

Affordable Housing Mitigation: Legal Considerations

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Common Legal Challenges

LEGAL CONSIDERATIONS

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



LEGAL CONSIDERATIONS

- Important to Evaluate State Constitution and Statutes
 - State Constitutional Home Rule Powers
 - State Statutory Authority
 - Express Authority
 - Mandatory Plans and Plan Consistency
 - Implied Statutory Authority
 - Broadly Implies Local Government Powers
 - Narrowly implies Local Government Powers
 - Dillon's Rule State
 - Prohibitions

Substantive Due Process/Equal Protection

LEGAL CONSIDERATIONS

- 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.

Takings-*Nollan/Dolan*

LEGAL CONSIDERATIONS

- 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.

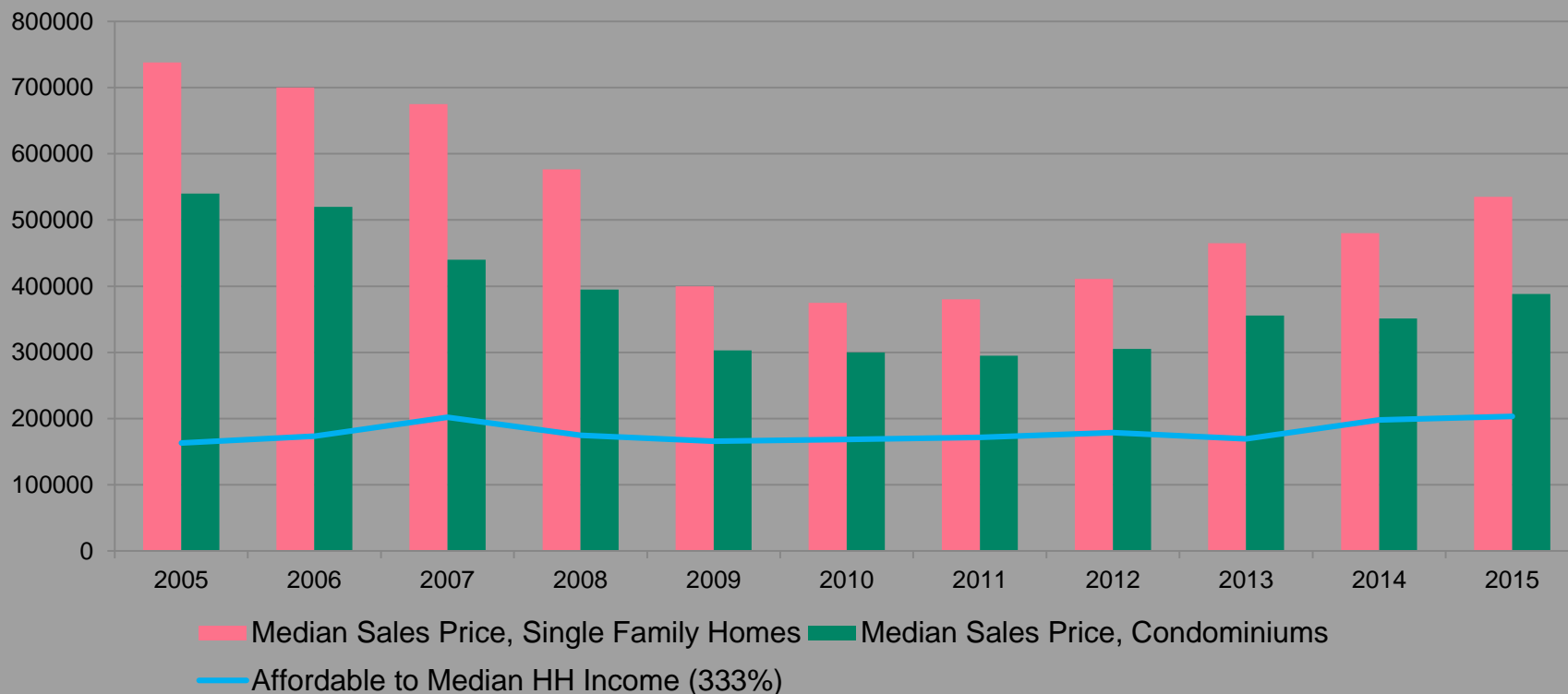
Takings-Nollan/Dolan

LEGAL CONSIDERATIONS

- Does *Nollan/Dolan* Apply? (cont.)
 - *Linkage Fees and Inclusionary Requirements are formula-based and Legislatively Adopted*
 - 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.

LEGAL CONSIDERATIONS

Comparison of Median Sales Prices and Affordable Housing Prices for Monroe County, 2005-2015



Sources: Florida Department of Revenue, Sales Data Files, Collected by the Florida Housing Data Clearinghouse from the Shimborg Center for Housing Studies at UF; American Community Survey 1-Year Estimates: Median Income for Households,

Overview of Workforce Housing Study

LEGAL CONSIDERATIONS

ANNUAL SALES OF HOMES AFFORDABLE TO THE MEDIAN HOUSEHOLD INCOME FOR MONROE COUNTY (2005 - 2016)

Year	Median Household Income	Affordable Price at 333% of Income	Sales at or Below Affordable Price*			Total Units Sold Annually	Affordable Price Units as % of Total Annual Sales
			Single-Family	Other**	Total		
2005	\$49,040	\$163,303	3	31	32	1,128	1.54%
2006	\$52,069	\$173,390	0	5	3	591	0.43%
2007	\$60,642	\$201,938	5	27	28	516	2.85%
2008	\$52,443	\$174,635	5	32	21	488	3.55%
2009	\$49,721	\$165,571	35	100	61	606	9.94%
2010	\$50,619	\$168,561	43	135	84	663	11.49%
2011	\$51,524	\$171,575	80	159	140	796	13.78%
2012	\$53,637	\$178,611	69	184	116	768	13.74%
2013	\$50,838	\$169,291	54	191	137	973	11.51%
2014	\$59,388	\$197,762	62	193	139	1,010	11.13%
2015	\$61,020	\$203,197	50	167	121	1,112	8.96%
Totals			406	1,224	1,630		
All Sales			11,560	7,312	8,651		
% at or under Affordability Threshold			3.51%	16.74%	8.64%		

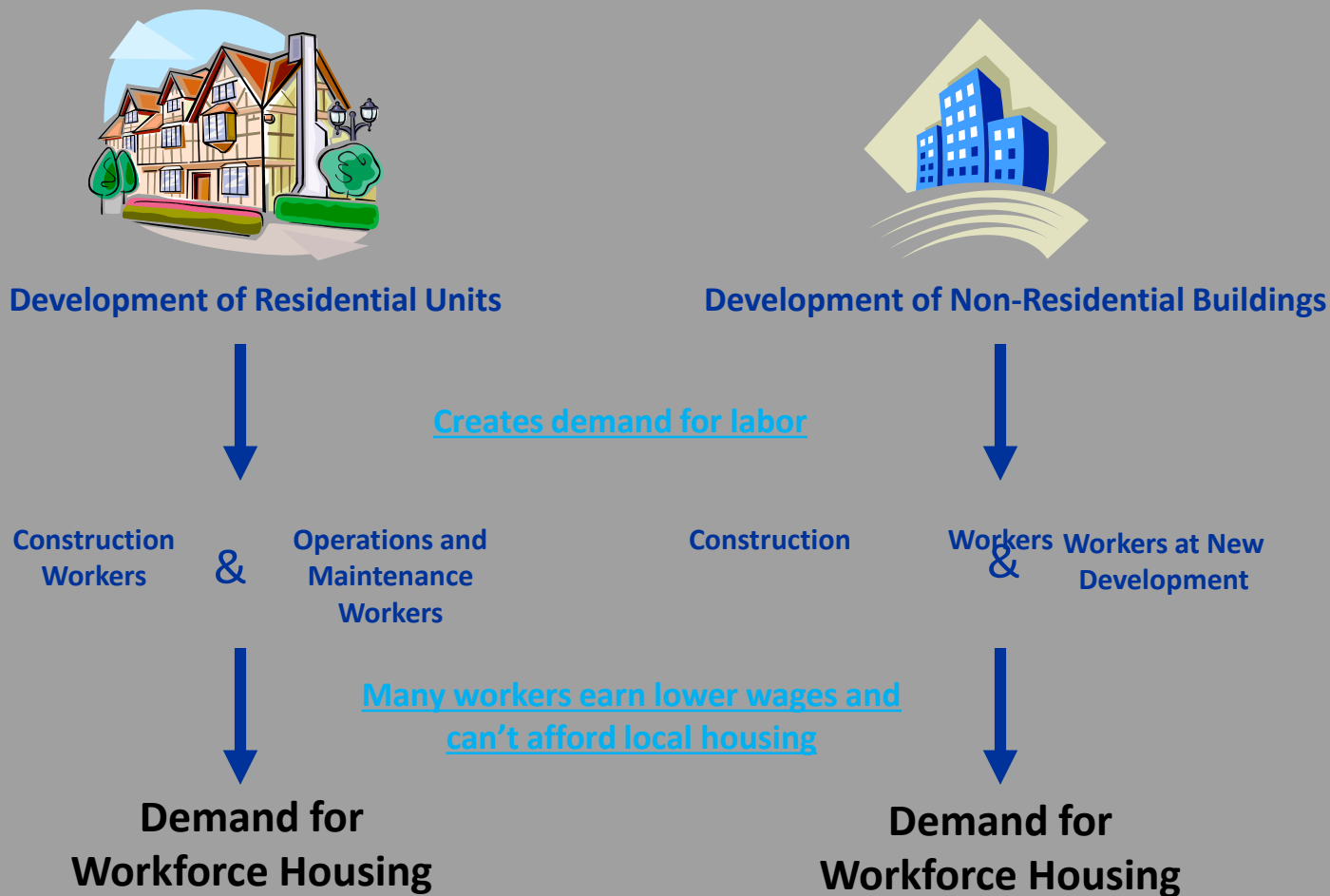
Source: Florida Keys Public Property Search, Florida Keys Board of Realtors

* The affordability limit defined at 30% of household income, results in the Affordability Threshold Price equal to 333% of median household income

**Other includes those sales classified as Condo, Townhouse, Duplex, Half Duplex, Mobile Homes, and Multi-Units in the database. Reasonable care was taken to exclude listed sales outside of the Florida Keys.

Overview of Workforce Housing Study

LEGAL CONSIDERATIONS





Overview of Workforce Housing Study

LEGAL CONSIDERATIONS

Construction Workers

Required to Build Residential Units
(per Square Foot)

+

Operations and Maintenance Employees

Needed to Service Residential Units
(by tenancy and square foot)

=

Workforce Housing
Need Generated by
Residential Unit





Overview of Workforce Housing Study

LEGAL CONSIDERATIONS

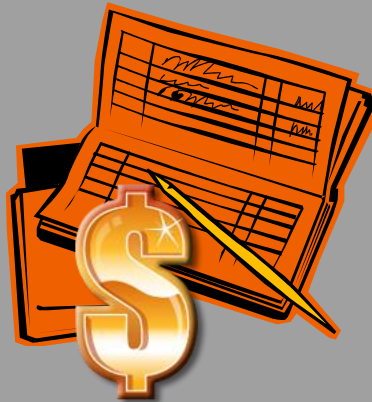
**\$\$ Cost of
Prototypical
Workforce
Housing Unit**
for Construction
and O&M Workers

—

**\$\$ Cost of Housing
That Is Affordable**
to Construction
and O&M Workers

=

**\$\$ Subsidy
Required to Afford
Workforce
Housing Unit**



Takings-Partial Regulatory Taking

LEGAL CONSIDERATIONS

- 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 regulatory remedy
 - Density bonuses

Practical Implications

LEGAL CONSIDERATIONS

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

Mitigation

LEGAL CONSIDERATIONS

- Construction of Affordable Housing Units.
- Conversion of Market Units.
- Dedication of Land.
- Payment of Fee/Subsidy.



QUESTIONS

**AFFORDABLE HOUSING MITIGATION:
LEGAL CONSIDERATIONS**

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