UIC Law Review

Volume 26 | Issue 1 Article 6

Fall 1992

The Need for Affordable Housing: The Constitutional Viability of Inclusionary Zoning, 26 J. Marshall L. Rev. 75 (1992)

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RECENT DEVELOPMENTS

THE NEED FOR AFFORDABLE HOUSING: THE CONSTITUTIONAL VIABILITY OF INCLUSIONARY ZONING

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INTRODUCTION

In 1991, the President's Advisory Commission on Regulatory Barriers to Affordable Housing issued its report on the effect of federal, state, and local laws on the development of affordable housing. The report, entitled *"Not in My Back Yard": Removing Barriers to Affordable Housing*, concluded that exclusionary, discriminatory, and unnecessary regulations constitute formidable barriers to affordable housing by raising costs twenty to thirty-five percent in some communities.[1] For purposes of the report, the Commission stated that a housing affordability problem exists when a household earning 100% or less of the area's median income cannot afford to rent or buy safe and sanitary housing in the market without spending more than thirty percent of its income.[2] The Commission proposed thirty-one recommendations for federal, state, and local governments, and for private action.

Several of the recommendations concerned the exclusionary nature of zoning. The Commission proposed that states undertake an ongoing action program of regulatory-barrier removal and reform.[3] The Commission further concluded that states can have a major impact upon the availability of affordable housing by becoming active participants in setting the requirements for developmental regulations. To that end, the Commission recommended that states initiate actions to end discrimination against certain types of

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1. ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACK YARD": REMOVING BARRIERS TO AFFORDABLE HOUSING 4 (Washington D.C., United States Department of Housing and Urban Development, July 1991) [hereinafter NOT IN MY BACK YARD].

2. *Id.* at 3.

3. *Id.* at 14.

affordable housing, such as manufactured housing, accessory apartments, duplexes, and single-room-occupancy units.[4]

The Commission report recommended an expansive range of actions to attack the regulatory barriers to affordable housing. The Commission viewed the elimination of a number of exclusionary zoning practices that keep housing prices artificially high as one way to achieve home ownership for millions of families. However, one method of achieving ownership through the provision of affordable housing that the Commission discussed, but did not recommend, was inclusionary zoning programs.[5] Under inclusionary zoning programs, a locality either mandates that a developer build a certain percentage of lower cost homes, or agrees to relax its zoning restrictions on density in return for a developer agreeing to provide moderately priced units.

Inclusionary zoning programs are designed for the purpose of *including* within a neighborhood residents of a particular income group. This goal of economic inclusion contrasts with the usual goal of zoning which is the exclusion of particular uses and thus, in effect, the exclusion of particular users. The lofty goals of inclusionary zoning programs, however, may be viewed by some as a land-use burden imposed on only a few developers for a public good. A developer may challenge an inclusionary zoning program as the taking of his property without just compensation. Though not without some basis, a Fifth Amendment claim should fail against a locality that has designed and implemented a program which allows a developer to earn a profit on his development. The recent Supreme Court decision in *Lucas v. South Carolina Coastal Council*[6] may bolster the developer's claim, but the decision should not cause it to succeed.

This article examines the viability of inclusionary zoning. Part I of this article provides a historical analysis of the exclusionary nature of zoning. Inclusionary zoning programs are a direct response to exclusionary zoning practices, such as zoning with a preference for single-family dwellings and for large lots which have the effect of economic segregation. Part II discusses inclusionary housing concepts. As part of the broader concept of inclusionary housing practices, Part II gives an overview of cases where courts have mandated regional fair-share requirements for the provision of affordable housing. Part II also provides a concrete example of inclusionary zoning by dicussing a program that Montgomery County, Maryland has implemented. Part III concludes with an analysis of the takings issue and United States Supreme Court pre-

4. *Id.* at 15-16.
5. *Id.* at 2-7 to 2-8.
6. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

cedent and presents ways in which an inclusionary zoning program can meet a constitutional takings challenge.

I. THE EXCLUSIONARY NATURE OF ZONING

Zoning as a measure designed to facilitate land development patterns is, by its very nature, exclusionary. Zoning separates incompatible uses, that is, it excludes uses considered inappropriate for that area. For example, zoning ordinances tend to exclude commercial and industrial uses from residential areas. Zoning, acceptable in the above situations, becomes controversial when it excludes low- and moderate-income residents from affordable housing, whether intentional or unintentional.

A. The Euclid Legacy

Village of Euclid v. Ambler Realty Co., the case that established the nature of zoning as an exclusionary tool, ushered in the modern era of land-use law.[7] *Euclid* began an era where the concept of zoning was accepted as a means of land planning. Many, however, now question the philosophy that the essence of zoning should be strict segregation of uses with protection of single-family dwellings as the highest purpose. One commentator goes so far as to say that in *Euclid* the Supreme Court sanctioned "a public mechanism for promoting and stabilizing private development, reducing risk in property investment, and protecting the character and quality of single-family residential neighborhoods."[8]

In *Euclid*, a village adopted an ordinance "establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single-family houses, etc., the lot area to be built upon, and the size and height of buildings."[9] Ambler Realty Company owned a tract of land containing sixty-eight acres. Under the ordinance, landowners could not use the first 620 feet of the land for apartment houses, hotels, or other public buildings.[10] The next 130 feet excluded industries, the-

7. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding exclusionary zoning as a valid exercise of state power not violative of the constitution).

8. Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, *in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 101 (Charles M. Haar & Jerold S. Kayden eds., 1990). Rabin contends that exclusion to preserve or enhance value is the essence of zoning. *Id.* He further states that "[t]he acceptance of zoning as a regulatory restriction on the rights of private property became a reality only after its potential for enforcing separation and protecting established privilege was understood and approved." *Id.* at 103. Rabin's analysis of racial separation as a "recurrent theme" in zoning could equally apply to separation by economic status. *Id.*

9. *Euclid*, 272 U.S. at 379-380.

10. *Id.* at 382.

aters, banks, and shops.[11] Ambler Realty attacked the ordinance on the grounds that it violated the Fourteenth Amendment by depriving it of property without Due Process of Law.[12]

In upholding the ordinance, the Supreme Court looked to whether there is a "rational relation" between excluding business and trade buildings from residential areas and the health and safety of the community.[13] The ordinance excluded apartment houses from residential districts because they were included in the category of business or trade. By allowing the exclusion of apartment houses from residential districts, the Supreme Court in 1926 upheld a regulatory barrier leading to the lack of affordable housing in 1992.

The Supreme Court in *Euclid* was open in its bias against multi-family housing. The Court singled out apartment buildings when discussing reports concurring in the view that communities should segregate business and industrial buildings from residential areas. The Supreme Court accepted reports pointing out the drawbacks of multi-family dwellings:

> [T]he development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others . . . and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities, - until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.[14]

Euclid established zoning as an appropriate use of the police powers that states could delegate to local governments. However, in promoting the general welfare and the health and safety of the community, the Supreme Court in reality promoted the detached single-family home as preferable to multi-family dwellings. The Court's bias against such dwellings and those who inhabit them was apparent. Zoning for single-family neighborhoods would preserve a more favorable environment in which to rear children, would in-

11. *Id.*
12. *Id.* at 384.
13. *Id.* at 391.
14. *Euclid*, 272 U.S. 365, 394-395 (1926).

crease the safety and security of home life, and even decrease noise and other conditions which produce or intensify nervous disorders.[15] *Euclid* introduced the use of zoning restrictions as regulatory barriers to affordable housing.

B. Zoning for Economic Segregation

Nearly thirty-six years after the decision in *Euclid*, Justice Hall of the New Jersey Supreme Court, dissenting in *Vickers v. Township Committee of Gloucester Township*,[16] recognized that communities can use zoning as a tool to effect economic segregation. In *Vickers*, the majority rendered an opinion holding that the township had the authority to enact a zoning ordinance amendment precluding trailer camps and parks from an industrial district. Thus, the court indirectly upheld the exclusion of low- and moderate-income residents from the township; residents who are most likely to purchase trailer homes. Recognizing that communities could properly use zoning to exclude factories from residential zones to preserve property values, Justice Hall refused to acknowledge as legitimate a municipalities use of the zoning power to control the residents of an area.[17] He wrote that the legitimate use of the zoning power does not "encompass provisions designed to let in as new residents only certain kinds of people, or those who can afford to live in favored kinds of housing, or to keep down tax bills of present property owners."[18] Not knowing that he was commenting on the future crisis in affordable housing, Justice Hall went on to state: "What restrictions like minimum house size requirements, overly large lot area regulations, and complete limitation of dwellings to single family units really do is bring about community-wide economic segregation."[19]

The New Jersey courts would revisit the issue of using zoning as an economic exclusionary measure in the *Mount Laurel* cases, culminating in 1983 with the mandate that municipalities must utilize their land-use regulations to provide for their fair-share of the region's affordable housing.[20] The concept of regional fair-share

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15. *Id.*

16. Vickers v. Township Comm. of Glouster Township, 181 A.2d 129 (N.J. 1962) (Hall, J., dissenting).

17. *Id.* at 147. The "trailer homes" in Vickers have evolved into "manufactured housing." *Id.* Despite the fact that the construction of manufactured housing is covered by a federal building code, the National Manufactured Housing Construction and Safety Standards Act, *see* 42 U.S.C. § 5401 (1988), some localities limit its use through zoning or building codes, or relegate it to undesirable outlying areas. NOT IN MY BACK YARD, *supra* note 1, at 7-12.

18. *Vickers*, 181 A.2d at 147.

19. *Id.*

20. Southbern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) (*Mount Laurel I*); Southern Burlington County

used in the *Mount Laurel* cases challenged the idea of the majority opinion in *Vickers* which stated that "it cannot be said that every municipality must provide for every use somewhere within its borders."[21]

Because exclusionary zoning is defined to protect the single-family residential district, localities are faced with the problem of how to define "single-family." Many areas designed zoning ordinances to exclude non-traditional living arrangements from the single-family zone. In 1974, the United States Supreme Court in *Village of Belle Terre v. Boraas*,[22] upheld a zoning ordinance that restricted land use to one-family dwellings and excluded lodging houses, boarding houses, fraternity houses, or multiple dwelling houses. The Court defined "family" as

> [o]ne or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.[23]

The owners of a house who rented it to six students at a nearby university brought an action under section 1983 of title 42 of the United States Code for an injunction declaring the ordinance unconstitutional. The Supreme Court upheld the ordinance.

As in *Euclid*, the majority looked at the problems presented by multi-family dwellings: "The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds."[24] Not content with that analysis, the majority showed its bias against multi-family dwellings and their inhabitants:

> A quiet place where yards are wide, people few, and motor vehicles are restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[25]

Again, a court indirectly upheld economic segregation and limited affordable housing.

NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*).

21. *Vickers*, 181 A.2d at 134 (quoting Fanale v. Borough of Hasbrouck Heights, 139 A.2d 749, 752 (1958)).

22. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

23. *Id.* at 2 (quoting the definition of "family" used in the ordinance).

24. *Id.* at 9.

25. *Id.*

In 1977, the Supreme Court was faced with another "single-family" case. In *Moore v. City of East Cleveland*,[26] the Court reviewed a city housing ordinance which limited occupancy of a dwelling unit to members of a single family. The ordinance contained an unusual and complex definition of "family" that included only a few categories of related individuals.[27] The Court, in a plurality opinion overturning the ordinance, distinguished *Belle Terre* by noting that the earlier case affected only unrelated individuals while the East Cleveland ordinance forbade the living together of certain categories of relatives.[28] The city sought to justify the ordinance as a "means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system."[29] The court found that "although these are legitimate goals," the ordinance served those goals "marginally, at best."[30]

Families sharing a dwelling space is one way of increasing the supply of affordable housing. However, the Supreme Court in overturning the ordinance expressed neither concern for the supply of affordable housing nor concern for economic segregation. The overriding factor in overturning the city's ordinance was the Court's recognition "that freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[31] Nevertheless, in a concurring opinion, Justice Brennan, joined by Justice Marshall, did give some recognition to the need for affordable housing:

> The "extended family" . . . remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern - virtually a means of survival - for large numbers of the poor and deprived minorities of our society. For them compelled pooling of scant resources requires compelled sharing of a household.[32]

The Supreme Court visited another form of exclusionary zoning in *City of Cleburne v. Cleburne Living Center*.[33] In *Cleburne*, the proposed operator of a group home for the mentally retarded brought suit challenging the validity of a zoning ordinance excluding such group homes from the permitted uses in a particular zoning district. The Court framed the issue as whether the city could require a special use permit for this type facility when it freely per-

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26. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

27. *Id.* at 496.

28. *Id.*

29. *Id.* at 499-500.

30. *Id.* at 500.

31. *Moore*, 431 U.S. at 499 (citing Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974)).

32. *Id.* at 508.

33. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

mitted other care and multiple-dwelling facilities (including apartment buildings and boarding and lodging houses).[34] The Court found the ordinance invalid because the record revealed no rational basis showing that the home would pose a special threat to the city's legitimate interests.[35] Interestingly, the Court held that negative attitudes and "vague unsubstantiated fears" were not permissible bases for treating a home for the mentally retarded differently from other multiple-dwelling facilities.[36] However, residents of single-family homes and the Court itself expressed negative attitudes against residents of the multiple-dwelling facilities which appeared to be the basis for excluding apartments in the *Euclid* decision.[37]

As one commentator noted, exclusionary zoning regulations are not without benefits for some segments of society. "Those who can afford the benefits enjoy large homes on large lots, quiet streets, uncluttered by old cars, and long drives to work or shopping."[38] However, exclusionary zoning ordinances can have a major impact on residential land costs, especially in preferred suburban locations. For example, the report from the Advisory Commission cited recent studies on the cost impacts of zoning patterns in suburban Washington, D.C. The report shows that restrictive ordinances add about ten percent to the price of a home beyond what is necessary to ensure health, safety, and welfare.[39] As the Commission recommended, removing barriers to certain types of affordable housing options, such as manufactured housing, single-room-occupancy units, accessory apartments, and duplex and triplex housing is one way to achieve more affordable housing. Another way is to implement inclusionary housing programs.

II. INCLUSIONARY HOUSING CONCEPTS

In July of 1991, the usually conservative New Hampshire Supreme Court unanimously ruled that a town must rewrite its residential zoning ordinance to consider the housing needs of the entire region and to allow construction of more apartments.[40] The court in *Britton v. Town of Chester* looked to *Euclid* for the possi-

34. *Id.* at 447.

35. *Id.* at 450.

36. *Id.* at 448-449.

37. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

38. Katherine Devers & J. Gardner West, *Exclusionary Zoning and Its Effect on Housing Opportunities for the Homeless*, 4 NOTRE DAME J.L., ETHICS AND PUB. POL'Y 349, 354 (1989).

39. NOT IN MY BACK YARD, *supra* note 1, at 205 (citing Henry Pollakowski & Susan Wachter, *The Effects of Land-Use Constraints on Housing Prices*, 66 LAND ECON. 315-24 (Aug. 1990)).

40. Britton v. Town of Chester, 595 A.2d 492 (N.H. 1991) (holding the Town of Chester's zoning ordinance unconstitutional and invalid).

bility that a municipality might be obligated to consider the needs of the region outside its boundaries. The court quoted the Supreme Court in *Euclid* when it recognized "the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[41] This case presents one solution to the affordable housing crisis—court compulsion of local communities to accept their fair-share of moderately-priced housing.

Some local governments, however, have not waited for courts to mandate that they accept a regional fair-share of affordable housing. The local municipalities have taken the initiative themselves to increase the supply of housing affordable to moderate- and low-income residents. For example, Montgomery County, Maryland, has designed an inclusionary housing program requiring developers of new housing to provide a certain number of units for moderate- and low-income families. This inclusionary zoning program awards density bonuses to developers who build the affordable units. Both the fair-share concept and inclusionary zoning can be considered inclusionary housing programs with the goal of providing affordable housing to a particular segment of the locality's population. This promotes economic inclusion, not exclusion.

A. Court-Mandated Regional Fair-Share Requirements

The New Hampshire Supreme Court in *Britton v. Town of Chester* was not carving out any novel legal concept when it required the town to accept its fair-share of the region's affordable housing needs. The New Hampshire decision cited the two *Mount Laurel* cases in determining that the builder was entitled to build a multi-family housing development. The two cases were decided eight years apart by the New Jersey Supreme Court and established the idea that a municipality should accept its fair-share of the regional need for low- and moderate-income housing.[42]

Mount Laurel is a township in South Jersey, not more than ten miles from the Benjamin Franklin Bridge crossing the river to Philadelphia. At the time of the decision, almost 10,000 acres of the 14,000-acre township were zoned for residential districts "permitt[ing] only single-family, detached dwellings, one house per lot."[43] The general ordinance prohibited attached townhouses, apartments and mobile homes within the township limits.[44]

41. *Id.* at 495 (quoting Village of Euclid v. Ambler Realty, 272 U.S. 365, 390 (1926)).

42. *Mount Laurel I*, 336 A.2d 713 (N.J. 1975); *Mount Laurel II*, 456 A.2d 390 (N.J. 1983).

43. *Mount Laurel I*, 336 A.2d 713, 719 (N.J. 1975).

44. *Id.*

The case was brought by the NAACP on behalf of a group of Black and Hispanic poor families seeking housing in Mount Laurel. The Court framed the following question of law:

> [W]hether a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby, as Mount Laurel has, exclude such people from living within its confines because of the limited extent of their income and resources.[45]

The New Jersey Supreme Court held that the municipality's zoning ordinance violated the general welfare provision of its State Constitution by not affording a realistic opportunity for the construction of its fair-share of the present and prospective regional need for low- and moderate-income housing.[46]

The court revisited *Mount Laurel* in 1983 because of the recognition that *Mount Laurel I* had not resulted in realistic housing opportunities, but in "paper, process, witnesses, trials and appeals."[47] The court noted that the "builder's remedy," which effectively grants a building permit to a plaintiff-developer based on the development proposal, as long as other local regulations are followed, should be made more readily available to insure that low- and moderate-income housing is actually built.[48]

Like the Township of Mount Laurel, the Town of Chester, New Hampshire, had a zoning ordinance that excluded multi-family housing from all five zoning districts. The ordinance provided for single-family homes on two-acre lots and duplex homes on three-acre lots.[49] The town subsequently amended the ordinance to permit "multi-family housing as part of a 'planned residential development' (PRD)."[50] However, "due to existing home construction and environmental consideration . . . only slightly more than half of the land in the two . . . districts zoned for PRDs could reasonably be used for multi-family development;" this constituted less than two percent of the land in the town.[51] Moreover, the ordinance imposed several subjective requirements and restrictions on a developer of a PRD, including review by a registered professional engineer before the planning board, but paid for by the developer, and the submission of a blank check to the board with the proposal.[52]

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45. *Id.* at 724.
46. *Id.* at 724-25.
47. *Mount Laurel II*, 456 A.2d 390, 410 (1983).
48. *Id.* at 452-53.
49. Britton v. Town of Chester, 595 A.2d 492, 494 (1991).
50. *Id.*
51. *Id.*
52. *Id.* at 494-95.

The New Hampshire Supreme Court found that the regulations of a municipality should promote the general welfare of the "community in which it is located and which it forms a part."[53] The Chester Zoning Ordinance did not provide for the lawful needs of the community.[54] The court awarded the "builder's remedy" but did not apply the *Mount Laurel I* analysis to determine whether to grant such a remedy. The court allowed the builder to construct his development if he could prove that the development provides "a realistic opportunity for the construction of low and moderate-income people."[55]

The Town of Chester should not have been surprised at the decision by the New Hampshire Supreme Court. Citing its previous decision in *Beck v. Town of Raymond*, the court reminded the Town that it had once before held that growth control regulations cannot be applied to exclude outsiders, "especially outsiders of any disadvantaged social or economic group."[56] The decision in *Britton* was merely the logical extension of that earlier decision.

The Town of Chester is not unique in its failure to zone for multi-family dwellings. It is not alone in its willingness to "build a moat" around itself and lower the "drawbridge" "only for people who can afford a single-family home on a two-acre lot or a duplex on a three-acre lot."[57] In the Washington, D.C. suburbs, the three largest "close-in jurisdictions with buildable land each restrict apartment construction to about 2 percent or less of the developable land."[58] Exclusionary zoning patterns appear pervasive. Mandating a regional fair-share of affordable housing is one way of providing low- and moderate-income housing. According to one recent press report, "the *Mount Laurel* decisions have led to the construction of about 22,000 affordable housing units in New Jersey."[59] However, other state courts may be more reluctant to order the construction of low-cost homes to alleviate the affordable housing shortage on the basis of their state constitutions. By relying on the courts, regions could leave affordable housing needs unmet.

B. Inclusionary Zoning: The Montgomery County Initiative

Inclusionary zoning is an idea that also can mandate the construction of affordable housing. An inclusionary program uses

53. *Id.* at 496.

54. *Britton*, 595 A.2d at 496.

55. *Id.* at 497-498.

56. *Id.* at 495 (citing Beck v. Town of Raymond, 394 A.2d 847 (1978)).

57. *Id.* at 495.

58. Kirstin Downey, *Advocates See A Way to Achieve More Low-Cost Housing: Mandate It*, WASH. POST, Nov. 12, 1991, at A12, col. 2.

59. *Id.*

novel land control methods to provide homes for low- and moderate-income residents. Incentive systems, deed restrictions, and even unique funding plans are part of a program to require developers to build affordable housing. Montgomery County, Maryland, has developed a prototype inclusionary zoning program.

Montgomery County, Maryland, is one of the nation's most affluent counties. In 1973, to address the problem of affordable housing, the County Council enacted the Moderately Priced Dwelling Unit ("MPDU") Ordinance. The Council found that a severe housing problem existed within the county with respect to housing for low- and moderate-income residents.[60] The Council made twelve legislative findings concerning the affordable housing problem. Among the findings was a statement that public policies, which permit exclusively high-priced housing developments, discriminate against young families, elderly persons, single adults, female heads of households, and minority households. Such policies produce the undesirable effects of exclusionary zoning.[61] The County Council made it the public policy of the county to provide for a full range of housing choices and for low- and moderate-income housing.[62]

The basis of the MPDU program is to require all subdivisions of fifty or more dwellings to include a minimum number of moderately-priced dwelling units ("MPDUs"). The developer would be awarded a density bonus to have a reasonable prospect of realizing a profit on such units.[63] The idea behind the "density bonus" is that the higher density that is not absorbed by the moderately-priced units becomes a bonus to the developer, thus, ensuring that the developer incur no loss or penalty as a result of constructing MPDUs. Under current regulations, between twelve and one-half and fifteen percent of the houses in new subdivisions of fifty or more units must be MPDUs. The required number of MPDUs varies according to the amount by which the approved development exceeds the normal or standard density for the zone in which it is located.[64] The builder agrees to construct the MPDUs along with or before the conventional units. Every MPDU must be offered for sale or rental to a good faith purchaser or renter.[65] Alternatively, the Housing Opportunities Commission has the option to buy or lease for its own programs, up to forty percent of all MPDUs which are not sold or rented under any other federal, state, or local program.[66]

60. MONTGOMERY COUNTY, MD., CODE ch. 25A-1(1988).
61. *Id.*
62. *Id.*
63. Ch. 25A-2.
64. Ch. 25A-5.
65. Ch. 25A-8(a)(a).
66. Ch. 25A-8(b)(1).

The County Executive sets sales and rental prices of MPDUs. Under the present sales price limits, a three-bedroom townhouse has a base sales price of approximately $65,000.[67] The present rental limit of a two-bedroom garden apartment is $580.[68] The sales prices and rental limits are reviewed annually and are revised to reflect changes in construction costs.

The County closely screens prospective buyers of MPDUs. A person seeking to rent or purchase a MPDU must apply to the County Department of Housing and Community Development for placement on the eligibility list maintained by the Department.[69] All of the houses for sale are sold through a lottery system to insure that all applicants have an equal chance of purchasing a MPDU. The income limits of people who may be placed on the eligibility list are established by the County and are subject to periodic revision. Present maximum income limits are as follows:[70]

Household Size	Maximum Permitted Moderate Income
1	$26,000
2	$34,500
3	$36,500
4	$38,500
5	$39,900

The applicant must verify that the household meets the income requirements for the MPDU program.

The ordinances places restrictions on the purchasers or renters of MPDUs to insure that the houses are available and affordable to future owners. First, owners of MPDUs are not permitted to lease their units to other parties unless the owner can demonstrate sufficient cause to have this restriction waived.[71] Second, the resale price of the MPDU will be controlled for a ten-year period. The owner may resell the unit during the control period; however, the resale price will be limited. Generally, the MPDU allows a price equal to the original price plus the increase in inflation from the date of the original purchase to the date of resale, plus the fair market value of any capital improvements made to the unit.[72] For the first sixty days, the unit must be offered to a person of eligible income and to the Housing Opportunities Commission. After the

67. MONTGOMERY COUNTY, MD., MODERATELY PRICED HOUSING PROGRAM, *Application Form* (Jan. 1986).

68. *Id.*

69. EXEC. REG. NO. 151-85, § 4A (County Executive, Montgomery County, MD., Apr. 17, 1986).

70. MONTGOMERY COUNTY, MD., MODERATELY PRICED HOUSING PROGRAM, *Application Form* (Jan. 1986).

71. EXEC. REG. NO. 151-85, § 4D (County Executive, Montgomery County, MD., Apr. 17, 1986).

72. MONTGOMERY COUNTY, MD., MODERATELY PRICED HOUSING PROGRAM, *Application Form* (Jan. 1986).

sixty-day period expires, that unit may be offered for sale to the public.[73]

Montgomery County's plan has led to the sale or rental of over 8,000 units.[74] Most of the single-family homes are clustered townhouses. Units in multi-family projects are usually distributed throughout the development. However, the program has not satisfied the County's need for cheaper housing. In fact, according to officials, the United States is in need of another 25,000 affordable housing units today.[75]

III. THE TAKINGS CHALLENGE

Inclusionary zoning used as a remedy for exclusionary practices or as a solution to the affordable housing crisis presents the legal issue of whether the inclusionary zoning program is an unconstitutional taking of private property for public use without just compensation. A developer might argue that by forcing him to dedicate a portion of his property to solve a public social problem, the local or state government has effectivelly taken his property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Although a developer may have a basis for a constitutional takings argument, an inclusionary zoning program can be designed to avoid a takings challenge. With the Supreme Court's present emphasis in regulatory takings challenges on the economic impact of the regulation and the economic viability of the owner's land, programs must ensure developers a reasonable return on their investments to survive a Fifth Amendment claim.

A. The Penn Central Test

Before 1987, a discussion of the takings issue would have centered on two state cases and on the Supreme Court decision in *Penn Central Transportation Co. v. City of New York*.[76] Two state courts analyzed the takings issue with regard to municipal inclusionary zoning programs, and reached different results. In *Board of Supervisors v. DeGroff Enterprises*,[77] the Virginia Supreme Court not only found the Fairfax County inclusionary zoning program to be beyond the authority of the local government, but also held the requirement to be a taking. However, in *Uxbridge Ass'n v. Township*

73. EXEC. REG. NO. 151-85, § 4C (County Executive, Montgomery County, MD., Apr. 17, 1986).

74. MONTGOMERY COUNTY, MD., MODERATELY PRICED HOUSING PROGRAM, *Application Form* (Jan. 1986).

75. Downey, *supra* note 58, at A12.

76. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

77. Board of Supervisors v. DeGroff Enter., 198 S.E.2d 600 (Va. 1973).

of Cherry Hill,[78] a New Jersey trial court rejected the takings claim of the developer, emphasizing that the developer had never applied for federal housing subsidies to cushion its financial loss on the inclusionary units, and thus, the developer was responsible for much of its own hardship.

On the matter of regulatory takings the Supreme Court set out a balancing test for determining whether a taking had occurred. The Court in *Penn Central* laid out three factors to consider for the balancing test: 1) the economic impact of the government regulation on the landowner; 2) the extent to which the regulation interferes with investment-backed expectations of the landowner; and, 3) the character of the government action.[79] The Court suggested that these various factors should be weighted on a case-by-case basis.[80]

Under the first and second factors, the owner must show that the regulation makes the property almost valueless. If the landowner can still earn any type of reasonable return on his property, then the fact that the developer could earn substantially more money is irrelevant.[81] Under a test like this, an inclusionary program such as the one implemented by Montgomery County should likely withstand the takings test. The program awards density bonuses in exchange for building the MPDUs, enabling the builder to have reasonable prospects of realizing a profit on the units. Furthermore, the program provides for review and revision of the sales prices and rental limits annually to reflect changes in construction costs. Such safeguards would meet the *Penn Central* test which implied that the property owner must suffer almost a total loss of economic value to establish a taking. Developers under Montgomery County's program are unlikely to show no return on their investment.

Courts apply the third factor, the character of the government action, to determine whether the government "physically invaded the claimant's tangible property."[82] The Court is more likely to find a taking when there is a physical intrusion, stating, "[a] 'taking' may more readily be found when the interference with property

78. Uxbridge Ass'n v. Township of Cherry Hill, No. L47571-77 (N.J. Sup. Ct. Mar. 17, 1980).

79. *Penn Central*, 438 U.S. at 124.

80. *Id.* However, two years later in Agins v. City of Tiburon, 447 U.S. 255 (1980), the Court created a two-part test for determining a taking. A taking occurs if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land. *Id.* at 260. It did cite *Penn Central* in support of the second factor, but did not discuss how the two-part test differs from the three-factor test in *Penn Central*. *Id.*

81. *Penn Central*, 438 U.S. at 130-131.

82. Andre Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 CAL. L. REV. 1301, 1317 (1989).

can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[83] In subsequent cases using this factor, however, the Court has focused on the serious nature of government's action and then on the government's justification for its action. The Court shifted its inquiry from "whether the government had imposed a serious loss on the claimant" to "whether the government's actions were justified."[84] As will be discussed below, the inclusionary zoning program could be justified as furthering the legitimate state interest of providing affordable housing.

The *Penn Central* Court also refused to accept the landowner's contention that a unique burden on a particular landowner was enough to constitute a taking. The majority stated that "legislation designed to promote the general welfare commonly burdens some more than others."[85] A developer in Montgomery County should also lose that argument. The inclusionary zoning requirement applies to all developers constructing projects of fifty or more units. The burden would not be unique to one particular landowner.

B. The Nollan Means/End Test

In 1987, the Supreme Court rendered three land-use opinions with significant repercussions for the regulatory taking analysis set forth in *Penn Central* and other cases. The cases were *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[86] *First English Evangelical Lutheran Church v. County of Los Angeles*,[87] and *Nollan v. California Coastal Commission*.[88] One commentator summarized the three decisions as follows:

> *First English* held that the U.S. Constitution requires an award of damages as compensation for a regulatory taking. *Nollan* invalidated as an unconstitutional taking a condition imposed on a development by the Commission that failed to demonstrate a "nexus" between a substantial state interest, the condition imposed, and impacts caused by the development. Finally, in the *Keystone* decision, the Court affirmed that all or substantially all of the value of the entire parcel must be

83. *Penn Central*, 438 U.S. at 124.

84. Peterson, *supra* note 82, at 1319.

85. *Penn Central*, 438 U.S. at 133.

86. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (holding that the petitioners failed to show that the relevant statutory provisions constituted a taking of private property without compensation).

87. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (permitting a landowner to recover damages for the period prior to the determination that a land-use regulation resulted in a taking).

88. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (imposing an easement as a condition for the grant of a development constituted a taking because the easement failed to substantially advance legitimate state interests).

"taken" by a regulation before a taking will be found.[89]

The *Nollan* nexus requirement could present a challenge to inclusionary zoning programs since it appears to tighten the nexus requirement of *Penn Central.*

James and Marilyn Nollan leased beachfront property in Ventura, California with an option to buy, where there were public beach areas located to both the north and the south.[90] A small bungalow was located on the lot, which the Nollans rented out until it fell into disrepair.[91] In order to exercise their option to purchase, the Nollans were required to demolish and replace the bungalow. This, however, was dependent on their acquisition of a coastal development permit from the California Coastal Commission.[92] The Commission eventually granted the permit subject to the condition that they allow the public an easement to pass across a portion of their property.[93] The Nollans filed a petition for a writ of administrative mandamus with the superior court. The court granted the writ and struck the permit condition.[94]

The Commission appealed to the California Court of Appeals. The Nollans then tore down the bungalow and built a new house, thereby satisfying the condition on their option to purchase the property while the appeal was pending. The Nollans then purchased the property without informing the Commission.[95] The Court of Appeals ruled against the Nollans, thereby reversing the superior court.[96] The Nollans appealed to the United States Supreme Court, raising the takings issue.

The Supreme Court found that the Commission's requirement for the grant of an easement as a condition of receiving a building permit was an uncompensated taking. In the decision, Justice Scalia set out the traditional takings test at the beginning of the decision: "We have long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interest' and does not 'den[y] an owner economically viable use of his land.' "[97] He further stated that Supreme Court cases "have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the reg-

89. Richard J. Roddewig, *Recent Developments in Land Use Planning and Zoning*, 21 URB. LAW. 769, 770 (1989).

90. *Nollan*, 483 U.S. at 827.

91. *Id.*

92. *Id.* at 828.

93. *Id.* at 827-28.

94. *Id.* at 829.

95. *Nollan*, 483 U.S. at 830.

96. Nollan v. California Coastal Comm'n, 223 Cal. Rptr. 28 (2d Dist. 1986).

97. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

ulation and the state interest satisfies the requirement that the regulation 'substantially advance' that state interest."[98] Obviously, the *Nollan* case would elaborate on one of those two prongs.

Rather than focusing on the economic impact of the government action, as the Court usually did, Scalia focused on the "substantially advances the legitimate state interest" prong. Commentators have interpreted Scalia's third footnote as arguing that the adverb "substantially" was an important element in the standard of review.[99] The Supreme Court found a taking because the permit condition failed to "substantially advance" the state interest which was the justification of the prohibition to build on the coast in the first place. In other words, "the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was."[100] The regulation failed to substantially advance any legitimate state interest.

In looking for a nexus, the Court might have upheld the requirement if the condition had been related to the public need or burden created by the Nollans' new house.[101] One could thus read *Nollan* as saying that the regulation was a taking "because it was not directed toward a 'social evil' caused by the Nollans' proposed use of their property."[102] The Court may have been suggesting a heightened cause and effect scrutiny under the Fifth Amendment such that a "property owner may not be singled out to bear the cost of a regulation unless the Court finds that the owner's use of her property caused the problem that the regulation seeks to address."[103]

The Supreme Court's decision in *Nollan* raised problems for the traditional takings analysis and indicated an instability in the area. *Nollan* appeared to shift the focus of the analysis from diminution of value to the determination of what is a legitimate state interest and how close is the relationship between the regulation and that interest. However, by scrutinizing the government conditions even more closely, the Court may be substituting its judgment of what is a public good for that of the state. "A judiciary willing to set aside such judgments effects a direct reduction in the ability of the people's elected representatives to exercise discretion in gov-

98. *Id.*

99. Note, *Taking a Step Back: A Reconsideration of the Takings Test of Nollan v. California Coastal Commission*, 102 HARV. L. REV. 448, 450 (1988) (citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-35 n.3 (1987)).

100. *Nollan*, 483 U.S. at 837.

101. Note, *Taking a Step Back*, *supra* note 99, at 451.

102. *Id.*

103. *Id.*

erning."[104] Possibly the "*Nollan* majority faulted only the state's judgment concerning the effectiveness of the remedy chosen by" the state.[105] However, its heightened scrutiny of regulations without more specific guidelines could pressure governments into acting more slowly to implement social policy through regulations. Government officials must guess whether the state interest behind their regulations is "legitimate" enough to withstand court scrutiny and whether the connection of the remedy to that state interest is close enough for the court's concern.

On the other hand, one commentator noted that the Court "suggested that no taking is likely to occur if the government is seeking to promote the common good."[106] The Court asserted that it is less likely to find a taking when the challenged governmental action "arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[107] However, the government was acting to promote the common good when it sought to condition the Nollans' permit on providing a public beach-access easement, yet the Supreme Court found a taking. Obviously, simply asking whether the government was acting to promote the common good was not enough, as shown by the decision in *Lucas*.

C. The Lucas Emphasis on Economic Impact

On June 30, 1992, when much of the legal community was focused anxiously on the Supreme Court's decision in the abortion rights case, the Court handed down a decision in a takings case that had been expected to expand the rights of property owners in Fifth Amendment cases to give them a greater chance of receiving compensation when government regulations reduce the value of the land. In *Lucas v. South Carolina Coastal Council*,[108] while the Court did not overturn its previous decisions on regulatory takings, it did appear to shift the emphasis in takings cases to the impact of the regulation on the economic viability of the land.

Like the *Nollan* case, *Lucas* involved the development of coastal property. In 1986, David Lucas purchased two lots on the Isle of Palms in Charleston County, South Carolina, for $975,000, where he intended to build beachfront homes.[109] Two years later,

104. Randall T. Shepard, *Land Use Regulations in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH. U. L. REV. 847, 864 (1989).

105. *Id.* at 865.

106. Peterson, *supra* note 82, at 1357.

107. *Id.* (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

108. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2888 (1992).

109. *Id.* at 2889.

the South Carolina state legislature passed the Beachfront Management Act,[110] which effectively prohibited Lucas from constructing any permanent structure on his two lots.[111] The Supreme Court noted, in its statement of the facts, that Lucas along with others had begun extensive residential development of the Isle of Palms, a barrier island, in the late 1970's when a 1977 South Carolina Coastal Zone Management Act was in effect.[112] Under that Act, owners of coastal land in designated "critical areas" had to obtain a permit from the South Carolina Coastal Council before using the land in a manner other than what was in use on September 28, 1977. The Court pointed out that Lucas's lots were not in a "critical area," and thus, not subject to the permit requirement.[113] This last fact, not even mentioned in the state supreme court's decision, could weigh significantly in the final disposition of this case on remand under the United States Supreme Court's final holding.

The Supreme Court of South Carolina held that the application and enforcement of the 1988 Beachfront Management Act to prohibit development on Lucas's beachfront property was not a regulatory taking of property without just compensation.[114] The court's decision focused on the purposes of the government regulation, particularly the purpose of preventing serious public harm.[115]

Because Lucas did not contest the legislative findings, the court found that Lucas had conceded that the beach area of the state's shores was a valuable public resource, that new construction would contribute to the erosion and destruction of that public resource, and that discouraging new construction in the area was necessary to prevent a great public harm.[116] Lucas argued that regardless of the regulatory purpose of preventing serious public harm, if the regulation deprived him "of 'all economically viable use' of his property," a taking has occurred for which he must be compensated.[117] The court did not agree with Lucas.

In its legal analysis, the South Carolina Supreme Court began by noting that the "United States Supreme Court has never articulated a set formula to determine where regulation ends and takings begin."[118] Therefore, the Supreme Court weighs several factors to

110. S.C. CODE ANN. § 48-39-250 (Law Co-op Supp. 1991).

111. *Lucas*, 112 S. Ct. at 2889.

112. *Id.*

113. *Id.*

114. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (1992).

115. *Id.* at 896-97.

116. *Id.* at 898.

117. *Id.* at 898.

118. *Id.* at 898 (citing Moore v. Sumter County Council, 387 S.E.2d 455, 457 n.2 (1990)).

decide "takings" claims on a "case by case basis."[119] The court went on to clearly state that "a taking has not been found when the regulation exists to prevent serious public harm."[120] In support of that contention, the court cited several Supreme Court cases, including *Mugler v. Kansas*,[121] a 1887 case upholding the prohibition of the manufacture and sale of intoxicating liquors. To support its holding that no taking of Lucas's land had occurred, the court relied on the United States Supreme Court decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[122] which stated in a footnote that "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity."[123] *Keystone* was also cited for the proposition that "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any just sense, be deemed a taking."[124] Under this reasoning, the South Carolina Supreme Court did not even have to consider the economic impact of the regulation on the economic viability of Lucas's land. Since the legislation's purpose was to prevent serious public injury, and since Lucas did not challenge the legislative findings that regulation of the coastal dune area was necessary, no taking could be found. The South Carolina Supreme Court was certain of its interpretation of the United States Supreme Court decisions on regulatory takings claims in nuisance and public harm cases: "[T]he fact remains that the Supreme Court has time and again held that when a State merely regulates use, there is no 'taking' for which compensation is due."[125] However, the South Carolina Supreme Court should not have been so sure of the United States Supreme Court.

From the initial paragraph of its decision, the United States Supreme Court focused not on the legislation's purpose of preventing public harm, but on the economic impact of the regulation on Lucas's oceanfront lots. The Court first noted that the trial court

119. *Lucas*, 404 S.E.2d at 898.

120. *Id.* at 899.

121. Mugler v. Kansas, 123 U.S. 623 (1887). The Court also cited Hadachek v. Sebastian, 239 U.S. 394 (1915), upholding an ordinance prohibiting the manufacture of bricks near residents in Los Angeles, and Goldblatt v. Hempstead, 369 U.S. 590 (1962), upholding the prohibition against excavating below the water table to extract gravel. *See Lucas*, 404 S.E.2d at 898.

122. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (petitioners failed to show that the relevant statutory provisions constituted a taking of private property without compensation).

123. *Lucas*, 404 S.E.2d at 899 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987)).

124. *Id.* at 900 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 490 (1987)).

125. *Id.* at 900.

found that the Beachfront Management Act rendered the lots "valueless."[126] Even when phrasing the issue, the Court emphasized the economic impact factor: "This case requires us to decide whether the Act's *dramatic* effect on the *economic value* of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of 'just compensation.' "[127]

The United States Supreme Court did agree that it had not determined any "set formula" for determining whether a taking has occurred.[128] The Court, however, described two categories of regulatory action which are categorically compensable without a case-specific inquiry into the state interest in the regulation. The first situation in which the Court categorically finds a taking encompasses regulations that effect a permanent physical invasion.[129] Compensation is required for a taking in those cases no matter how small the intrusion or how lofty the state interest.[130] The other situation of categorical treatment is "where regulation denies all economically beneficial or productive use of land."[131] Lucas's situation fell squarely into the second category when the Supreme Court accepted the trial court's finding that the South Carolina prohibition against building left Lucas's land valueless.

Justice Scalia, who delivered the Court's opinion, admitted that the Court "had never set forth the justification for this rule."[132] Looking to Justice Brennan's suggestion in his dissent in *San Diego Gas & Electric v. San Diego*, Scalia equated the total deprivation of beneficial use to physical appropriation.[133] To further support categorically requiring compensation in cases where regulatory action deprives a landowner of all economic use of his land, the Court relied on "the fact" that such regulations "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[134]

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126. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2889 (1992).

127. *Id.* (emphasis added).

128. *Id.* at 2893.

129. *Id.* (citing Loretto v. Telepromter Manhattan CATV Corp., 459 U.S. 419 (1982) (New York law mandating landlords to install cable facilities for tenants constituted an actual physical intrusion, and thus, was a compensable taking under the Fifth and Fourteenth Amendments)).

130. *Id.* at 2893.

131. *Lucas*, 112 S. Ct. at 2893 (citing Agins v. City of Tiburon, 447 U.S. 225, 260 (1980)).

132. *Id.* at 2894.

133. *Id.* (citing San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).

134. *Id.* at 2894-895 (citing Annicelli v. Town of South Kingstown, 463 A.2d 133, 140-41 (R.I. 1983)).

In response to the South Carolina Supreme Court's holding that harmful uses of property may be prohibited by government regulation without requiring compensation, the Court first recognized that its prior decisions have "suggested" that contention.[135] However, the Court contended that the "harmful use" principle was only the Court's early attempt to justify, in theoretical terms, regulatory takings, but cannot be used to distinguish regulatory takings that require compensation from regulatory deprivations that do not require compensation.[136] Instead, where government seeks to sustain a regulation that deprives land of all economically beneficial use, it can deny compensation to the landowner only if the prohibited uses inhere in the title itself. In other words, the state's laws of property and nuisance place restrictions upon land ownership.[137] The Supreme Court reversed the decision of the South Carolina Supreme Court, and remanded the decision for a showing by South Carolina that the state's property and nuisance law prohibit the use Lucas intended.[138]

Lucas bought the two lots before the Beachfront Management Act was enacted. The 1977 South Carolina Coastal Zone Management Act was in force at that time. Under that Act, his land was not in a "critical area" so Lucas did not need state approval to build.[139] Thus, when Lucas purchased the land, no regulatory restrictions on development inhered in the title itself. For South Carolina, therefore, to prohibit Lucas from developing his parcels under the 1988 Act without awarding him compensation, the State would now have to show that such restrictions are in the title because of the background principles of the state's law on nuisance and property.

The Court did not engage in a factual analysis of the takings factor emphasized in *Nollan* that a land use regulation must substantially advance a legitimate state interest. Instead, it concerned itself with showing that the "harmful or noxious use" analysis was the progenitor of the "substantially advances legitimate state interest" factor.[140] Thus, government regulation of a use became legitimate not only because of the noxious quality of a prohibited use, but

135. *Id.* at 2897.

136. *Lucas*, 112 S. Ct. at 2897-99. Justice Scalia stated that the "harmful use" analysis is simply a restatement of the requirement that the government's regulation substantially advance a legitimate state interest. *Id.* at 2897. Further, Justice Scalia stated that since the difference between a " 'harm-preventing' and a 'benefit-conferring' regulation" is simply in the eye of the beholder, such a noxious use analysis cannot "serve as a touchstone" to determine if a regulatory taking has occured. *Id.* at 2897-99.

137. *Id.* at 2899-2901.

138. *Id.* at 2902.

139. *Id.* at 2889.

140. *Id.* at 2897.

also, because of a policy of public benefit. According to the Court, the transition from its focus on "noxious" uses to the contemporary principle of legitimate state interest was "an easy one, since the distinction between '[a] harm preventing' and [a] 'benefit-conferring' regulation is often in the eye of the beholder."[141] Because this distinction is difficult, if not impossible, to objectively discern, the Court concluded that the noxious use logic could not be used as the basis for distinguishing regulatory takings that require compensation from regulatory deprivations that do not require compensation. The Court did not engage in any analysis using the *Nollan* means/end test, sticking by the categorical rule it had developed early in the case.

Criticism of the Court's opinion did not have to wait its publication. Justice Blackmun, in his dissent, accused the Court of "launch[ing] a missile to kill a mouse."[142] He argued that the Court had created a new categorical rule and exception which were not based in "prior case law, common law, or common sense."[143] Focusing on the purpose of the Act and the state's interest in prohibiting development of the area, Blackmun declared that the Act should have been found constitutional if the state legislature was correct that the prohibition prevented serious harm.[144] He pointed out that the Court had consistently upheld regulations imposed to restrict significant injury to the public whatever the economic effect on the owner.[145] Blackmun recited facts showing that the area where Lucas's lots were located was notoriously unstable. In about half of the last forty years, all or a part of his property was either part of the beach or flooded twice daily by the ebb and flow of the tide.[146] Thus, prohibiting development of such land was necessary to prevent public harm. Like the South Carolina Supreme Court, Blackmun cited *Mugler v. Kansas* for the proposition that restrictions on the use of property for purposes of preventing injury to public health, safety, or welfare cannot be deemed a taking.[147] He found no support for the categorical rule in any prior decision of the court.

Justice Stevens, in his dissent, agreed with Blackmun that the Court's justification for its categorical rule was "remarkably thin."[148] Stevens wrote that the Court's new rule conflicts with the

141. *Lucas*, 112 S. Ct. at 2897.

142. *Id.* at 2904.

143. *Id.*

144. *Id.* at 2906.

145. *Id.* (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Gorieb v. Fox, 274 U.S. 603 (1927); and Mugler v. Kansas, 123 U.S. 623 (1887)).

146. *Lucas*, 112 S.Ct. at 2905.

147. *Id.* at 2910 (citing Mugler v. Kansas, 123 U.S. 623, 668-79 (1887)).

148. *Id.* at 2917.

Court's frequent recognition that the definition of taking cannot be reduced to a "set formula" and requires a case-by-case analysis that balances public and private interest. He pointed out that the Court had "frequently - and recently - held that in some circumstances a law that renders property valueless may nonetheless constitute a taking."[149] According to Stevens, a comparison of values is relevant but not conclusive.

D. Analysis of Inclusionary Zoning Under the Tests in Nollan and Lucas

The *Lucas* decision could force courts to scrutinize more closely the economic impact of regulations. Although the *Lucas* decision will most immediately impact environmental regulations, particularly in the area of coastal zone management, the Court's emphasis on the economic viability of the use of land could effect all types of regulatory taking cases, even those where the owner is not denied all productive use of the land.

For one thing, the categorical rule appears to lessen the weight of the state's legitimate interest in the takings equation even when the regulation does not deprive the landowner of all economically viable use. The balance between public and private interest in takings decisions has apparently shifted to the private interest. Under the *Lucas* rule, takings claims must first begin with an examination of the economic impact of the regulatory action before the state can even show its legitimate interest in regulating.

Furthermore, the Court did not offer any guidelines as to when a regulation has denied an owner's land of all economically beneficial use. For example, Lucas's lots were declared valueless by the trial court, but Blackmun pointed out that the land could have been put to "other uses," like fishing and camping, or could have been sold to neighboring landowners as a buffer.[150] This example raises the issue of from whose perspective will denial of all beneficial use be determined. If a state makes a showing that the land has economic uses other than development, then possibly the land is not "valueless." On the other hand, the decision appears to associate "valueless" with the lack of development.[151] The *Lucas* decision should impress upon local land use officials the importance of designing inclusionary zoning programs not only to ensure that landowners are not denied the economically viable use of their land, which should pose no problem since residential development is not being prohibited, but also to insure that developers receive a rea-

149. *Id.* at 2919.
150. *Id.* at 2917.
151. *See Lucas*, 112 S. Ct. at 2917.

sonable profit on the moderately priced dwelling units. A court may be more inclined to hold that a landowner has suffered a taking where a developer cannot build because constructing moderately priced units would not enable him to recover his costs or receive reasonable profits on his land.

One way that has been used to guarantee developers a reasonable profit is to use density bonuses. Density bonuses entitle the developer to build more dwelling units on a given parcel than usually allowed. The higher density should compensate for the building of lower-priced units. However, developers may be reluctant to take advantage of them to avoid the appearance of an overbuilt project. Developers' production costs may also be cut by fast track processing of development permits, and granting concessions for such requirements as minimum floor area, room and lot size, setback lines, building heights, open space, parking spaces, and various amenities.

Another way to avoid a severe negative economic impact on developers is to set sales prices and rental limits to cover costs of construction. Furthermore, the sales prices and rental limits should be consistently reviewed and revised to reflect the changes in construction costs.

The *Lucas* decison may not be interpreted so broadly as to effect situations other than regulatory actions prohibiting *all* development for purposes of preventing public harm. However, the Court has once again unsettled the area of land use law and has now focused the regulatory takings determination on the economic impact of the regulation. But the *Nollan* nexus factor remains.

A clear nexus must exist between the state interest and the government action. The regulation or other government action must substantially advance a legitimate state interest. The degree to which the state action "substantially" advances the government interest depends upon the magnitude of the state interest. Thus, the greater the state interest, the less the government's action will be scrutinized. This approach invites courts to scrutinize the purpose of the government action. The Supreme Court in *Nollan* stated that it had "not elaborated on the standards for determining what constitutes a 'legitimate state interest,' " but it listed three governmental purposes and regulations that satisfied the two-prong *Penn Central* test - scenic zoning, landmark preservation, and residential zoning.[152]

152. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-35 (1987) (citing Agins v. City of Tiburon, 477 U.S. 225 (1980)(allowing scenic zoning); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978)(supporting landmark preservation); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)(allowing residential zoning)).

When litigating the *Nollan* case, the California Coastal Commission set forth three permissible purposes of government regulations satisfying the two-prong test of the taking analysis: protecting "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 preventing congestion on the public beaches."[153] These are laudable goals of government action, but one wonders whether the Supreme Court, in finding the permit condition of an easement invalid as a taking, was concerned about the legitimacy of viewing a beach as a state interest, especially considering the intrusiveness of the government regulation. The Court did not focus on this issue, but its almost summary disposition of the means used to achieve that end can lead to the inference that the Court was not particularly impressed with the Commission's goal. If the Commission's goal had been of greater societal importance, the Court may not have searched for such a tight fit between the condition and the burden, for such a "substantial" advancement of a "legitimate" state interest.

Thus, for an inclusionary zoning program to meet the *Nollan* test, the municipality implementing the program should articulate a state interest of paramount importance to society. It should then design the program to specifically address the state's concern, even going so far as to conduct surveys and gather statistical evidence to prove the nexus. In other words, the connection between the regulation, or other government action, and the state interest must be close. Providing affordable housing to moderate- and low-income residents is a legitimate state interest. Inclusionary housing programs clearly do substantially and directly advance that legitimate state interest.

To show that providing affordable housing is a legitimate state interest, the municipality need look no further than the programs and policies of the federal government. The nation has had a housing policy for over fifty years. Since the United States Housing Act of 1937,[154] the federal government has provided housing assistance to low-income persons. Section 23 of that Act stated that public housing agencies were to provide low-rent housing which "will aid in assuring a decent place to live for every citizen."[155]

The United States has a declared housing policy:

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credits . . . to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and san-

153. *Nollan*, 483 U.S. at 835.
154. 42 U.S.C. § 1401 (1988).
155. 42 U.S.C. § 1423 (1988).

itary dwellings for families of lower income.[156]

Although this policy has been carried out through a variety of programs and with a varying degree of emphasis by different administrations, it remains the policy. President George Bush even spoke briefly of the housing problems in his State of the Union address on January 28, 1992, when he requested that Congress fund his Homeownership and Opportunity for People Everywhere ("HOPE") initiative. These programs, even if inspired by election year politics, continue to support the idea that providing affordable housing is a legitimate government function. Even a cursory examination of federal programs indicates that providing affordable housing is a legitimate state interest. Jack Kemp, current Secretary for the United States Department of Housing and Urban Development ("HUD"), in the 1989 Annual Report of HUD to Congress, states that one of the six priorities for HUD was to "[e]xpand homeownership and affordable housing opportunities."[157] One of the stated purposes of the President's HOPE initiative is to increase homeownership opportunities for low- and moderate-income families.[158] The major provisions of HOPE call for assistance to help tenants in public housing to become owners of their units, renewal of a tax credit for development of new affordable rental units, and funds for fifty "Housing Opportunity Zones" targeting those communities that best remove tax and regulatory barriers to affordable housing.[159]

Localities have made the provision of affordable housing their policy. For example, in implementing its MPDU Program, Montgomery County Council made several legislative findings with respect to the supply of housing for low- and moderate-income residents. For one, it found that public policies which permit exclusively high-priced housing development produce the undesirable and unacceptable efforts of exclusionary zoning, thus failing to implement the County's housing policy.[160] To that end, the Council declared that the policy of the county would be to provide for low- and moderate-income housing to meet existing and anticipated future employment needs in the county.[161] It also made it the policy to provide a full range of housing choices for all incomes.[162] The county showed a legitimate interest in providing housing for its residents by linking the inadequate supply of housing to overused roads, pollution, and other problems of large scale commuting from

156. 42 U.S.C. § 1437 (1988).
157. 1989 HUD ANN. REP. vi.
158. *Id.* at 1.
159. *Id.*
160. MONTGOMERY COUNTY, MD., CODE ch. 25A-1(6) (1988).
161. Ch. 25A-2(2).
162. Ch. 25A-2(1).

outside the county, to discrimination, and to personnel turnover in business. Providing affordable housing is a legitimate state interest since it impacts the health, safety, and welfare of the county residents.

Under the national housing policy of providing affordable housing, initial reliance was placed on direct government action, carried out by State-chartered, local public housing authorities, which built, owned, and operated public housing projects.[163] In the 1960's, the national housing policy shifted to using the private sector for production of subsidized housing, especially for moderate-income families.[164] However, by the end of the 1980's, budget cuts and program changes led to a drop in the number of families receiving assistance. State and local government initiatives have to be created to provide for affordable housing to fulfill the nation's policy of housing its low- and moderate-income citizens.

Montgomery County's inclusionary housing program is designed to advance the legitimate state interest of providing affordable housing. The program is designed to provide housing units that are within the price range of its moderate-income residents, a category determined by statistical studies. Many restrictions are placed on program participants to ensure that the units are rented or bought by those residents. Montgomery County is merely stepping in where the federal government has stepped out.

The inclusionary zoning program can be demonstrated to substantially advance the state's legitimate interest in providing affordable housing. Such programs directly lead to the construction of homes with prices within the income of low- and moderate-income residents. The Supreme Court in *Nollan* stated that "[i]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house."[165] The same cannot be said of inclusionary zoning programs that require developers to construct a certain percentage of units in a development to be affordable to a segment of the population earning moderate incomes. The relationship is direct. As previously stated, the Montgomery County initiative has led to the construction of 8000 units, and the *Mount Laurel* decision has led to the construction of about 22,000 units.

With the *Lucas* and *Nollan* decisions in the background, state and local officials must ensure that the inclusionary programs do not severely impact the economic viability of the land and that the

163. Housing: Low- and Moderate-Income Assistance Programs, CONG. RESEARCH SERVICE (CRS)(Library of Congress May 2, 1991).

164. *Id.* at 2.

165. Nollan v. California Coastal Council, 483 U.S. 825, 838 (1987).

programs substantially advance a legitimate state interest, showing a tight nexus between the means and the end.

IV. CONCLUSION

The crisis of affordable housing is the problem of the 1990's. Not only is homelessness on the increase, but middle- and low-income workers are increasingly finding it difficult to find affordable housing near their jobs, if they find any at all. Exclusionary zoning practices are part of the problem. Years of economic segregation of neighborhoods by zoning regulations, as well as unfounded fears and prejudices, have restricted the construction of affordable housing units such as multi-family dwellings and accessory apartments. Affirmative action on the part of state and local governments can begin to relieve the crisis, especially as the federal government exits the housing construction business. Inclusionary programs are a beginning. Zoning for moderate- and low-income dwellings and mandating a regional fair-share of such housing may result in an increase in the number of affordable homes to those who teach, fight fires, and sweep floors. However, the obstacle to such problems may not be constitutional. It is more likely that the "not in may back yard" syndrome, as expressed by residents and their political leaders, poses the greatest obstacle to affordable housing.