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Many of the country's most desirable communities are "scrambling to address skyrocketing housing prices, workforce displacement, and increasing homelessness."[1] Silicon Valley in California was recently dubbed an "affordability wasteland" when the median home price reached $800,000.[2] Two islands in Hawaii are not far behind, with Kauai's median home costing $785,000 and Maui's $734,000 in 2006.[3] 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%.[4] 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.[5]

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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

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.[6] Governments often view conditional exactions on private developers as a socially responsible way to encourage home ownership.[7] 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.[8]

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*This articwillnto

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

with the land.[24] "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."[25] 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."[26]

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.[27] 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.[28] 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

24. *See* Bays & DaRosa, *supra* note 1, at 44; HONOLULU CITY

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*.[40] 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.[41]

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.[42] As Justice Holmes explained, the takings issue is "a question of degree and therefore cannot be disposed of by general propositions."[43] 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.

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.[44] Although the state possesses the power to regulate property without payment of compensation, if the regulation goes too far, a taking may be found.[45]

At the head of the regulatory takings line of cases is *Pennsylvania Coal Co. v. Mahon.*[46] 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.[47] 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

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.[49] *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.[50] Amber Realty owned a tract of commercial land that had a market value of about $10,000 per acre.[51] After the land was re-zoned for residential use only, its value was substantially reduced to about $2,500 an acre.[52] Though the land's value was reduced by 75%, the Court found it did not constitute a taking.[53] 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."[54] 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.[55] 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."[56] 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.[57] In any case, however, the

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.[58] 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.[59] 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.[60] The second part of the *Agins*' test is whether the owners were left with any viable

exactions, largely due to the possibility of "taking by subterfuge."[65] The two leading conditional exaction cases, *Nollan v. California Coastal Commission*[66] and *Dolan v. City of Tigard*,[67] 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. [68] 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.[69]

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.[70] The Commission argued that the easement was "a mere restriction of use" and did not constitute the taking of a property interest.[71] 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."

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

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."[76] "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.[77] 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."[78] 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.[79] 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.[80] 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.[81] 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

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.

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."[99] Oddly, the Court, in *City of Monterey v. Del Monte Dunes at Monterey*, cited *Dolan*,

authority of the city to impose."[107]

Ehrlich owned a private health club for several years when it started losing money.[108] 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.[109] He had to close the fitness club the same month as a result of continuing financial losses.[110] 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.[111] 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.[112] 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.[113] Ehrlich challenged the exaction, alleging that the imposition of the fees resulted in an unconstitutional taking without just compensation.[114]

The court characterized Culver City's action as a form of regulatory "leveraging."[115] 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 . . . ."[116] 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

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."[117]

California's court applied the nexus and rough proportionality test to Ehrlich's situation though he was not dedicating land but paying a fee.[118] 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.[119] In the case of total prohibition to the residential development, the city argued the tennis court would still be there[120] (though oddly, there was no prohibition of Ehrlich's destruction of them, but the recreation fee would certainly help the

considered a facial challenge to a Napa Valley's inclusionary zoning ordinance.[141] 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.[142] The court therefore applied the *Agins*' "substantially advanced" test.[143] 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 tak nn5(teg8A)18i0w[(test)7.1(s, s)3' 676I01.125 TD0.36 Tw[2differatedre7.5 betw

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.[148] 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

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*, HONOLULUA

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. [149] 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.[150] Presently, only workforce housing ordinances and agency policies address the goal of socio-economically integrated housing. Were

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

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.[154] While

151. Erhlich 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,

should be paid for either by the public as a whole, or by a private entrepreneur for a business profit."[159]

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.[160] 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.[161] 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?[162] 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

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 N

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.[163] It seems likely, therefore, that Hawaii's twenty-five percent affordable housing exactions on hotel,

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.

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.[169] Generally, they just declare that the purpose of the ordinance is to make developers subsidize affordable housing.[170] 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.[171] *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.[172] 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.[173]

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.[174] 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

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.[175] 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.[176] 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.[177] 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.[178] Special or private

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.[179] As indicated earlier, the recent opinion in *Napa Valley* was based on this re-characterization of affordable housing exactions.[180]

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.[181] But logically speaking, the distinction becomes veritably meaningless where an exaction is paid in-lieu of a land dedication.[182] *Garneau v. City of Seattle* characterized affordable housing requirements as monetary fees unreachable by *Dolan*.[183] 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.[184]

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.[185] Affordable housing exactions do not logically fit this description. Conceptually splitting land and money exactions

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.[186] 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? (

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.[190] 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.[191] 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.[192] 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

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

191 *See, e.g.*,

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.[193] However, the most recent case, *Home Builders Association v. City of Napa*,[194] was denied review by the California Supreme Court, thus allowing Napa's inclusionary zoning ordinance to stand.[195] 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.[196] 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.[197] 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*.

193. *See* Kautz, *supra* note 11 at 989-99 (citing Bd. of Supervisors of Fairfax County v. DeGroff 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. [198] 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.[199] 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.[200]

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

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.

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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.[206] 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.[207]

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.

APPENDIX A

MEDIAN HOME PRICES AND MEDIAN INCOME 2005 AND 2006[211]

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