Friday Session: 2:45–4:00 pm

Commercial Linkage Fees — Can They Work in Urban Settings?

Sponsored by Economic & Planning Systems

2:45—4:00 p.m.
Friday, March 10, 2006
Sturm College of Law/Frank J. Ricketson Law Building

Case study reviews of affordable housing mitigation programs for residential and non-residential development in both resort settings and metropolitan areas. Presentations will draw from diverse applications and post questions about optimal methods and practices.

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The Economics of Commercial Linkage and Inclusionary Zoning: Community Case Studies and Impacts to Project Viability

By Andrew Knudtsen
Vice President, Economic & Planning Systems

February 2006

**The Economics of Commercial Linkage and Inclusionary Zoning:
Community Case Studies and Impacts to Project Viability**

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Interest in commercial linkage and inclusionary housing programs is growing. Historically, these programs have received the greatest support in high-cost communities, where community interest, housing need, and developer tolerance have coalesced in such a way that programs have succeeded and provided a consistent production of units. While the success has not been uniform across all communities or all projects, the general conclusion is that the initial efforts have provided adequate benefits to outweigh costs. Can this success be replicated in large, urban communities?

Market conditions vary significantly by community. To be considered in large scale urban settings, programs like these will succeed only to the extent to which the parameters are tailored to fit local market conditions. To address the application in urban setting, this analysis will:

- Summarize case studies of communities with commercial linkage and inclusionary zoning programs.
- Provide proforma analysis and evaluate the financial impact and overall viability for projects subject to inclusionary housing standards.
- Assess the market receptivity to dwelling units created through these programs and discuss the level of demand by type of community.

HOUSING PROGRAMS

Commercial Linkage

Many communities have adopted impact fee programs to increase resources available to address the impacts of growth. Commercial linkage programs provide similar benefits as they proportionally link the impacts on housing to sources that generate demand. The rational used to support these programs is that communities are justified in requiring developers to address a portion of the impacts caused by the new employees and households drawn to a community to operate new businesses. As the rate of commercial development increases, the new employees place an increased demand on the housing supply. To increase the supply in proportion to the increment of new demand, commercial linkage programs require mitigation that is typically in the form of a fee, but in some cases in the form of constructed housing stock.

Any commercial linkage program must be grounded in a study documenting regional housing conditions and providing the nexus between commercial development and its impacts on housing. The nexus analysis should document the different employment generation rates by use and reference wage levels by industry. To the extent the local housing market provides units at affordable rents or sales prices, the mitigation requirements must be adjusted down accordingly. It is critical that the study recognize and isolate existing housing gaps from those attributable to growth. Commercial linkage programs cannot address existing deficiencies.

In the following sections, two case studies are provided from studies completed by Economic & Planning Systems (EPS) for high-cost communities. The economic impacts of these programs have been absorbed more easily in these types of markets. The economic challenge of creating successful programs in metropolitan areas will be addressed later in this paper.

Aspen, Colorado

Aspen is recognized internationally and the demand for housing in the community is priced accordingly. Most locals need some form of affordable housing assistance to be able to live in the community. There are seven different levels of affordability in the adopted program, ranging from seasonal workers at the low end to business owners and professionals at the upper end.

The commercial linkage requirement represents one element of a larger program. It is based on a nexus study completed by EPS that includes survey research of local businesses. The findings by use are shown below in **Table 1**. The average of 3.9 per 1,000 square feet is higher than that of comparable resort communities. The difference can be attributed to greater sales volume per square foot, which would be expected given the profile of guests in Aspen. The data set were adequately robust to cross tabulate by zone district and the City adopted its requirements accordingly. The advantage of this approach is that City staff are not required to track changes over time and provide credits or require additional fees when uses change.

Table 1
Comparison of Employment Generation Rates per 1,000 Sq. Ft.

Type of Business	Aspen	Comparable Communities
All Retail	2.6	3.2
Office – General	4.4	2.8
Office -- Real Estate	6	3.4
Restaurant and Bar	7.3	8
Hotel (emp. per room)	1.1	0.7
All Services	3.3	4.2
Banking	--	2.1
Government	3.9	1.6
Other	3.7	2.4
Average	3.9	2.7

Source: Economic & Planning Systems and RRC Associates

An application of these standards is provided below for a 3,000 square foot commercial building, assumed to be constructed in the Commercial Core. As the employment generation is 4.1 persons per 1,000 square feet, the number of employees is 12.3 in this example. The rate exceeds the average, given that the data documented higher employment rates for certain uses and certain zone districts. The Commercial Core is the primary retail and commercial area of the City and includes the highest intensity of land use. Based on adopted housing targets, the City requires development to mitigate 60 percent of the impact, reducing the number of employees to 7.38. Based on housing guidelines that translate employees to floor area the fee-in-lieu is $68.36 per square foot, or $134,532 for the project.

Sonoma County, California

Sonoma County has developed a commercial linkage program to enable communities within the County to provide housing solutions for low and very low income households. The methodology used to develop the program is based on employment growth projections by sector, and is summarized below:

- Within each sector, projected employment was broken out by four income tiers, linked to AMI levels.
- Housing subsidy by AMI was determined by comparing potential housing payments, at 30 percent of gross income, to housing costs.
- Within each sector, projected growth was applied to subsidy costs by AMI level to generate a total subsidy by sector.
- Floor area by sector was estimated by multiplying industry standards by total projected employment.

- Total subsidy by sector was divided by projected construction by sector to determine the maximum fee per square foot. These maximum fees are provided below in **Table 2.**
- For ease of implementation, the sectors were aggregated into three categories, Commercial, Industrial, and Retail, with corresponding fees.
- A mitigation level of 10 percent was recommended, recognizing that this tool should be one of many used to address the regional housing needs.

Table 2
Sonoma County Nexus Study Methodology

Sector	Projected New Employees 2001-2006	SF per Employee	Total SF Demanded 2001-2006	Total Subsidy	Max. Fee per SF
Agriculture[1]	194	na	na	$7,270,025	na
Distribution	2,220	1,000	2,219,854	$57,085,845	$26
Education	2,565	375	961,901	$29,880,749	$31
Government	128	300	38,324	$1,743,380	$45
Hotel	137	1,500	205,590	$6,582,285	$32
Heavy Industrial	1,309	800	1,047,545	$18,571,953	$18
Light Industrial	5,305	600	3,183,274	$69,122,849	$22
Medical	2,296	500	1,148,092	$22,447,595	$20
Office	6,770	275	1,861,625	$58,616,457	$31
Retail	6,773	500	3,386,446	$121,492,884	$36
R&D	824	400	329,558	$1,160,462	$4
Total	**28,521 employees**		**14,382,209 SF**	**$393,974,484**	

[1] Includes direct farm employment only; food and wine processing employment in included in Light Industrial.

Source: Economic & Planning Systems

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The final recommendation included fees at $2.08 for Commercial, $2.15 for Industrial, and $3.59 for Retail. Comparable fees from other jurisdictions in California at the time ranged from $0.26 for Industrial up to $3.00 for Office. Applying these standards to a hypothetical commercial development of 3,000 square feet results in a fee-in-lieu of $6,450.

Inclusionary Zoning

Inclusionary zoning standards typically require developers to set aside a percentage of units as affordable. In some cases, the requirements are triggered by some type of discretionary development approval. These types of programs frequently include incentives for developers that off-set a portion of the costs related to the housing. Unlike linkage fees, inclusionary zoning programs are typically viewed as a zoning standard or use restriction. When viewed in these terms, the nexus study needed for linkage programs is not required, but governing jurisdictions must not overreach by eliminating the economic use of property.

Elements of existing successful inclusionary zoning programs are based on studies that document local and regional housing conditions with findings regarding the lack of housing available to households earning moderate incomes. Locally adopted programs should be tailored to the findings of the study and provide inventory to address gaps in the supply at the income level identified by the research. In some cases, this will include households well above the median income level. The housing study should also reflect comparable standards from peer communities and ensure that proposed terms are consistent with industry standards.

The Denver City Council adopted the Inclusionary Housing Ordinance (IHO) in August of 2002. The goal of the IHO is to provide affordable workforce housing in a comprehensive and consistent manner throughout Denver. Affordable units provided under the IHO program are referred to as Moderately Priced Dwelling Units (MPDUs). The IHO uses a series of incentives to facilitate construction of MPDUs. These incentives include project expense rebates, density and parking bonuses, and expedited permit processing.

The IHO makes the following stipulations:

- All qualified developments of 30 or more residential for-sale units must provide at least 10 percent of their total project units as MPDUs.

- MPDUs must be priced at rates affordable to households earning between 60 percent and 110 percent of the Area Median Income as defined by the U.S. Department of Housing and Urban Development (HUD).

The IHO mandates that for-sale affordable housing units be subject to a covenant backed by the Denver Housing Authority. The purpose of the covenant is to establish the property's designation as an affordable unit and to ensure that the property will remain as an affordable unit for a certain period of time. The covenant creates a restriction on the appreciation of the housing unit which effectively maintains the affordability of the unit by restricting the future sales price.

ECONOMIC CONSIDERATIONS

Real Estate Project Viability

In terms of community benefit, commercial linkage and inclusionary housing are often viewed as effective tools to housing needs. Any evaluation of the effectiveness of a program should account for costs. The full spectrum of participants in the development process often share a portion of the costs. There are four general categories of expenses and revenues which can be modified to cover costs related to housing programs. These include:

- Increasing subsidies from external sources dedicated for affordable housing;
- Reducing land costs through negotiations at the on set of the project ;
- Increasing sales and rents (with the potential for slower absorption rates for market rate units); and
- The hypothetical option of reducing internal rates of return.

In **Table 3** and **Table 4,** these factors are shown to document the economic impacts of an inclusionary housing requirement. The development program is hypothetical, but is representative of current standards and economic performance. The two tables are provided to show how the housing requirements affect viability. The only factor to be modified is the inclusionary housing requirement, increasing from 10 percent in the first cast to 20 percent in the second. All other factors affecting development are held constant, including construction costs, transaction costs, interest rates, and land costs. Revenues are also held constant regarding sales price points and subsidies, with half of the affordable units set aside for households earning 80 percent of the Area Median Income (AMI) and the other half dedicated at the 95 percent level.

The first scenario allows the developer to achieve a 16.5 percent return on equity. Under the second scenario, the return drops to 5.4 percent, making the project infeasible. If returns drop below the internal targets of a development company, it will not pursue the project. In the first scenario, there are a number of factors that enable the project to generate the return, including a per door land cost at 50 percent of market rate (decreasing costs by $16,000 per unit), revenues from affordable units at 95 percent of AMI, which adds $30,000 per door for these units, and the IHO subsidy of $5,000 per unit, which is available as a credit against building permit fees.

Table 3
Development Proforma – 10 Percent Mitigation Rate

	Factor	For Sale Total	Per Unit 80% AMI	Per Unit 95% AMI	Per Unit Market
Project Description					
Number of Units		300	15	15	270
Gross Building Area		354,000	1,000	1,000	1,200
Project Revenue					
Gross Sales Income [1]		$92,881,543	$164,735	$195,368	$324,000
Less: Sales Commission [2]	*2.8%*	*$2,600,683*	*$4,613*	*$5,470*	*$9,072*
Adjusted Gross Income		$90,280,860	$160,123	$189,897	$314,928
Plus: IHO Rebate		$150,000	$5,000	$5,000	$0
Net Income		**$90,430,860**	**$165,123**	**$194,897**	**$314,928**
Project Costs					
Land Acquisition		$9,120,000	$16,000	$16,000	$32,000
Building Construction	$170	$60,180,000	$170,000	$170,000	$204,000
Soft Costs [3]	10.0%	$6,018,000	$20,060	$20,060	$20,060
Contingency [4]	5.0%	$3,309,900	$11,033	$11,033	$11,033
Total Project Costs		**$78,627,900**	**$217,093**	**$217,093**	**$267,093**
Net Operating Profit(Loss)	NI - TPC	**$11,802,960**	**($51,970)**	**($22,196)**	**$47,835**
Financial Analysis					
Construction Loan Amount	75%	$58,970,925	$162,820	$162,820	$200,320
Construction Loan Fees	2.5%	$1,474,273	$4,914	$4,914	$4,914
Construction Loan Interest [5]	8.0%	$7,076,511	$23,588	$23,588	$23,588
Total Financing Costs	Fees + Int.	**$8,550,784**	**$28,503**	**$28,503**	**$28,503**
Project Summary					
Total Development Costs	NOP+TFC	**$87,178,684**	**$245,596**	**$245,596**	**$295,596**
Equity Required	TPC - Loan	**$19,656,975**	**$54,273**	**$54,273**	**$66,773**
Net Cash Flow	NOP - TFC	**$3,252,176**	**($80,473)**	**($50,698)**	**$19,332**
Return on Equity	NCF/Equity	**16.54%**	**-148.27%**	**-93.41%**	**28.95%**

[1] Based on HUD Income for a two-person household
[2] Assumes that sales commission to Buyer agent will be a cost to the buyer
[3] Soft Costs are a precentage of building construction only
[4] Contingency is a precentage of all project costs excluding land acquisition
[5] Assumes 18 months to construct at 8.0 percent interest

Source: Economic & Planning Systems

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Table 4
Development Proforma – 20 Percent Mitigation Rate

	Factor	For Sale Total	Per Unit 80% AMI	Per Unit 95% AMI	Per Unit Market
Project Description					
Number of Units		300	30	30	240
Gross Building Area		348,000	1,000	1,000	1,200
Project Revenue					
Gross Sales Income [1]		$88,563,086	$164,735	$195,368	$324,000
Less: Sales Commission [2]	*2.8%*	*$2,479,766*	*$4,613*	*$5,470*	*$9,072*
Adjusted Gross Income		$86,083,320	$160,123	$189,897	$314,928
Plus: IHO Rebate		$300,000	$5,000	$5,000	$0
Net Income		**$86,383,320**	**$165,123**	**$194,897**	**$314,928**
Project Costs					
Land Acquisition		$8,640,000	$16,000	$16,000	$32,000
Building Construction	$170	$59,160,000	$170,000	$170,000	$204,000
Soft Costs [3]	10.0%	$5,916,000	$19,720	$19,720	$19,720
Contingency [4]	5.0%	$3,253,800	$10,846	$10,846	$10,846
Total Project Costs		**$76,969,800**	**$216,566**	**$216,566**	**$266,566**
Net Operating Profit(Loss)	NI - TPC	**$9,413,520**	**($51,443)**	**($21,669)**	**$48,362**
Financial Analysis					
Construction Loan Amount	75%	$57,727,350	$162,425	$162,425	$199,925
Construction Loan Fees	2.5%	$1,443,184	$4,811	$4,811	$4,811
Construction Loan Interest [5]	8.0%	$6,927,282	$23,091	$23,091	$23,091
Total Financing Costs	Fees + Int.	**$8,370,466**	**$27,902**	**$27,902**	**$27,902**
Project Summary					
Total Development Costs	NOP+TFC	**$85,340,266**	**$244,468**	**$244,468**	**$294,468**
Equity Required	TPC - Loan	**$19,242,450**	**$54,142**	**$54,142**	**$66,642**
Net Cash Flow	NOP - TFC	**$1,043,054**	**($79,345)**	**($49,570)**	**$20,460**
Return on Equity	NCF/Equity	**5.42%**	**-146.55%**	**-91.56%**	**30.70%**

[1] Based on HUD Income for a two-person household
[2] Assumes that sales commission to Buyer agent will be a cost to the buyer
[3] Soft Costs are a precentage of building construction only
[4] Contingency is a precentage of all project costs excluding land acquisition
[5] Assumes 18 months to construct at 8.0 percent interest

Source: Economic & Planning Systems

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As discussed previously, infusing subsidy into the project receives the highest priority by all members of a development effort, as it enables the rest of the project proforma to remain consistent with industry standards. Direct subsidies, such as HOME funds, or indirect subsidies, such as density increases, are ways to improve a project's performance; however, direct subsidies are quickly tapped and demand far exceeds supply at the Federal, State, and local levels. In the case of the Denver IHO, developers are provided a subsidy of $5,000 per unit, which has been included.

The two scenarios assume a discounted land cost for the affordable units. In the short duration of the Denver IHO, horizontal developers have accounted for this to secure entitlements. This is not unlike the historical relationship between land value and community priorities, as articulated by zoning codes. In the most general terms, density regulations have some of the greatest impact on land value. Other zoning standards, as they have emerged over time, have developed equivalent recognition for their impact to land value (i.e., stream setbacks, height limits, etc.). Horizontal developers attempt to factor in all public standards to determine residual land value. Past market research indicates that this approach is effective in most markets, although land-constrained markets are driven more by comparable sales than residual land value calculations

Many arguments against affordable housing programs cite the added cost to market rate units. An informed way to view this concern is to determine the additional cost as a percentage of base cost. In high-cost housing areas, this percentage is directly correlated to price and will shrink as prices increase. This correlation is why these types of programs have had greater acceptance in resort communities. In this case study, which is based on urban market conditions, the average price of the market unit was $324,000 and the affordable units were sold at $164,000 and $195,000 based on AMI. The resulting net cash flow of $3.2 million provided a return of 16.5 percent. By increasing land cost for the affordable units to market rate, the net cash flow drops by approximately $500,000. To maintain the original rate of return, the additional costs could be dispersed among the market rate units, increasing prices by approximately $2,000, or less than 1 percent of sales price.

Many resources are needed to make inclusionary housing and commercial linkage programs economically viable. Flexibility in standards and, most importantly, calibration to local market conditions, is critical to long term success.

Commercial Linkage and Inclusionary Zoning

Economic Considerations

Andy Knudtsen
Vice President
Economic & Planning Systems

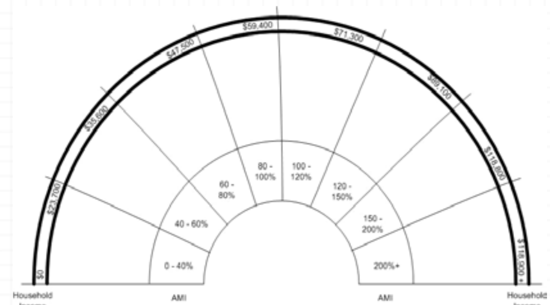
Affordable Housing Programs

- Commercial Linkage and Inclusionary Zoning Case Studies
  - Where have they been successful?
  - What elements have contributed to the success?
- Economic Considerations
  - Impact to Project Viability
  - Impact to Market Receptivity

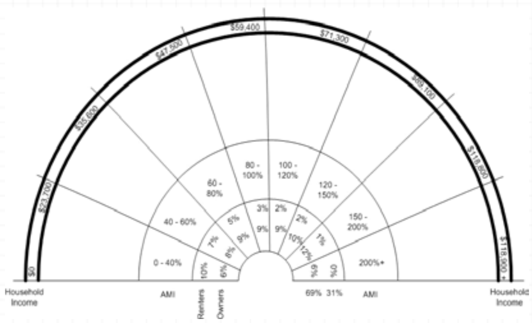
Commercial Linkage

- Proportionally links the impacts on housing to the sources that generate the demand.
- Programs can be calibrated by use, location, or type of employment
- Studies evaluating the linkage provide the foundation for the program
  - Field surveys to set ratios by use
  - Larger studies help communities understand differences between “Keep Up” and “Catch Up.”
  - Define gaps using comparison of supply and demand
  - Refine data to understand where greatest needs fall
  - Range of benefits for the community and for economic development

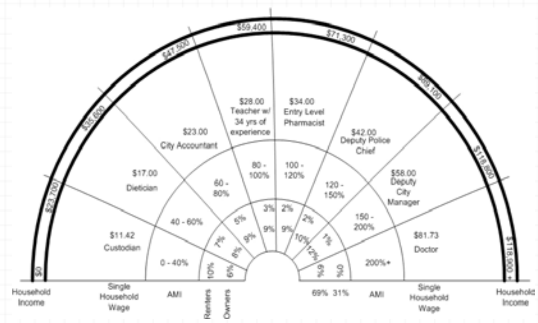
Metro-Area AMI



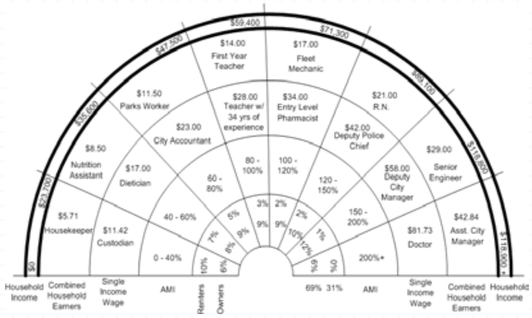
Tenure



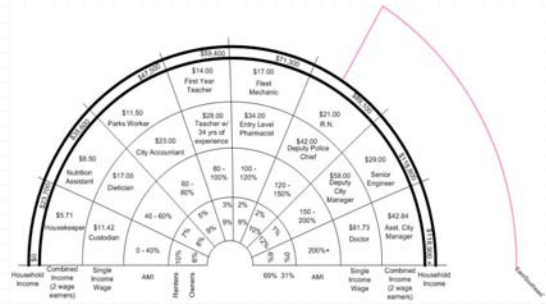
Employment Examples – Single Wage Households



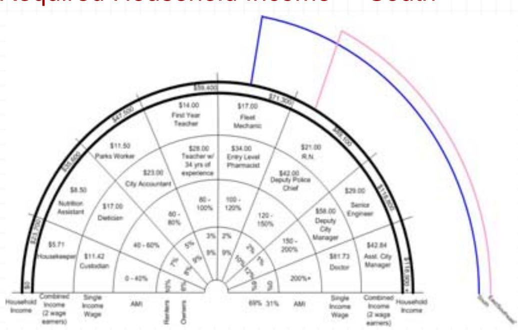
Employment Examples – Two Wage Households



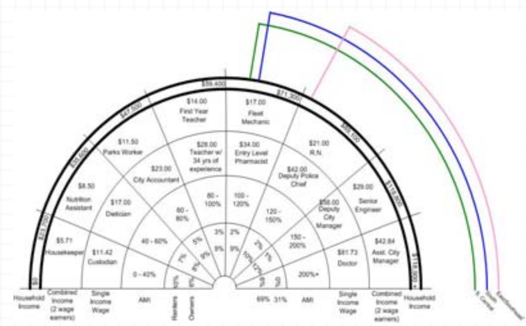
Required Household Income – East/Southeast



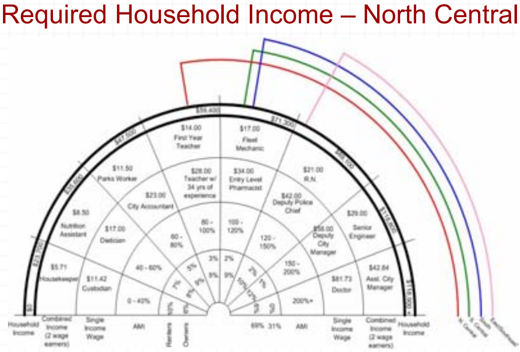
Required Household Income – South



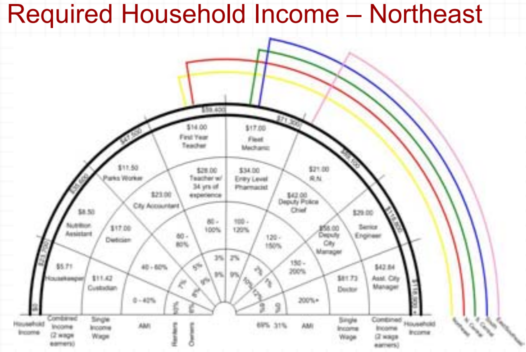
Required Household Income – South Central



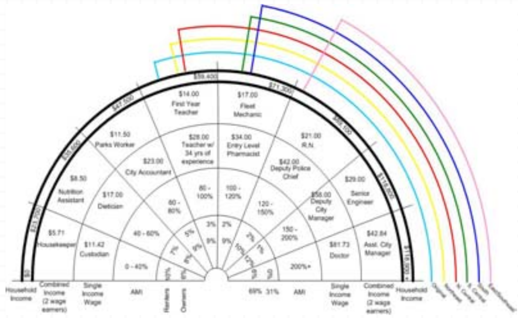
Required Household Income – North Central



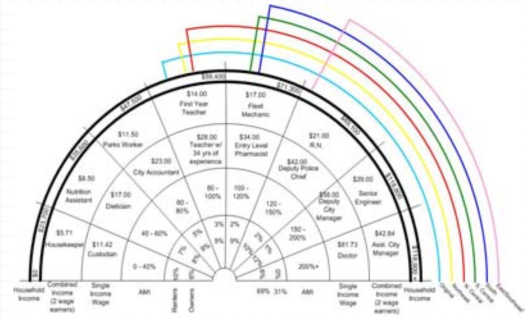
Required Household Income – Northeast



Required Household Income – Original Town



Spectrum of Need

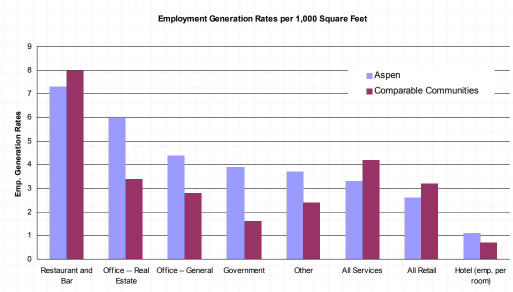


Case Study -- Aspen, CO

- International recognition
- Demand for housing reflects the resulting market area
- Prices far exceed local capability to purchase or rent

- Commercial Linkage Program
  - Traditional resort commercial linkage driven by use
  - Data segmented by location, given the economic strength of Aspen's commercial core
  - Key concern involved economic vitality and uses that are key to the success of resort communities

Comparison of Employment Generation Rates



Case Study -- Sonoma County, CA

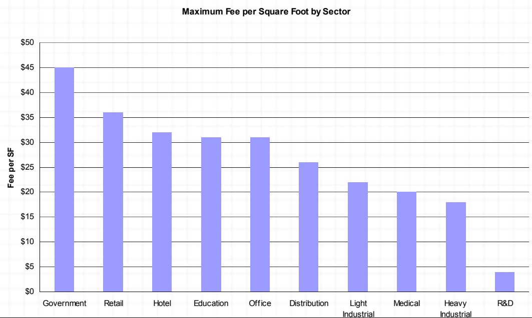
- Close proximity to Bay Area drives real estate market
- Local employment key concern that drove the effort

- Commercial Linkage Program
  - Employment growth projections by sector
  - Using wage data, estimated growth by AMI
  - Funding gap identified by comparing potential housing payments to average housing costs
  - Magnitude of program costs determined by applying subsidies by sector to growth projections

Sonoma County (Con'd)

- Projected floor area by sector using industry standards for employment categories
- Fees estimated by dividing total subsidy cost by estimated development
- For ease of implementation, sectors aggregated into three categories: Commercial, Industrial, and Retail
- Mitigation level of 10 percent was recommended, recognizing that this tool is one of many to be used to address housing

Fees by Employment Sector



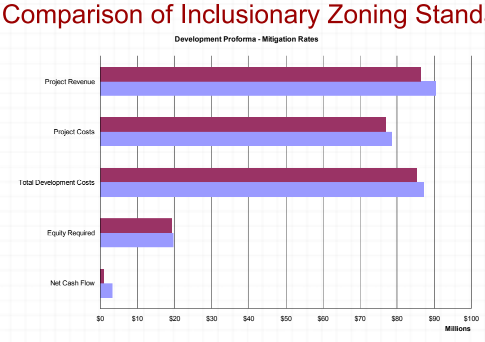
Case Study -- Denver, CO

- Inclusionary Housing Ordinance set at 10 percent, for projects with 30 or more units and which meet other development characteristics
- AMI range for ownership units falls between 60 percent and 110 percent of AMI
- City provides subsidy, parking reduction, and fast-track permitting
- Units subject to appreciation cap and resale restrictions

Impacts to Project Viability

- Four general categories of revenues and expenses to accommodate housing requirements
  - Increasing subsidies from external sources
  - Reducing land costs
  - Increasing sales and rents
  - Reducing rates of return

Comparison of Inclusionary Zoning Standards



Market Acceptance

- **Lowry Community Land Trust**
- The land trust model employs an equity cap in order to provide permanently affordable housing units.
- A homeowner's return is limited to 25 percent of the profit from sale of the unit.
- The land lease amount translates into approximately $10,000 in unit price; units are offered at prices that have been adjusted for this loss of purchasing power.
- The LCLT has sold units to a wide variety of individuals ranging from middle aged singles to retirees wanting to live near their children.
- Demand exceeded supply.

- **Monarch Mills**
- The 69 unit condominium project shares its site with luxury townhomes and the Museum of Contemporary Art/Denver.
- Of the 69 units 56 are on 20-year deed restrictions for affordable housing.
- The project represents the affordable housing requirement transferred from several development within the Riverfront area.
- All 56 units sold within six months of pre-sales beginning.

- **Syracuse Village** –
- One of two affordable housing projects in Stapleton, offering 1- and 2-bedroom units ranging in size from 800 to 1,200 square feet.
- One of two projects in Denver that has not generated market demand.
- While performance has been disappointing, appears that deed restriction and limited resale are not factors.
- These units have been referred to as the “yuppie incubator”. Many of the units have been sold to the temporarily poor, such as medical residents and other young professionals with high debt to income ratios.

- **Zocalo** – A 42 unit condominium at 22nd and Decatur Street near Invesco Field at Mile High includes six affordable units offered at 80 percent of AMI.
- The affordable units were not distinguishable in finish from the market rate units, including extra storage and reserved parking.
- All six units were under contract in three weeks.
- Generally a strong resales market, provided that units meet general standards of balance of the project.
- Location helps facilitate sales.

An Overview: Inclusionary and Linkage Programs for Affordable Housing and the Federal Constitution

By Craig Richardson
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An Overview: Inclusionary and Linkage Programs for Affordable Housing and the Federal Constitution

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There is little debate housing affordability problems exist in many resort communities across the nation, especially since the recent run-up in housing prices over the past four to five years. Experience teaches us that the problem is multi-faceted and consequently cannot be solved through a single program or regulatory initiative. One regulatory tool a growing number of resort communities are considering or have implemented is the affordable housing mitigation requirement, either through linkage fees or inclusionary housing requirements. They generally involve the imposition of a condition on new development during the land use regulatory process that requires action to ensure a certain number of the employees needed to service the new development have access to housing in the community they can afford. Usually, the condition is met through payment of a housing mitigation fee, construction of affordable housing, conversion of existing free market units to affordable units, or dedication of land for affordable housing.

The issues surrounding the formulation of such a regulatory requirement are complex, involving state and federal law issues, housing cost data, economic analysis and other policy related issues. The purpose of this paper is to summarize one of the components that goes into the design of an affordable housing mitigation requirement -- the federal constitutional issues, and the implications they have for the successful development of such a program. Obviously, in the design of an affordable housing mitigation program, state law, housing cost data, economic and policy issues must also be considered.

Initially it should be recognized that designing an affordable housing mitigation program that conforms with federal constitutional limitations is complex because such a program may be viewed in more than one way. Housing mitigation requirements may be viewed as traditional land-use regulations or as price controls. They may also be viewed as exactions, in that they require the landowner/developer to provide a "public good" and may allow the developer to pay fees to avoid specific restrictions. The view taken will affect how the courts examine the federal constitutional issues.

If an affordable housing mitigation requirement is challenged on federal constitutional grounds, it will probably be attacked as violating the substantive due process, equal protection or takings clauses of the constitution. The federal constitutional limitations relevant to these challenges are summarized below, followed by recommendations for how an affordable housing mitigation program can be designed to address these federal constitutional limitations.

A. Substantive Due Process

Substantive due process provides constitutional protections so that government will not deprive a person of property for an arbitrary reason. *Hyde Park Co. v. Santa Fe City*

Council, 2000 U. S. App. LEXIS 24022 (10th Cir. 2000). *Mitchell v. City of Moore*, 218 F. 3d 1190, 1198 (10th Cir. 2000); *Hennigh v. City of Shawnee*, 155 F. 3d 1249, 1253 (10th Cir. 1998). Persons who demonstrate a protected property interest (which is not synonymous with property ownership) are protected under the fifth and fourteenth amendments of the United States Constitution from land use regulations and regulatory fees that violate substantive due process.[1]

Violations of substantive due process are judged based on a deferential standard. The first step involves identifying whether there is a legitimate governmental objective or goal for the regulation – a goal which the enacting body could arguably have been pursuing. The second step asks whether there is a conceivable rational relationship between the alleged goal and the zoning regulation. The proper inquiry is concerned with the existence of a <u>conceivably</u> rational basis that furthers a goal, not whether that basis was considered by the legislative body when the regulation was adopted by the local government. The ultimate decision of whether a zoning decision is arbitrary/capricious under this standard of review is a question of law that must be determined by the court. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Village of Belle Terre v. Boraas*, 416, U.S. 1, 6 (1974); *Gorieb v. Fox*, 274 U.S. 603 (1927); *Norton et. al v. Village of Corrales*, 103 F. 3d 928 (10th Cir. 1996); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1580-82 (10th Cir. 1996); *Jacobs, Visconsi & Jacobs Co. v City of Lawrence*, 927 F. 2d 1111 (10th Cir. 1991); *Landmark Land Co. v. R.E. "Buck" Buchanan, et. al.*, 874 F. 2d 717 (10th Cir. 1988); *Restigouche, Inc. v. Town of Jupiter*, 59 F. 3d 1208 (11th Cir. 1995); *Corn v. City of Lauderdale Lakes*, 997 F. 2d 1369 (11th Cir. 1993); *Grant v. County of Seminole*, 817 F.2d 731 (11th Cir. 1987); *Pearson v. City of Grand Blanc*, 961 F. 2d 1211 (6th Cir. 1992); *Snake River Venture v. Board of County Commissioners, Teton County*, 616 P. 2d 744, 753 (Wyo. 1980).

Given the courts' recognition that actions preventing unreasonable increases in housing prices are a legitimate governmental interest,[2] and the long time precedent controlling the review of substantive due process challenges, affordable housing requirements should survive substantive due process challenges if there is a conceivable relationship between the legitimate goal of providing affordable housing and preventing unreasonable increases in housing prices, and affordable housing mitigation requirements. – which there generally is. However, to ensure this conceivable rational relationship exists, a support study for the program should show a need for affordable housing in the community that is not being

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[1] The Fifth Amendment provides, in part, that: "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." *U.S. Const.* Amend V. The Fourteenth Amendment provides, in part, that: "[n]o state shall . . . deprive any person of life, liberty, or Property, without due process of law. . . ." *U.S. Const.* Amend XIV.

[2] In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), the United States Supreme Court held that protecting consumer welfare is a legitimate goal of price regulations, and that preventing unreasonable increases in housing prices is a legitimate governmental interest. See also *Home Builders Association of Northern California v. City of Napa*, 90 Cal.App.4th 188 (2001) ("… "it is beyond question that [the City of Napa's] inclusionary zoning ordinance will 'substantially advance' the important governmental interest of providing affordable housing for low and moderate income families." (90 Cal.App.4th at 195); *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1997 (1992); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *FCC v. Florida Power Corp.*, 107 S. Ct. 1107 (1990); *Greystone Hotel v. City of New York*, 13 F. Supp. 2d 524, 528 (S.D.N.Y 1998); *Holmdel Builders Association v. Township of Holmdel,* 582 A. 2d 277 (N.J. 1990); *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851 (Cal. 1997).

addressed. The affordable housing requirement should also require the provision of affordable housing units in amounts no greater than the needs. More specifically, it is suggested the support study:

- Demonstrate housing costs have increased over time, outstripping the ability of many local employees to afford housing;

- Establish a measurable and reasonably attainable affordable housing goal for the community;

- Estimate existing and projected affordable housing needs, based on the housing goal;

- Identify the affordable units that are and will be provided through existing affordable housing programs and the private market, and affordable housing that will need to be provided through the mitigation program;

- Develop reliable data on how many new employees will be needed to service new businesses and homes; and

- Reasonably allocate mitigation requirements to new development based on the number of employees needed to service the development and the subsidy needed to making housing affordable for employees.

B. Equal Protection

Equal protection challenges are based on the fourteenth amendment, which provides in part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws" (U.S. Const. Amend XIV). The standard for equal protection cases involving land use regulations requires that if the regulation effects a fundamental right or suspect class the regulation is subject to strict scrutiny. However, if a suspect class or fundamental right is not involved, the regulation is subject to a deferential standard of review similar to substantive due process challenges.

Affordable housing mitigation regulations generally do not implicate fundamental rights or suspect classes. This means review of equal protection challenges to housing mitigation requirements are subject to the deferential standard of reasonableness review. Consequently, affordable housing mitigation requirements should survive equal protection challenges if there is a conceivable rational relationship to the legitimate governmental interest of ensuring the provision of affordable housing in a community. In short, if the housing mitigation program can meet a substantive due process challenge, it should also be able to sustain an equal protection challenge.

C. Takings

The third federal constitutional hurdle in the successful implementation of an affordable housing program is addressing takings claims. In the broadest sense, the United States Supreme Court recognizes three types of takings challenges that are relevant to affordable housing mitigation programs: (1) partial regulatory takings claims; (2) *Nollan/Dolan* claims; and (3) claims that the regulation results in a physical occupation of property.

1. Partial Regulatory Takings

Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), "... [t]he general rule at least is, that while property may be regulated to a certain extent, if it goes too far it will be recognized as a taking" (260 U.S. at 415). One way a regulation "goes to far" so as to effect a regulatory taking is to deprive a property owner of all economically beneficial use of his or her property. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992); *Clajon Production Corporation v. Petera,* 70 F.3d 1566 (10th Cir. 1995*); Loveladies Harbor Inc. v. United States*, 28 F. 3d 1171 (D.C. Cir. 1994).

The law requires that before a court of law finds that a regulation has "gone too far" and denied a property owner all economically beneficial use of property, the property owner must demonstrate that:

> (1) There was a denial of economically viable use of property as a result of the regulatory imposition (a "partial taking," *Lingle v. Chevron*, 125 S. Ct. 2074 (2005); *Loveladies*, 28 F. 3d 1171; *Florida Rock Industries, Inc. v. United States*, 18 F. 3d 1560 (1994));
>
> (2) The property owner has distinct investment backed expectations *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978); *Loveladies*, 28 F. 3d 1171); and
>
> (3) It was an interest vested in the owner, as a matter of state property law, and not within the state to regulate under common law nuisance doctrine. *Lucas*, 505 U.S. 1003.

Affordable housing requirements can be designed so as not to deprive a property owner of economically beneficial use of his or her property. However, to ensure the regulation does not generally result in the denial of economically beneficial use of property, several things should be done. First, an analysis of development feasibility should be undertaken before determining affordable housing requirements (levels) to evaluate the likely effect of the regulations on the ability of property owners to enjoy an economically viable use of the property considering the amount of the affordable housing mitigation requirement. However, it should be noted that the law does not require that the local government provide every property owner or developer with a profit on land, and generally the inquiry is whether the property owner has been deprived of all economically viable use of the land. Second, the regulations should include a "special study" provision that allows a developer to show that providing the required levels of affordable housing would make any development economically unfeasible, and show the amount of affordable housing that could be accommodated.

2. *Nollan/Dolan* Claims

Nollan/Dolan claims involve two different types of challenges to conditions of development approval; they are generally considered at the same time. The *Nolan* challenge is that the regulation fails to advance legitimate governmental interests because there is no "essential nexus" between the legitimate governmental interest and the government action (the permit condition imposed). The *Dolan* challenge asks whether there is a "rough proportionality" or reasonable relationship, both in nature and extent, between the development condition at issue and the impact of the development on the community.

Even though there has been some confusion about when the heightened judicial scrutiny of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard.* 512 U.S. 374 (1994) should be applied to local land use decisions, today, after *Lingle v. Chevron*, 125 S. Ct. 2074 (2005), it appears the law is clear that *Nollan/Dolan* applies only to adjudicative land use exactions – specifically government demands made as a condition of obtaining development approval that a landowner dedicate land or an easement allowing public access to property -- extinguishing the landowner's right to exclude others from the dedicated property.

Seminal support that the heightened scrutiny required by *Nollan/Dolan* only applies in these limited contexts is found in the United States Supreme Court decisions of *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) themselves, and five other Supreme Court decisions: *Ehrlich v. City of Culver City*, 512 U.S. 1231,114 S.Ct. 2731, 129 L.Ed.2d 854 (1994); *Ehrlich v. City of Culver City*, 519 U.S. 929, 117 S.Ct. 299, 136 L.Ed.2d 218 (1996); *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 115 S.Ct. 2268, 132 L.Ed.2d 273 (1995), *City of Monterey v. Del Monte Dunes,* 527 U.S. 687, 119 S. Ct. 1627, 143 L. Ed.2d 882 (1999); and *Lingle v Chevron*, 125 S. Ct. 2074 (2005).

Most recently in *Lingle*, Justice O'Connor wrote for a unanimous Supreme Court.

> Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions – specifically government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit. See *Dolan*, supra, at 379-380, 114 S. Ct 2309 (permit to expand a store and parking lot conditioned on the dedication of a portion of the relevant property for a "greenway," including a bike/pedestrian path); *Nollan*, supra, at 828, 107 S. Ct. 3141 (permit to build a larger residence on beachfront property conditioned on dedication of an easement allowing the public to traverse a strip of the property between the owner's seawall and the mean high-tide line).

125 S. Ct. 2074, 2086 (2005) (Emphasis added).

These decisions have significant implications to local government inclusionary and linkage regulations for affordable housing. This is so because it now appears that the heightened judicial scrutiny of *Nollan/Dolan* does not apply, <u>because inclusionary and linkage programs are legislatively adopted, non-discretionary (formula-based or quantitative) regulations, based on support studies</u>.[3]

Even with these recent developments, however, it is suggested that local governments continue to design both their inclusionary and linkage programs so they comply with the heightened judicial scrutiny of *Nollan/Dolan*. As is discussed below, this can be done through a support study.

a. Nollan/ Substantially Advancing Legitimate Government Interest/"Essential Nexus"

In *Nollan*, as a condition on a permit for re-developing an existing bungalow on a beachfront lot, the California Coastal Commission attempted to require a dedication of a lateral public easement across the lot to connect two public beaches that were separated by the lot. The Coastal Commission stated in imposing the condition that its purpose was to promote the legitimate state interest of diminishing the "blockage of the view of the ocean" caused by construction of the larger house. The United States Supreme Court disallowed the exaction as a regulatory taking of property, and adopted a standard of review which required governmental actions taken as part of development review to have an "essential nexus" to the legitimate governmental purpose on which the action is based. This "essential nexus" standard, as applied by the court in *Nollan*, involved an inquiry about whether there is a basic and reasonable relationship between the legitimate governmental purpose being addressed and the action taken pursuant to the governmental regulation. The court determined that in *Nollan* there was none.

> How enhancing the public's ability to 'traverse to and along the shorefront' served the same governmental purpose of 'visual access to the ocean' from the roadway was beyond our ability to countenance. The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into 'an out-and-out plan of extortion.' … *Dolan v. City of Tigard*, 512 U.S. at 387 (Supreme Court discussing its decision in *Nollan*).

Federal courts have applied the *Nollan,* 483 U. S. 825, "essential nexus" requirement in one case relevant to affordable housing requirements. In *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied,* 112 S.Ct. 1997 (1992), the Court of Appeals for the Ninth Circuit upheld an affordable housing linkage fee program for nonresidential development, in part, on the grounds the fee imposed met the "essential

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[3] In Colorado, the legislature through CRS §29-20-203(1) has embraced this rule, establishing that if a land exaction and/or fee-in-lieu system are crafted as "legislatively formulated assessment[s], fee[s], or charge[s] imposed on a broad category of property owners" then the "essential nexus" and "roughly proportional" standards do not apply. see *Krupp v Breckenridge Sanitation District*, 19 P.3d 687 (Col.2001).

nexus" requirements of *Nollan*. According to the Court, the fee bore "a rational relationship to a public cost closely associated with [the] development."(941 F.3d at 874) The Court went on to hold that *Nollan* only meant that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld"(941 F.3d at 875).

As is discussed above, even if it no longer appears that inclusionary or linkage programs for affordable housing must comply with the heightened judicial scrutiny of *Nollan*, it is suggested that local government continue to design both their inclusionary and linkage programs to comply with these requirements. As is discussed in the next section, this can be done through a support study.

***b. Dolan*/ Reasonableness of the Nature and Scope of Permit Conditions**

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), as a condition on a permit for expanding an existing business, the City of Tigard attempted to require a dedication of property for a bike path to alleviate traffic congestion and a greenway to help in flood control. The United States Supreme Court disallowed the exaction as a regulatory taking of property without just compensation. The court adopted a standard of review which required any discretionary (adjudicative) land exaction imposed as a condition of development approval to be "roughly proportional" to its impact on the community.[4] The court equated the rough proportionality test with the rational nexus standard used in state courts' consideration of development exactions or impact fee programs.[5] "Despite any semantical differences, general agreement exists among the courts 'that the dedication should have some reasonable relationship to the needs created by the [development]…'" (512 U.S. at 391). The court explained, "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development" (512 U.S. at 391).

As is discussed above, even if no longer appears that inclusionary or linkage programs for affordable housing must comply with the heightened judicial scrutiny of *Dolan*, it is suggested that local government continue to design both their inclusionary and linkage programs to comply with these requirements.

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4 It should be noted that the United States Supreme Court in *Dolan* instead of using the term "rational nexus" or "reasonable relationship," as has been established in the state court opinions, characterized the test as "rough proportionality," even though it is the rational nexus/reasonable relationship standard that they embraced. The Supreme Court refused to use such a term such as "reasonable relationship" " partly because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment."

5 State court decisions cited with approval include *Simpson v. North Platte*, 297 N.W.2d 297 (Neb. 1980); *Jordan v. Village of Menomonee Falls,* 137 N.W.2d 442 (Wisc. 1965), appeal dismissed, 385 U.S. 4 (1966); *Collis v. Bloomington*, 246 N.W.2d 19 (Minn. 1976); *College Station v. Turtle Rock Corp.,* 680 S.W.2d 802 (Tex. 1984); and *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979).

This can be done through development of the appropriate support study and support data that identifies a housing affordability problem, identifies future need caused by new development for affordable housing, and then fairly allocates that need. More specifically, the support study should include:

- Trend data demonstrating that housing costs have increased over time, outstripping the ability of most local employees to afford housing;

- Employment data from the business sector of the community that demonstrates the employment generated by new businesses and tourist accommodation units, along with their wages;

- Data and surveys that demonstrate how the free market residential units "use" the services of repair, maintenance, and property service firms and other persons to service their homes, as well as construction employees to construct their homes – generally workers who cannot afford to live in the community; and

- A reasonable allocation of mitigation requirements to new development based on the number of employees needed to service and construct new development and the subsidy needed to address housing affordability.

3. Physical Occupation

Where government authorizes a physical occupation of private property, the action will generally be found to be a taking (or taking per se), and compensation is required. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1872). Similarly, if a government regulation limits the right of the owner of property to exclude others, or permits others to enter or use the property, a taking may be found. *United States v. Causby*, 328 U.S. 256 (1946); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

The physical invasion cases most relevant to affordable housing mitigation requirements involve rent and vacancy control regulations that limit landowners' rights to control the use of property. The seminal case on this issue is *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Yee,* 503 U.S. 519, mobile home park owners argued that the City of Escondido's rent control ordinance limiting rental prices on the "pad" resulted in a physical taking when it was considered in conjunction with the California state law restricting the mobile home park owner's right to terminate a tenancy on the "pad." The reason was that it increased a mobile home's value by giving the mobile homeowner the right to occupy the "pad" indefinitely at a sub-market rent. It was argued that this governmental act transferred from the mobile home park owner to the mobile home owner a right of physical occupation of the park owner's land (503 at 527).

The United States Supreme Court disagreed that the regulations resulted in a physical occupation of property and a taking. The Court held that the Escondido ordinance, even when considered in conjunction with the state restrictions on tenancy, failed to result in a physical occupation of the mobile home park owners' property. The reason was that even though the regulations placed vacancy (tenancy) and rental controls on mobile home "pads," they did not *compel* the park owners to rent their property for mobile home purposes (e.g., the property could be developed or redeveloped for other purposes).

> The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.' *FCC v. Florida Power Corp.*, 480 U.S. 245, 252. 94 L. Ed. 2d 282, 107 S. Ct. 1109 (1987). 503 at 527.

Because of the voluntary nature of the occupation in *Yee*, 503 U.S. 519, the Supreme Court held that no unwanted physical occupation of the park owners property had occurred. The laws regulated the use of the property and thus did not amount to a taking.[6] (Probably because of the *Yee* decision, there have been very few challenges to either inclusionary or linkage programs on the grounds they result in a physical occupation of property. Most courts that have addressed the issue recognize these types of regulations as rent and price control regulations, and/or use regulations.)

The Supreme Court in *Yee,* 503 U.S. 519, however, was clear that … "[a] different case would be presented were the statute on its face or as applied, to compel landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 503 at 528.

The Court also recognized that even though this "transfer of wealth argument" did not result in a physical invasion (503 at 528), it might still be relevant to the question of whether the regulation causes a regulatory taking. This is so because the concept of "wealth transfer" is important to the inquiry of whether there is a sufficient nexus between the effect of the price and rent control requirements and the legitimate governmental interest it is supposed to advance.

> …. Petitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. This effect might have some bearing on whether the ordinance constitutes a *regulatory* taking as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is suppose to advance. See *Nollan v. California Coastal Comm'n*, *supra*., at 834-835. 503 at 530.

Simply put, the physical invasion cases demonstrate that local governments must be careful in designing affordable housing mitigation regulations because they require rent and price controls to function properly. Whether viewed as a price control, land use regulation or

[6] See also *Greystone Hotel v. City of New York*, Lexis 14960 (2d Cir. 1999) (holding New York Rent Stabilization Law did not amount to a per se physical taking because the statute did not force Class B hotel owners to allow guests onto their property or to stay in the business); *Seawall Associates v. City of New York*, 542 N.E. 2d 1021 (1989) (holding there is no physical invasion where landlords voluntarily put their property to use for residential housing).

exaction, the issues related to the effect of rent and price controls addressed in *Yee* , 503 U.S. 905, are relevant to the design of affordable housing requirements.

Under *Yee*, 503 U.S. 519, the fact that recipients of affordable housing are able to capitalize on the difference between the market price and the controlled price of the affordable housing unit and realize a money gain is permissible (as long as property owners subject to the regulation are not compelled to participate). However, such a "wealth transfer" may create grounds for a regulatory takings claim due to nexus problems. [7]

Yee, 503 U.S. 519, also makes clear that it is important to ensure that affordable housing requirements are designed and implemented so that they do not compel physical occupations of the owner's property by renters or buyers.

[7] It is difficult to show sufficient nexus between the legitimate governmental interest of ensuring affordable housing in a community and the furtherance of this legitimate governmental purpose if recipients of affordable units are not required to re-sell them at affordable levels.

LINKAGE FEES AND INCLUSIONARY ZONING — CAN THEY WORK IN URBAN SETTINGS?

Legal Issues and Case Studies

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March 10, 2006

OVERVIEW OF PRESENTATION

- Overview of Legal Issues
- Practical Implications
- Case Studies

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Common Legal Challenges

OVERVIEW OF LEGAL ISSUES

- Authority
- Substantive Due Process
- Equal Protection
- Takings
  - *Nollan/Dolan*
  - Partial Regulatory Takings
- Other State Laws

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Authority

OVERVIEW OF LEGAL ISSUES

- Important to Evaluate State Constitution and Statutes
- Are There Implied Powers?
- Florida Example: State Constitutional Home Rule Powers
- Colorado Example:
  - Municipalities- Charter home rule powers (Art. XX, Col. Const.)
  - Counties- 1034 Powers
  - CRS Section 38-12-301, Local Control of Rents Prohibited *Telluride v. Lot Thirty Four Ventures.*
    - Focus on in-lieu fee option.

CLARION

Substantive Due Process/Equal Protection

OVERVIEW OF LEGAL ISSUES

- Deferential Standard
- Substantive Due Process
  - Is there a Legitimate Governmental Goal the Local Government Could Arguably be Pursuing?
  - Is there a Conceivable Rational Relationship between the Goal and the Regulation?
- Equal Protection
  - Does the Regulation effect a Fundamental Right ?
  - If Not: Standard of Review is Similar to that of SDP.

CLARION

Takings-*Nollan/Dolan*

OVERVIEW OF LEGAL ISSUES

- Does *Nollan/Dolan* Apply? (Involves Permit Conditions)
  - *Nollan*- Whether fails to advance a legitimate governmental interest because there is no essential nexus between governmental interest and permit condition.
  - *Dolan*-Whether there is "rough proportionality," or reasonable relationship, both in nature and extent, between permit condition imposed and impact of development.
- *Lingle v. Chevron, 125 S. Ct. 2074*
  - *Nollan/Dolan* only apply to:
    - Adjudicative land use exactions where
    - Landowner is required to dedicate an easement allowing public access to property as permit condition.
    - Compares to situation of *per se* takings (physical occupation)

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Takings-*Nollan/Dolan*
OVERVIEW OF LEGAL ISSUES

- Does *Nollan/Dolan* Apply? (cont.)
  - *Linkage Fees and Inclusionary Requirements are formula-based and Legislatively Adopted – Not Adjudicative*
  - Linkage Fees and Inclusionary Housing Requirements are rent and price controls – there is no physical occupation because permit condition does not compel action, or result in property owner's right to use, possess, and dispose of property.
- If *Nollan/Dolan* Applies:
  - Use Support Study to Identify There is Affordable Housing Problem
  - Use Support Study to Demonstrate there is Reasonable Relationship Between Mitigation Requirement and Need Created for Affordable Housing From Development.

Takings-Partial Regulatory Taking
OVERVIEW OF LEGAL ISSUES

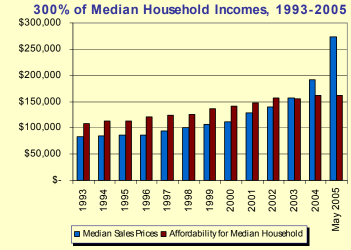
- Does Regulation Deny Economically Beneficial Use?
  - Affordable Housing Regulations can be designed so as not to deprive a property owner of economically beneficial use.
    - To ensure this is case should conduct general evaluation of development feasibility for projects.
    - Include Special Study provision that:
      - Allows landowner to demonstrate deprivation of economically beneficial use, and appropriate regulatory remedy.

PRACTICAL IMPLICATIONS

- Important to Prepare <u>Support Study</u> Before Adopt Affordable Housing Mitigation Program.
- <u>Support Study</u> should develop strong nexus/reasonable relationship between development and need for affordable housing, and mitigation required of it.
  - <u>Problem Description</u> – identify affordable housing problem exists in community.
  - <u>Need for Affordable Housing</u> – identify need for affordable housing created by new development.
  - <u>Goal</u>– establish affordable housing goal.
  - <u>Reasonable Mitigation Requirement</u> – establish there is a reasonable relationship between the affordable housing mitigation required from new development and the need for affordable housing it creates.

Problem Description
PRACTICAL IMPLICATIONS

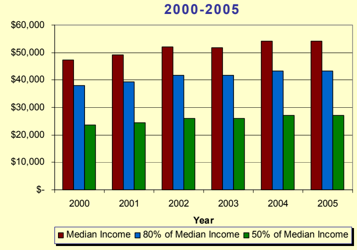
Figure 2.2
Comparison of Median Sales Prices and 300% of Median Household Incomes, 1993-2005



Source: U.S. Department of Housing and Urban Development and the Florida Association of Realtors.

Problem Description
PRACTICAL IMPLICATIONS

Figure 2.3
Area Median Incomes for Fort Myers-Cape Coral MSA 2000-2005



Source: U.S. Department of Housing and Urban Development.

Problem Description
PRACTICAL IMPLICATIONS

- Problem Description:
  - In 1998, 86% of houses sold were priced at or below $160,000.
  - By 2005, that number has dropped to 24%.
  - By 2004, the median sales price for <u>over 90 percent</u> of the MLS residential units sold (single and multi-family units) were above levels that are considered affordable for median income households.

Goals

PRACTICAL IMPLICATIONS

- Establish Realistic Goal
- Consider
  - Not all employees live in community.
  - Need to stabilize work force.
  - Fiscal Realities.

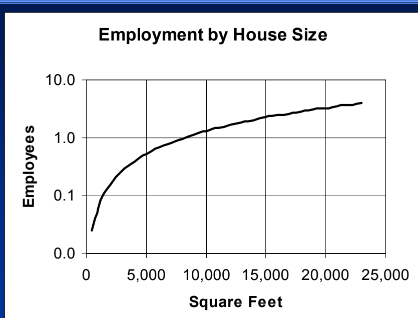
Needs

PRACTICAL IMPLICATIONS

- Needs
  - Residential (Measure in units)
    - Operation and Maintenance Employees Surveys

Needs

PRACTICAL IMPLICATIONS



Needs

PRACTICAL IMPLICATIONS

- Needs
  - Nonresidential (Measure in units)
    - Employees and Size of Business
    - Types of Uses

Need

PRACTICAL IMPLICATIONS

Goals of Methodology

- Focus on the source of the need for affordable housing created by development, by land use type, to ensure nexus principles followed.
- Ensure consistent application.
- Require little additional analysis by applicant or staff, except in unusual circumstances.
- Provide a foundation for consistent application of mitigation options.

Need

PRACTICAL IMPLICATIONS

Methodology – Focus on Following Land Uses

- **Retail**
- **Office**
- **Industrial**
- **Tourist/Recreational**
- **Institutional**
- **Governmental**

Mitigation
PRACTICAL IMPLICATIONS

Mitigation

- Construction of Affordable housing Units.
- Conversion of market Units.
- Dedication of Land.
- Payment of Fee/Subsidy.

CLARION

CASE STUDY 1: CALIFORNIA

California Affordable Housing Laws

1) General "Fair Share" Housing Law

- Statutory requirement that each local government must plan for its "fair share" of the statewide housing need.

2) Anti-NIMBY Law

- Restricts the ability of local governments to deny or reject affordable housing projects.

3) Density Bonus Law

- Allows increase in allowable density if it includes a percentage of affordable units (varies from 5 to 35 percent). Reductions in development standards.

4) Redevelopment Law

- Requires replacement of affordable units removed through redevelopment, percentage of TIF funds go to improve affordable housing, and percentage of units developed must be affordable to moderate, low and very low incomes.

CLARION

CASE STUDY 1: CALIFORNIA

California Affordable Housing Programs

1) Linkage Fee Programs

- At least 19 local agencies have adopted linkage fee programs to mitigate the need for affordable housing generated by nonresidential development.
- Jurisdictions conduct a nexus/support study to establish the link between new nonresidential development and the need for affordable housing.
- Fees are typically set on a square foot basis, ranging form $1 to $10 a square foot, depending upon the type of land use, and the community.
- Some programs allow for construction of affordable housing units.
- Management of program.
- Sacramento's linkage fee program set precedent for state and has been upheld by U.S. District Court and Ninth Circuit of Appeals

CLARION

CASE STUDY 1: SACRAMENTO, CA

Method for Assessing Affordable Housing Impacts in Sacramento, CA

1) City/County Affordable Housing Linkage Fee Program

- Establishes a close nexus between employees by industry/land use type to affordable housing demand
- Can be consistently applied.
- Requires little additional analysis by applicant or staff.
- Provides foundation for consistent application of mitigation options.

CLARION

CASE STUDY 1: SACRAMENTO, CA

Sacramento, CA Methodology Calculations

Step 1: Estimate of Total New Employees.

Step 2: Estimate Employees Who Live Within Jurisdiction.

Step 3: Adjustment for Changes in Labor Force.

Step 4: Adjustment for Number of Households.

Step 5: Breakdown of Household by Occupation.

Step 6: Estimate Moderate, Low, and Very Low Income Households.

Step 7: Adjustment for Multiple Earner Households.

CLARION

CASE STUDY 1: SACRAMENTO, CA

California Affordable Housing Programs

2) Inclusionary Housing Programs

- Approximately 120 local governments (1 in 5) have adopted programs.
- Variation in percentage of housing required, ranging from 4 to 30 percent. Most common inclusionary percentage is 10 percent; a quarter require 20-23 percent.
- Most programs offer alternatives to site construction, such as: off-site construction, payment of in-lieu fees, or land dedications.
- Include durability requirement.
- Incentives often established in conjunction with inclusionary requirements.
- Units must be managed.
- More than 34,000 units have been produced to date through inclusionary programs in CA.

CLARION

CASE STUDY 1: CALIFORNIA

California Affordable Housing Programs

3) Market-Based Responses

- Require some form of financial participation by a private sector company
- Housing Trust Fund of Santa Clara County – raised more than $30 million from corporations, foundations, local government agencies, and other sources for grants to first time homebuyers and subsidizing development of rental units.
- Coastal Housing Partnership of Santa Barbara and Ventura Counties developed by local employers who found it difficult to recruit employees – more than 60 public and private employers have joined to offer employees a housing benefit package including: a downpayment loan program, homebuyers assistance program, mortgage refinancing program, rental housing assistance.

CASE STUDY 2: KEY WEST, FL

Key West, Florida

- *Inclusionary Zoning* - All new residential development must include affordable units for moderate and low-income families.
- Requires 30% of units be affordable (moderate and low-income households).
- Mitigation options:
  - On-site development of units;
  - Development of units off-site through partnership with other developer;
  - Payment in-lieu of construction -- $40,000/affordable unit required – if approved by City Commission.
- Units must stay affordable for up to 25 years.
- Policy encourages development of accessory infill units for workforce and elderly.
- 141 affordable units developed, primarily because regulation does not apply to "re-development" – which is basically what is occurring in Key West.

CASE STUDY 3: TALLAHASSEE, FL

Tallahassee, Florida

- Adopted to encourage private sector development of affordable housing.
- Effective date is October 1, 2005, if City Council not satisfied with private sector development of affordable units.
- Requires developers of 50 or more units in specified areas within the city and all DRIs include a percentage of affordable units within the development.
- Must have 10% of units affordable for homeownership, or 15% affordable as rental.
- Mitigation allowed by:
  - Building units on-site;
  - Donating lot to city for every unit required; or
  - Paying a fee in-lieu of construction ($10,000-$25,000 – based on median sales price of housing in the development).
- Policy includes incentives for voluntary compliance prior to effective date: density bonus, expedited review, flexible design standards, transportation concurrency exemption.

CASE STUDY 4: MASSACHUSETTS

Massachusetts Affordable Housing Law

1) Comprehensive Permit Law (40-B)

- Simplifies development process, both procedurally and substantively, for proposed affordable housing developments in communities where less than 10% of housing is set aside for affordable units, or less than 1.5% of land area is for affordable housing.
- Requires local governments to establish special review procedure (comprehensive permit process) for affordable housing projects that bypasses normal process (through local ZBA).
- If ZBA denies, or conditions placed on approval make project uneconomical, can appeal to state created Appeals Committee.
- Appeals Committee can overturn ZBA decision if unreasonable and inconsistent with local needs.
- By 2001, 25,000 affordable units in 170 communities approved under the legislation.

QUESTIONS