is clear that a broadly worded purpose statement in an ordinance will not save an individual exaction from constitutional scrutiny.<sup>173</sup>

In conclusion, it seems clear that if a *Nollan/Dolan* analysis were applied to an affordable housing exaction, there would be a strong argument that many affordable housing exactions comprise unconstitutional takings.<sup>174</sup> Government may protect its exactions from constitutional infirmity by studying and articulating the purpose of a prohibition more clearly so that it matches up with the purpose of the exactions, and by actually measuring the expected impact of a development before levying exactions. Ironically then, *ad hoc* exactions may be more likely to pass a takings challenge than those applied as a blanket, or at least broadly applied exactions without any individual findings, since statements of generalized or *possible* impact is not sufficient, just as statement of *possible* ways the exaction will offset the impact is not sufficient.

#### IV. RE-CHARACTERIZING CONDITIONAL EXACTIONS TO AVOID THE

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169. See, e.g., COUNTY OF HAW. CODE, § 11.1.

170. *Id.*

171. *Id.*

172. See Brandt, *supra* note 13, at 1335-37.

173. COUNTY OF HAW. CODE § 11.2 (citing its Affordable Housing ordinance's objectives as "(1) Implement goals and policies of the general plan; . . . (6) Require residential developers to include affordable housing in their projects or contributed to affordable housing off-site.").

174. Other commentators, having drawn the same conclusions, have wondered if providing benefits to the developer would qualify as due compensation. See, e.g., Berger, *supra* note 12.

*NOLLAN/DOLAN* TWO-STEP

Because application of the *Nollan/Dolan* two-step would likely result in finding an unconstitutional taking for many affordable housing exactions, the most obvious way to beat a takings challenge is to argue that the two-step test is not applicable and that individual applications of affordable housing ordinances should be subject to a lesser standard of review.<sup>175</sup> At least three different approaches have been suggested for removing affordable housing exactions from the *Nollan/Dolan* regulatory umbrella. First, some defendants have argued that the nexus and proportionality test apply only to land dedications, but not monetary exactions, though the courts' sentiment is usually that money and land exactions are more similar than different.<sup>176</sup> Under this rationale, land dedication options in the affordable housing regimes would still be subject to the *Nollan/Dolan* tests, but the various in-lieu exactions and price control measures would not.

Second, some courts have found that only *ad hoc*, discretionary "agreements" (where bargaining occurs between the developer and the city outside the normal legislative processes), and not legislated action, will be subject to *Dolan's* heightened scrutiny.<sup>177</sup> Government defendants could argue that the heightened scrutiny is only called for when there is the need for a safeguard against government pretending to do one thing when it is really doing another.<sup>178</sup> Special or private bills hammered out in council chambers would thus be more susceptible to a takings challenge than uniformly applied ordinances. Therefore, the unilateral agreement system used by Oahu would be particularly vulnerable to a challenge, since unilateral agreements are almost purely a product of proposal, bargaining, and conditional acceptance between the developer and the county council and planning department personnel.

Third, the courts could determine that affordable housing exactions are not really exactions, but just another limitation on a land

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175. *Ehrlich v. City of Culver City*, 911 P.2d 429, 451-60 (Cal. 1996) (Mosk, J., concurring).

176. *See Gameau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998); *Blue Jeans Equities West v. City & County of San Francisco*, 4 Cal. Rptr.2d 114 (Ct. App. 1992). This proposition has some basis, albeit somewhat muddled in *Del Monte*, 526 U.S. at 687, as discussed *supra*, notes 97-100 and accompanying text.

177. *See, e.g., Ehrlich*, 911 P.2d at 451-60 (Mosk, J., concurring).

178. *Id.*

owner's use of his property or a fee paid in exchange for a benefit, and therefore, like most zoning ordinances or impact fees, they should be given a high degree of deference.<sup>179</sup> As indicated earlier, the recent opinion in *Napa Valley* was based on this re-characterization of affordable housing exactions.<sup>180</sup>

First, because of the Supreme Court's lack of direction regarding whether the nexus and rough proportionality test applies only to land dedications or to monetary exactions, some courts have suggested that monetary exactions are distinct from land exactions.<sup>181</sup> But logically speaking, the distinction becomes veritably meaningless where an exaction is paid in-lieu of a land dedication.<sup>182</sup> *Garneau v. City of Seattle* characterized affordable housing requirements as monetary fees unreachable by *Dolan*.<sup>183</sup> But the case involved fees the city levied to help relocate low-income residents that were being displaced by upgrades to the developer's property, and it seems logical that these fees would have passed a nexus and rough proportionality analysis anyway.<sup>184</sup>

The fundamentally distinct character of Hawaii's affordable housing exactions means *Garneau*'s logic is not readily applicable to Hawaii's affordable housing exactions. With Hawaii's affordable housing regimes, a contractor can choose the method for meeting the condition on his entitlements: dedicate land, directly subsidize the prices of market homes, or pay an in-lieu fee. So long as a fee is not a generally applicable tax or a fee for services needed by the development (sewer, water, and even bedroom "taxes" to help local schools that will receive the project's new students), neither of which are subject to the takings clause, the *method* of paying a conditional exaction should make no difference for purposes of a takings analysis.<sup>185</sup> Affordable housing exactions do not logically fit this description. Conceptually splitting land and money exactions

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179. *Home Builders Ass'n v. City of Napa*, 90 Cal. App. 4th 188 (Ct. App. 2001) *review denied* Sept. 12, 2001 (2001 Cal. Lexis 6166) (examining Napa's affordable housing exactions and finding that the regulations could not be facially challenged as unconstitutional under takings law, because they met the rational basis test for run-of-the-mill zoning ordinances).

180. *See City of Napa*, 90 Cal. App. 4th at 188.

181. *See, e.g.*, JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 738-739 (Aspen 2004).

182. *Id.*

183. *Garneau*, 147 F.3d at 802.

184. *Id.*

185. *Id.*

therefore is a distinction without a difference, and this method of sidestepping heightened scrutiny should fail.

In *Benchmark Land Co. v. City of Battle Ground*, the court emphasized the similarity of exacting land or money when it examined the constitutionality of an exaction that required the developer to improve a road outside of the proposed residential development as condition to a development permit.<sup>186</sup> The court reasoned that whether money or land was exacted,

[T]he same questions would arise: was the money exacted for and used to solve a problem connected to the proposed development? And was the amount of money exacted roughly proportional to the development's impact on the problem? (*Dolan*.) Surely if the issues for an exaction of money are the same as for an exaction of land, the test must be the same: a showing of "nexus" and "proportionality."<sup>187</sup>

*Benchmark* distinguished charging developers to solve problems within and associated with a development with exactions for problems pre-existing outside of it.<sup>188</sup> Affordable housing ordinances themselves acknowledge the interchangeability of land dedications and monetary payments to fulfill an exaction. Thus, it is likely that the *Nollan* and *Dolan* tests would apply regardless of the form a developer chooses to fulfill the affordable housing exaction, though it is still possible that one option or another would be more or less likely to pass.

The second characterization of affordable housing exactions the courts have used to remove them from the more exacting tests of *Nollan* and *Dolan* is to suggest that legislated exactions do not require heightened scrutiny. For example, the *Ehrlich* court indicated in dicta that if the recreation fee levied against the permit applicant had been a uniformly applied, legislated fee—like the art fee it found constitutional—it would not have submitted the exaction to heightened scrutiny.<sup>189</sup>

The problem with arguing that only *ad hoc* regulations are

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186. 14 P.3d 172, 175 (Wash. App. 2004).

187. *Id.* (parentheticals in original).

188. *Id.* at 175. "The City, as in *Nollan* and *Dolan*, did not restrict the development of the property by limiting the number of residences, requiring wider streets, imposing height limits or other similar conditions. Instead the City required the developer to address a problem that existed outside the development property—an adjoining street in need of improvement. And the development did not cause the problem, at most it only aggravated it." *Id.*

189. *Ehrlich v. City of Culver City*, 911 P.2d 429, 437 (Cal. 1996).

susceptible to a takings challenge is that it fails to recognize that the takings analysis does not automatically change depending upon the legislative or ad hoc origins of the government action. The *Dolan* case itself dealt with the application of a legislated ordinance, though it was applied with some administrative discretion to Dolan's particular circumstance.<sup>190</sup> When courts speak of the "nature" of the government action, they are not referring to the way government decided to appropriate a citizen's property; rather, they are referring to whether an appropriation is susceptible to a takings analysis, e.g., whether it is an assessment in exchange for benefit, a broadly applicable tax, or a conditional exaction on land entitlements. Assessments and taxes are not susceptible to takings challenges.<sup>191</sup> Once the assessment or tax category is rejected, and a regulatory exaction is identified, the focus of a takings analysis becomes not the origin of the authority for the government act, but the fairness of the property owner's burden. It is less important whether the city council passes a special bill, entered an individual unilateral agreement, or whether the government applies a codified workforce ordinance.

While it is true that discretionary license in a government branch or agency helps to persuade the Court that government has ulterior motives in its exactions, it is not dispositive. *Nollan* and *Dolan* both involved legislated ordinances or policies as applied to an individual permit applicant.<sup>192</sup> Whether legislation or ad hoc discretion is the source of an action against a property owner, it is an inquiry that fits better in a due process inquiry than in a takings challenge. Insofar as courts refuse to apply *Dolan* at the threshold based upon a finding that an exaction was a product of regular governmental legislative processes, I think they have misread the proper application of this factor. It is properly a factor in weighing the nexus and rough proportionality of the exaction, but it is not a substitute for them.

Third, characterizing inclusionary zoning as a run-of-the-mill land use restriction instead of an exaction would mean the affordable housing requirement would be subjected to the deference generally given land use regulations as a legitimate exercise of the state's police power. Not surprisingly, developers generally view exactions as

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190. *Dolan v. City of Tigard*, 512 U.S. 374, 377-80 (1994).

191. See, e.g., Eric A. Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burden Principle and Its Broader Application*, 97 NW. U. L. REV. 189 (2002) (exploring the distinction between taxes and takings by defining taxes as general obligations and takings as deprivation of a particular asset).

192. *Dolan*, 512 U.S. 374; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

government conditions on development, not zoning ordinances, though there has been longstanding debate on the issue amongst academics. Just three state courts throughout the country have characterized inclusionary zoning ordinances as ordinary land use restrictions.<sup>193</sup> However, the most recent case, *Home Builders Association v. City of Napa*,<sup>194</sup> was denied review by the California Supreme Court, thus allowing Napa's inclusionary zoning ordinance to stand.<sup>195</sup> This method of removing affordable housing exactions for the *Dolan/Nollan* two-step clearly has some legal traction, though its extent remains only speculative.

In *City of Napa*, Napa's inclusionary zoning ordinance withstood a takings challenge because the court viewed Napa's regulation as an ordinary land use restriction that was legislatively created, and not a condition applied ad hoc to a particular developer's permits.<sup>196</sup> The court essentially characterized the ordinances as prohibiting residential development that did not include affordable units. Having concluded that the distinction between exaction and land use restriction was the key to applying a lower standard of review, the *Napa* court failed to explain how inclusionary zoning is more like other zoning ordinances than an exaction or impact fee.<sup>197</sup> Because the Builder's Association brought a facial challenge, the *Napa* court applied the *Agins*' "substantially advances" test. If the Builders Association had instead presented an individual developer's case, even if the *Napa* court characterized the affordable housing exaction as a land use restriction, it would have looked at the burden on the developer and whether the "restrictions" fundamentally disturbed the developer's reasonable investment-backed interests under *Penn Central*.

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193. See Kautz, *supra* note 11 at 989-99 (citing Bd. of Supervisors of Fairfax County v. DeGroof Enters, 198 S.E. 2d 600 (Va. 1973) (finding that Fairfax's "zoning enabling act" was a taking under the Virginia constitution because it attempted to control compensation for developers despite its legitimate state interest but noting that the court's opinion was nullified by legislation confirming inclusionary zoning) and S. Burlington County NAACP v. Twp. of Mt. Laurel, 456 A.2d 390 (N.J. 1983) (confirming that inclusionary zoning regulations should be treated as land use regulations and given deference), and *City of Napa*, 90 Cal.App.4th at 188 (review denied Sept. 12, 2001) (2001 Cal. Lexis 6166) (characterizing inclusionary zoning ordinance as a land use restriction and refusing to apply the intermediate scrutiny test from *Dolan* and *Nollan*).

194. *City of Napa*, 90 Cal. App. 4th 188.

195. See Kautz, *supra* note 11, at 2.

196. *City of Napa*, 90 Cal. App. 4th at 194-95.

197. *Id.*

The *City of Napa* court should have examined the practical difference between land use regulations and conditional exactions to justify the application of the less exacting *Agins*' test. With a zoning ordinance, property is restricted to certain types of uses and a developer cannot change the rule by simply paying a fee, dedicating land, or selling his homes cheap.<sup>198</sup> A real zoning ordinance in the form of a land use restriction is not susceptible to paying off the government to get the use the builder desires.

The character of affordable housing exactions is distinguishable. If a development, in fact, is suitable for the zoning applied to an owner's property, which zoning reflects a community's overall plans for growth and land use generally, it is qualitatively different for government to make a developer pay for entitlements that would otherwise be granted. This is typically characterized as an exaction, and under takings jurisprudence, this kind of affirmative demand of government in the form of a condition placed on development is treated differently than the use prohibitions endemic to zoning ordinances. However, as the *Napa* court pointed out, in *Southern Burlington County NAACP v. Township of Mount Laurel* (hereinafter "*Mount Laurel I*"), the New Jersey court analogized inclusionary zoning requirements to zoning restrictions for single-family homes on large lots, a form of zoning intended to create housing for high-income groups.<sup>199</sup> The *Mount Laurel I* court created a conceptual connection between inclusionary zoning exactions and other zoning ordinances by concluding that all zoning had inherent socioeconomic characteristics: affordable housing requirements were just another type of "socio-economic zoning" that would remedy the exclusionary zoning practices that had contributed to the lack of Mount Laurel's affordable housing.<sup>200</sup>

It is arguable that the New Jersey court confused the similarity in intention, creating a particular housing opportunity for a particular socio-economic group, with the substantive reality of affordable housing requirements and their different character compared to zoning ordinances. Moreover, the *Napa* court's reliance on the logic

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198. See CHEMERINSKY, *supra* note 39, at 628.

199. 456 A.2d at 449. But for an interesting study on how the Mt. Laurel inclusionary zoning rulings and subsequent ordinances failed to provide housing for lower income residents as it had hoped, see Berger, *supra* note 12.

200. See *Mount Laurel I*, 456 A.2d at 449. There has been considerable criticism of the legal reasoning behind the New Jersey's Supreme Court's social engineer, noble as the cause was. See, e.g., Berger, *supra* note 12.

of the Mount Laurel decisions may have been misplaced, since those decisions dealt primarily with equal protection and due process claims when a developer who wanted to build affordable housing, which would serve the needs of minorities, was denied permits.<sup>201</sup>

With Hawaii's various types of affordable housing requirements, it is hard to see how they could logically be characterized as just another breed of zoning ordinance, just a land use restriction. Of the available affordable housing options for satisfying an exaction, New Jersey's logic would readily apply only to the construction of affordable units within the same residential development—if affordable housing units were viewed as a restriction like height, density, or set-back, then zoning every residential lot to include affordable units would be akin to any other land use restriction. But construction of affordable units on site is just one option a developer may choose to fulfill an affordable housing requirement in all four counties in Hawaii. The developer may also build the required affordable units off-site (a curious "land use restriction" of the particular property at question in a particular application for permits), if that is what such a requirement is. Similarly, the payment of an in-lieu fee, available as an alternative to actual construction of affordable units in all four counties, bears little resemblance to a land use restriction. It is hard to argue that requiring a large in-lieu payment for each required affordable unit (in-lieu of building them) is a land use regulation instead of an exaction. Likewise, the dedication of developable lots or land to the county (Kauai's preferred method of fulfilling their affordable housing requirements) fits more comfortably in the concept of an exaction than a zoning ordinance.

Of the three arguments to remove affordable housing exactions from the *Dolan* two-step, I think *City of Napa* demonstrates that characterizing affordable housing exactions as ordinary land use restrictions is more likely to prevail than the others. Nonetheless, I think that *City of Napa* was decidedly wrongly, and only time will tell whether other courts follow its precedent. I believe it is more likely that affordable housing exactions will be recognized as what they truly are by future courts faced with the question—conditional exactions on development. Thus, while some lower courts have considered these three ways to dodge the *Nollan/Dolan* test for nexus and rough proportionality as applied to conditional exactions, none of the arguments is strong enough to be dispositive.

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201. See *Mount Laurel I*, 456 A.2d at 449.

## V. CONCLUSION

The thorny problem of an affordable housing crisis may call for drastic measures from communities who wish to house their vitally needed workforce. As for communities that feel that depending on the private sector to help alleviate their affordable housing crisis is the socially responsible thing to do, specific findings regarding the impact of residential development on the need for affordable housing will help protect the ordinance from a takings challenge. Generalized statements of what the impact *could* be will not survive the *Dolan* rough proportionality test, so individualized findings may be needed on a case by case basis. Also, this may bear on whether it makes constitutional sense to exact affordable housing units from very small residential projects—is the evil impact from five market units proportional to what it will cost to subsidize one of the units for the targeted income group?

Additionally, affordable housing ordinances created as a product of an ordinary legislative process may be less suspect as takings than ad hoc agreements, where the courts realize, the developer is *not* on equal footing for bargaining.<sup>202</sup> The legislative process and generally applicable rules tend to look less like government pretending to do one thing when it is, in fact, doing another.<sup>203</sup> The nexus required for ad hoc agreements may be more difficult to fulfill, though the Court has not said so expressly.

The *City of Napa* court suggested that when a benefit accrues to a developer as part of the “deal” with the government, a taking could not be found.<sup>204</sup> The court suggested that part of the reason *City of Napa*’s inclusionary zoning ordinance was constitutionally sound was that it provided significant benefits to developers; namely, expedited processing, fee deferrals, loans or grants, or density bonuses.<sup>205</sup> This comports with the dicta in *Penn Central* where the court indicated

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202. See, e.g., *City of Napa*, 90 Cal.App. 4th at 194-96 (citing *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952, 972 (1999)) (finding that the justification for heightened scrutiny only applies where there is the need for the safeguard against the possibility that the justification for the exaction is merely a pretext for taking the property without paying compensation and it is not applicable to a “generally applicable piece of economic legislation”).

203. Though as indicated above, the individualized findings that more readily accompany the formation of a Unilateral Agreement may offer protection against failing the rough proportionality test.

204. See *City of Napa*, 90 Cal.App.4th at 194.

205. *Id.*

that there was not a taking because the rights denied to develop at the historically preserved property could be shifted to another nearby property, so that the burden on the owners from the regulatory use restriction was mitigated.<sup>206</sup> Finding ways to substantially ease the burden on the developer or to build incentives into the bargain for building affordable units will likely protect an affordable housing ordinance, either facially or as applied, from constitutional infirmity.<sup>207</sup>

From the perspective of a residential developer who may be asked to contribute affordable housing units to the community in exchange for entitlements, a takings challenge is more likely to succeed if filed as an “as applied” taking instead of a facial challenge. The nexus and rough proportionality test embrace a heightened scrutiny that extends greater protection for property owners; whereas, facial challenges are more likely to be examined under the more deferential “substantially advances” test, where any viable economic use left for the property will excuse due compensation.

Likewise, where the exaction is levied as part of an *ad hoc* process, a developer will have an easier time challenging the motives of government where the purposes for an outright prohibition and the purposes for the conditional exaction do not align readily. The dicta in *Nollan* and *Dolan* regarding the need for protection against government’s masquerading one purpose for another has had a profound impact on the lower courts, whether the Supreme Court meant for this to be the case or not.<sup>208</sup>

Finally, where government has failed to provide evidence of a cognizable correlation between the burden a developer will bear under an exaction’s cost and the evil the residential development is likely to create, if any, the developer should argue that the government has the burden of proving the rough proportionality, not the citizen challenging it. In the context of a challenge to an

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206. See *Pa. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 137 (1978).

207. Some affordable housing experts are confident that it is possible to make affordable housing requirements cost-neutral for developers by creating incentives, donating government-owner land, giving tax credits or exemptions, reducing the cost of entitlements by streamlining the process, or even easing building codes that are expensive but yield little benefits to home owners—like allowing a developer to install swales instead of expensive curbs, for example. See, e.g., Joint Legislative Housing and Homeless Task Force, Report to Hawaii State Legislature, Appx. C. p. 4 (Jan. 2006) (testimony of Dean Uchida, Director of the Land Use Research Foundation of Hawaii).

208. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

individual conditional exaction, if the court were to re-characterize the affordable housing exaction as a land use restriction, the developer may still prevail if he were able to prove that his reasonable investment backed expectations were fundamentally destroyed by the magnitude of the exaction. Thus, under *Penn Central*, a taking may still be found when affordable housing exactions go too far, though such a ruling has not been made by the courts to date.<sup>209</sup>

Given the constitutional vulnerability of affordable housing ordinances, communities need to continue to look for solutions to the affordable housing crisis. If communities were able to create incentives for building affordable homes, or to create benefits for the developer who subsidizes affordable housing units, workforce ordinances could become a win-win part of the solution. Streamlining the entitlement process, especially needed in Hawaii, would reduce builders' costs without the government incurring any cost or losing revenue. Partnering with non-profit developers by giving public land over to affordable residential projects is another possibility. Tax credits, transfer tax forgiveness, short-cuts on overly protected building codes (like allowing for swales instead of curbs, for instance), fast-track permit processes, installation of bus stops in the development are all ways to give a developer value for affordable housing assessments.<sup>210</sup> Providing value or benefit in exchange for fees would free affordable housing exactions from constitutional question, and it would encourage residential development instead of creating disincentives that will further squeeze the housing supply and drive prices ever higher.

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209. See *supra* notes 46-48 and accompanying text.

210. See, e.g., Bays & DaRosa, *supra* note 1 at 53-54; JOINT LEGISLATIVE HOUSING AND HOMELESS TASK FORCE, REPORT TO HAWAII STATE LEGISLATURE (Jan. 2006).

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## APPENDIX A

MEDIAN HOME PRICES AND MEDIAN INCOME 2005 AND 2006<sup>211</sup>

COUNTY	MEDIAN 2006 SINGLE FAMILY HOME PRICE	CHANGE FROM 2005	MEDIAN 2006 CONDO PRICE	CHANGE FROM 2005	MEDIAN INCOME 2006
HONOLULU	\$625,000	+18.1%	\$309,000	+34.9	\$71,300
HAWAII	\$435,500	+19.3%	\$605,000	+35%	\$55,300
KAUAI	\$785,000	+25.6%	\$353,764	+17% <sup>212</sup>	\$60,900
MAUI	\$727,000	-6.8%	\$539,000	+60%	\$65,700

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211. Bays & DaRosa, *supra* note 1 at 37-38.

212. Kauai's prices are particularly difficult to average to show a short-term trend, because the pool of home sales is very small. Homes may sell in one quarter, or even in one year, that just happen to be more or less expensive than the last. *See Kauai Median Home Price: \$650,000*, PACIFIC BUSINESS NEWS (HONOLULU), Feb. 14, 2006, available at <http://www.bizjournals.com/pacific/stories/2006/02/13/daily13.html> (last visited Jun. 13, 2006).

