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# A Rational Nexus Approach to Workforce Housing Land Development Conditions, 52 UIC J. MARSHALL L. REV. 647 (2019)

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# A RATIONAL NEXUS APPROACH TO WORKFORCE HOUSING LAND DEVELOPMENT CONDITIONS

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Housing for economically active households, which has come to be known as Workforce Housing, has become an increasing vexing problem that is especially acute in resort type areas where housing is extraordinarily expensive.[2] The unavailability has been a constraint on economic development due to a lack of labor, as well as a concern for community viability if only the wealthy can be housed. Workforce housing[3] is being sought so that locally employed households can have adequate housing and the need for labor can be met. In addition, many communities are concerned about the social and cultural problems resulting from excluding a large segment of the population from the community.

Craig Richardson, of Clarion and Associates, and James C. Nicholas have recently prepared developer provisions of workforce housing programs ("the Clarion programs") for local governments in

1. James C. Nicholas is Emeritus Professor of Urban and Regional Planning, University of Florida, PhD University of Illinois. Julian C. Juergensmeyer is Professor and Ben F. Johnson, Jr, Chair in Law, Georgia State University, AB, JD, Duke University.

2. *Compare*, *Existing Single Family Home Sales*, NAT'L ASSOC. OF REALTORS, www.nar.realtor/sites/default/files/documents/ehs-12-2019-single-family-only-2020-01-22.pdf (finding that in 2017 the U.S. median sales price of an existing single family home was $248,800 and had risen to $261,600 in 2018), *with* sales data from the Teton County, Wyoming, Assessor (showing the median sales price for a single family home was $1,242,500; $622,500 for an attached single family home; and $556,500 for a multifamily unit as of 2018).

3. Workforce housing is a subset of affordable housing. It is housing occupied by or to be occupied by members of the workforce that are employed, but are unable to achieve market housing at their levels of earned income.

Colorado, Florida, and Wyoming. The Clarion programs present a breakthrough method to determine the amount of workforce housing that residential and non-residential developers must provide in order to attain an adequate supply of affordable workforce housing. The method measures the employee generation of the proposed development and then ascertains the percentage of those employees that will need affordable housing. This paper (1) sets the legal context and the legal theories behind the Clarion programs, (2) explains and discusses those programs in regard to their compliance with nexus and proportionality principles, and (3) provides an evaluation of how the Clarion programs meet requisite legal/constitutional standards.

## I. LEGAL CONTEXT AND LEGAL THEORIES APPLICABLE TO THE CLARION PROGRAMS

The Clarion programs fall within the concept of development exactions – or developer funding requirements – and therefore necessitate particular attention to the legal status of development "exactions" and the role they play in obtaining the infrastructure which is needed to service new development. The authors follow the practice of most lawyers and planners in using the term "exactions," even though the authors lament the negative vibes that the term "exaction" emits. The dictionary definition of "to exact" is "to force or compel to be paid; to extort."[4] The use of the term therefore implies that by requiring "exactions" local government are doing something illegal or morally wrong. A more appropriate label for developer funded infrastructure requirements that are nexus based, proportionate, and used to internalize the costs of development rather than pass them on to local governments and their taxpayers would be something like "proportionate share mitigation requirements," in that developers are being required to mitigate the infrastructure costs imposed on the jurisdiction. On the other hand, if the cost of providing new infrastructure is passed on to the local taxpayers, the taxpayers are being "exacted" or "extorted" from by being required to subsidize developments. In the alternative, the American legal system could follow the lead of several European and Latin American countries and conceptualize developer funding requirements as "value capture" programs.[5]

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4. *Exact*, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (2d ed. 1972).

5. MARTIM O. SMOLKA, IMPLEMENTING VALUE CAPTURE IN LATIN AMERICA: POLICIES AND TOOLS FOR URBAN DEVELOPMENT 8 (2013).

> Value capture refers to the recovery by the public of the land value increments (unearned income. . .) generated by the actions other than the landowner's direct investments. . . . Although all such increments are essentially unearned income, value capture policies focus primarily on the increment generated by public investments and administrative actions, such as granting the permission for the development of specific

Whatever terminology one uses, the requirements for developer funded infrastructure must be satisfied while nexus and proportionality requirements protect developers from takings of their property and denial of due process claims.[6] Developer funding requirements for traditional or "hard" infrastructure such as roads, parks, schools, libraries, and the like – most frequently in the form of impact fees[7] – easily satisfy nexus and proportionality requirements. So-called "social infrastructure" such as affordable and work force housing are more difficult to defend from such claims. As Professor David L. Callies has observed:

> Unless local government can demonstrate a clear rational and proportional nexus between market price and the imposition of below-market cost housing set-asides, it may not require them at any stage in the land development process. What scant precedent exists for imposing such exactions on residential developments does so only when the local government requiring such exactions provides a series of meaningful bonuses to help offset the cost of the mandatory affordable housing set-asides. As to the imposition of such costs on non-residential development, local government must demonstrate that it generates a need for such housing, generally of the workforce variety, and that the amount to be set aside is proportionate to that need.[8]

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> land uses and densities. The objective is to draw on publicly generated land value increments to enable local administrations to improve the performance of land use management and to fund urban infrastructure and service provisions. The notion is that benefits provided by governments to private landowners should be shared fairly among all residents.

*Id.* In the United States, the concept is primarily implemented through impact fees and transferable developments rights, although there was a former focus on infrastructure costs associated with new development rather than the value created by development permission for the developer. *See* Julian Conrad Juergensmeyer, *Developer Funding of Affordable and Work Force Housing Through Impact Fees and Land Value Recapture: A Comparison of American and Spanish Approaches*, 297 REV. DE DER. URBANISTICO Y MEDIA AMBIENTE 131 (2015); Rachelle Alterman, *Evaluating Linkage and Beyond: Letting the Windfall Recapture Genie out of the Exactions Bottle*, 34 WASH. U. J. URB. & CONTEMP. L. 3 (1988).

6. *See Due Process*, *infra* note 20.

7. An impact fee is a charge imposed on new developments by local governments that recoup a proportionate share of the costs of providing infrastructure to that development. The costs commonly recouped are for roads, parks, and utilities. ARTHUR NELSON, JAMES NICHOLAS, & JULIAN JUERGENSMEYER, IMPACT FEES: PRINCIPLES AND PRACTICES OF PROPORTIONATE-SHARE DEVELOPMENT FEES (2009).

8. David L. Callies, *Public and Private Land Development Conditions: An Overview*, 52 UIC J. Marshall L. Rev. 747, 769 (2019). In other forums the authors would contend that Callies' analyses are overly strict but accept them for the purposes of this article since they believe that the Clarion programs meet even his severe interpretation of the applicable constitutional standards. The authors suggest that in evaluating the severity of Callies' interpretation, the reader should consider court decisions such as Holmdel Builders Ass'n v. Twp.

At the outset, it should be noted that the Clarion programs do not follow the common approach of many local governments that seek to obtain workforce and affordable housing through set-asides required or incentivized through so-called "inclusionary zoning" or "inclusionary housing programs."[9] While inclusionary housing programs, either mandatory or voluntary, have been steadily growing in popularity as an affordable housing tool among local governments,[10] opportunities for improvement remain. Unlike the Clarion approach, most inclusionary housing programs require residential unit developers to set aside a certain percent – often between ten percent and twenty percent of units – for affordable housing, based on the income of the people who buy or rent them.[11] Many such programs also require commercial development such as office buildings or office parks to build or fund affordable units.[12] Often, rent restrictions are imposed as part of such programs. One of the problems presented by this usual approach is the basis – nexus and proportionality – for whatever percentage is required.

The Clarion programs are grounded in the required dedications approach which was formulated during the heyday of subdivision regulation that evolved to include various mitigation requirements and the policy of allowing developers to pay in lieu of constructing the infrastructure needed for mitigation. In most states from the beginning – and now everywhere – these required dedications and mitigations had to meet reasonable standards to satisfy their validity pursuant to the police power. These standards are best encapsulated in the "Dual Rational Nexus Test," which holds that such requirements must have a reasonable or rational nexus with the actual needs created by the development and that such requirements must be reasonably proportionate to the impact fees of development.[13]

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of Holmdel, 583 A.2d 277 (1990), Com. Builders of N. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), Cal. Bldg. Industry Ass'n. v. City of San Jose, 351 P.3d 974 (2015); *See also* Alan Mallach & Nico Calavita, *United States: From Radical Innovation to Mainstream Housing Policy*, *in* INCLUSIONARY HOUSING IN INTERNATIONAL PERSPECTIVE: AFFORDABLE HOUSING, SOCIAL INCLUSION, & LAND VALUE RECAPTURE 15 (Alan Mallach & Nico Calavita eds., 2010).

9. *See Inclusionary Zoning and Mixed-Income Communities*, U.S. DEPT. HOUSING & URB. DEV. (Spring 2013), www.huduser.gov/portal/periodicals/em/spring13/highlight3.html (highlighting various inclusionary zoning programs and their impact on communities).

10. Emily Thaden & Ruoniu Wang, *Inclusionary Housing in the United States: Prevalence, Impact, and Practices* 56 (Lincoln Inst. of Land Pol'y, Working Paper No. WP17ET1, 2017), www.lincolninst.edu/sites/default/files/pubfiles/thaden_wp17et1_.pdf.

11. *Id.* at 45.

12. Jerold Kayden & Robert Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 L. & CONTEMP. 127, 128 (1987).

13. JULIAN CONRAD JUERGENSMEYER, THOMAS E. ROBERTS, PATRICIA E. SALKIN & RYAN ROWBERRY, LAND USE PLANNING AND DEVELOPMENT

The essence of the Clarion programs is to determine the amount of workforce housing that developers must provide by measuring the employee generation of the proposed development and then to ascertain the percentage of those employees that will need assistance to attain housing. No arbitrary figure, such as a ten percent set-aside, is involved. Generation calculations such as those used in the Clarion programs have long been used in determining transportation impact fees.[14] In the transportation context, local governments use methods/formulas created by organizations such as the Institute of Transportation Engineers to calculate the number of trips generated by the proposed development. The Clarion methodology and requirements apply to both residential and nonresidential development, although with likely quite disparate employee generation and housing assistance need rates due to the difference in the number of employees needed. It is also important to note the employee generation rate makes this approach appropriate only to workforce housing and not to affordable housing in general. Perhaps the term affordable workforce housing would be most appropriate to describe them.[15]

"Exactions" or development conditions of all types are imposed pursuant to a local government's police power and therefore they must be reasonable to be constitutionally permissible exercises of the police power.[16] Of course the definition of "reasonableness" in the land use control context is elusive. The seminal case is *Euclid*,[17] in which the court recognized the principle that zoning pursuant to the police power was constitutional and formulated the fairly debatable rule as the approach to determining reasonableness.[18] The reasonableness concept is accompanied by requirements that the exercise of the police power must not constitute a taking of property without compensation nor a denial of due process.[19]

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REGULATION LAW § 9.9 (4th ed. 2018).

14. NELSON, NICHOLAS, & JUERGENSMEYER, *supra* note 8, at ch. 5, 8.

15. Workforce housing projects commonly target police officers, firefighters, teachers, and health care workers. Their professions are deemed critical to the community. Workforce housing can be either rental or ownership. The provision can be made or assisted in a variety of ways, sometimes through public housing and other times through purely private means. *See* UNIV. OF N.C., SCHOOL OF GOV't, *Community and Economic Development in North Carolina and Beyond* (July 2018), www.ced.sog.unc.edu/category/cd/built/.

16. JUERGENSMEYER, ROBERTS, SALKIN & ROWBERRY, *supra* note 14, at § 9.9.

17. Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926).

18. If the land use regulation "be deemed fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388. This principle was, of course grounded in the separation of powers doctrine and has been subsequently eroded in some states through the classification of many zoning actions such as quasi-judicial rather than legislative. *See* Fasano v. Bd. of Cty. Comm'rs, 507 P.2d 23 (Or. 1973); Bd. of Cty. Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993).

19. *Due Process*, BLACK'S LAW DICTIONARY 610 (10th ed. 2014) (defining due process as "the conduct of legal proceedings according to established rules and

In recent years the U.S. Supreme Court's decisions in *Nollan v. California Coastal Commission*[20] and *Dolan v. City of Tigard*[21] mixed takings and due process jurisprudence to formulate nexus and proportionality requirements – now referred to as the Nollan/Dolan test. Simply stated, *Nollan* requires a nexus between the exaction and the need to prevent or counteract the anticipated adverse public effects of the proposed development.[22] *Dolan* dealt with the issue of the proportionality of any requirement or condition with the impacts or harms expected to result from the development.[23] The following language from the decision gives insight regarding how the Court first applies *Nollan*'s nexus requirement and then adds the concept of proportionality:

> In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. . . . If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. . . . Here, however, we must decide this question.[24]
>
> . . . .
>
> . . . We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.[25]

Although it is generally accepted that exactions must meet the *Nollan/Dolan* nexus and proportionality requirements, there is still considerable uncertainty as to whether monetary payment requirements, such as impact fees, or only land dedications fall within their ambit. Professor David L. Callies maintains that they are:

> There is no reasonable distinction among in-lieu fees, mitigation fees, and impact fees. All are fees charged by government as a condition for land development approval (as distinguished from charges such as user fees and taxes . . .). All are embraced by the Court's term

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principles for the protection and enforcement of private rights. . . ." and noting that "[t]here are two Due Process Clauses in the U.S. Constitution, one in the 5th Amendment applying to the federal government and one in the 14th Amendment applying to the states").

20. Nollan v. Cal. Coastal Com., 483 U.S. 825, 827-42 (1987).

21. Dolan v. City of Tigard, 512 U.S. 374, 377-96 (1994).

22. *See* JUERGENSMEYER, ROBERTS, SALKIN & ROWBERRY, *supra* note 14, at § 1.5.

23. *Dolan*, 512 U.S. at 377-396.

24. *Id.* at 387 (citations omitted).

25. *Id.* at 391.

"monetary exaction," and thus all are now subject to the nexus and proportionality requirements of *Nollan* and *Dolan*.[26]

The authors are not totally convinced.[27] However, it is moot to evaluate the Clarion programs since they are based on requiring developers to provide workforce housing rather than pay fees for its construction. Therefore, the analysis of the programs will proceed on the assumption that at least many courts, correctly or incorrectly, would apply *Nollan/Dolan* to them.

## II. THE CLARION PROGRAMS: JACKSON/TETON COUNTY, WYOMING

Several communities have established workforce housing programs employing the nexus and proportionality requirements. Perhaps best known are Aspen/Pitkin County, Colorado, Islamorada, Florida, and the most recent adoption, Jackson/Teton County, Wyoming.[28] The latter is an impressive example of the process of governmental compliance with the nexus and proportionality requirements.

### *A. Problem Identification*[29]

Housing in the City of Jackson/Teton County is expensive. It results in a serious housing affordability problem for the workforce. This is largely due to influences and factors outside Teton County. The County is a beautiful place, attractive to many affluent second-home buyers and permanent residents. Also, developable land in the county is limited. The figure below demonstrates that these factors have escalated housing values,[30] thus pricing out most

26. Callies, *supra* note 8, at 765.

27. *See* Julian C. Juergensmeyer & James C. Nicholas, *Impact Fees Should Not be Subjected to Takings Analysis*, in TAKING SIDES ON TAKINGS ISSUES: THE PUBLIC AND PRIVATE PERSPECTIVES (Thomas E. Roberts, ed., 2002); Zygmunt J.B. Platter & Michael O'Loughlin, *Semantic Hygiene for the Law of Regulatory Takings, Due Process, and Unconstitutional Conditions – Making Use of a Muddy Supreme Court Exactions Case*, 89 U. OF COLO. L. REV. 741, 789 (2018); JUERGENSMEYER, ROBERTS, SALKIN & ROWBERRY, *supra* note 14, at § 1.5.

28. *See* Town of Jackson, Wyoming, Land Development Regulations, Art. 6, §3 (2018); Teton County, Wyoming, Land Development Regulations, Land Development Regulations, Art. 6, §3 (2018); City of Aspen, Colorado, Municipal Code, Title 26 §540, 710; Pitkin County, Colorado, Cty. Code, Title 8 §3, 6.

29. Problem identification should proceed prior to establishing the required nexus and proportionality in regulations.

30. Teton County single family sales prices are from three different sources: (1) 1986 to 2000 are from the March 2002 Teton County, Wyoming Affordable Housing Support Study, p. 3; (2) 2000-2002 are from the Wyoming Housing Database Partnership, August 28, 2008, and are adjusted to median from averages, and (3) 2003-2018 are from data provided by the Teton County Assessor. Income data are from Teton County, Wyoming, Planning Department, www.tetoncountywy.gov/documentcenter/view/10607/historical-median-

employees that had not previously acquired housing.

Table 1 below illustrates the relationships between median household income, affordable housing prices at the thirty percent rule,[31] and median sales prices during a period of thirty-two years. During that period:

- Median Household Income rose by 262%, at 4.1% per year,
- Median Selling Prices rose by 1,281%, at 8.5% per year,
- Median Family Income as a Percent of Selling Price fell from 3.2% to 7.4%.

Table 1: Median Household Income, Affordable Housing Prices, and Median Sales Prices, Teton County, 1986 - 2018[32]

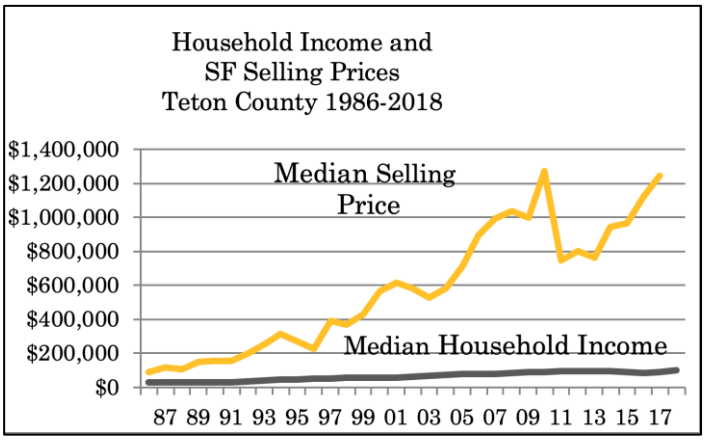


Table 1 shows that, in 1986, housing was affordable to median income earners since median income was thirty percent of sales prices. The affordability gap grew throughout the period except during the Great Recession. Incomes were growing, but the housing prices were ballooning at twice the rate of incomes.[33]

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incomes?bidId= (research data on file with authors).

31. The general rule is that housing should not require more than thirty percent of housing income. This would mean that an affordable housing price would be 333% of median household income.

32. The sales data used here and in subsequent tables are from several sources. Teton County single family sales prices are from three different sources: (1) 1986 to 2000 are from the March 2002 Teton County, Wyoming Affordable Housing Support Study, p. 3; (2) 2000-2002 are from the Wyoming Housing Database Partnership, August 28, 2008, and are adjusted to median from averages, and (3) 2003-2018 are from data provided by the Teton County Assessor. Income data was collected from Teton County, Wyoming, Planning Department, www.tetoncountywy.gov/documentcenter/view/10607/historical-median-incomes?bidId= (authors have personally collected all Teton County housing sales data from the Teton County Assessor in response to a specific request inputted by the authors, research data is on file with the authors).

33. During 1986 to 2017 median household income grew at an annual rate of 4.0% per year while median housing sales prices grew at 8.8% per year. Teton County sales data are from the Teton County Assessor, 2018 (research data on

The data in Table 1 looks at housing as if it were sold at a single median price. This, however, is never the case. Table 2 displays data for individual sales from 2003 to 2017 by type of housing and sales price. It accounts for the range that housing prices fall into.

Table 2: Individual Sales by Type of Housing and Sales Price, Teton County, 2003 - 2017[34]

| Year | Median HH Income | Affordable Price at 333% of Income | Sales at or Below Affordable | | | Total Units Sold | | | Total Units Sold | Affordable Price Units as % of Total Annual Sales |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | SFD | SFA | Condo | SFD | SFA | Condo | | |
| 2003 | $69,900 | $233,000 | 0 | 3 | 64 | 250 | 89 | 157 | 496 | 13.5% |
| 2004 | $73,500 | $245,000 | 0 | 15 | 126 | 189 | 93 | 239 | 521 | 27.1% |
| 2005 | $76,700 | $255,667 | 0 | 19 | 137 | 189 | 93 | 239 | 521 | 29.9% |
| 2006 | $81,800 | $272,667 | 1 | 0 | 108 | 293 | 100 | 254 | 647 | 16.8% |
| 2007 | $81,000 | $270,000 | 0 | 0 | 3 | 209 | 80 | 160 | 449 | 0.7% |
| 2008 | $83,300 | $277,667 | 0 | 0 | 4 | 116 | 47 | 92 | 255 | 1.6% |
| 2009 | $89,500 | $298,333 | 0 | 0 | 8 | 96 | 23 | 34 | 153 | 5.2% |
| 2010 | $92,500 | $308,333 | 0 | 0 | 17 | 103 | 35 | 48 | 186 | 9.1% |
| 2011 | $94,900 | $316,333 | 1 | 11 | 27 | 130 | 30 | 72 | 232 | 16.8% |
| 2012 | $96,200 | $320,667 | 4 | 16 | 29 | 153 | 47 | 71 | 271 | 18.1% |
| 2013 | $96,300 | $321,000 | 2 | 12 | 27 | 199 | 75 | 106 | 380 | 10.8% |
| 2014 | $96,800 | $322,667 | 1 | 1 | 33 | 162 | 56 | 106 | 324 | 10.8% |
| 2015 | $90,700 | $302,333 | 1 | 1 | 17 | 178 | 82 | 114 | 374 | 5.1% |
| 2016 | $85,800 | $286,000 | 0 | 0 | 10 | 185 | 74 | 118 | 377 | 2.7% |
| 2017 | $91,400 | $304,667 | 0 | 0 | 4 | 192 | 82 | 114 | 388 | 1.0% |
| All Sales 2003-17 | | | 10 | 78 | 614 | 2,644 | 1,006 | 1,924 | 5,574 | 12.6% |
| All Sales 2013-17 | | | 4 | 14 | 91 | 916 | 369 | 558 | 1,843 | 5.9% |
| % at of Under Affordability Threshold: | | | | | | | | | | |
| 2003-17 | | | 0.2% | 1.4% | 11.0% | | | | | 12.6% |
| 2013-17 | | | 0.2% | 0.8% | 4.9% | | | | | 5.9% |

The bottom of Table 2 displays the aggregate conclusion that, during 2003 - 2017, 12.6% of houses sold at or below the affordable limit (333% of median household income), the vast majority of which were multifamily (condominiums). More recently, between 2013 and 2017, only 6% of sales were at or below affordable levels, again mostly multifamily (condominium). Collectively, Tables 1 and 2 demonstrate the serious housing affordability problem in the City of Jackson/Teton County for the workforce.

## *B. Percent of the Workforce that Can Afford Prototypical Workforce Housing Costs*

The next step after demonstrating the serious affordable workforce housing problem in the community was to determine the employee households that could not reasonably afford housing. This was done by first determining the cost to build a modest dwelling unit for an employee housing (a "prototypical unit"), and then determining whether the employee could reasonably afford to pay for or rent the unit. Housing costs were based on actual construction and land costs incurred by the Jackson/Teton County Housing Authority (the "Housing Authority") to acquire land and construct housing for the workforce. The records for their most recent

file with authors).

34. *Supra* note 33.

developments are shown in Table 3. Table 4 shows the Housing Authority's costs to build the projects.[35]

Table 3: Gross and Living Floor Area of Workforce Housing Projects, Teton County, 2018[36]

| | Gross Area[37] | Living Area | Units | per Unit | |
|---|---|---|---|---|---|
| | | | | Gross Area | Living Area |
| 174 N. King St. | 31,531 | 21,286 | 30 | 1,051 | 710 |
| Redmond Street Rentals | 35,078 | 18,645 | 26 | 1,349 | 717 |
| Grove Phase 2[38] | 42,141 | 33,252 | 24 | 1,756 | 1,386 |
| Totals | 108,750 | 73,183 | 80 | | |
| Averages | | | | 1,359 | 915 |

Table 4: Land and Construction Cost of Workforce Housing Projects, Teton County, 2018[39]

| | Land Cost | Construction | Total |
|---|---|---|---|
| 174 N. King St. | $1,885,487 | $13,198,409 | $15,083,896 |
| Redmond Street Rentals | $3,645,000 | $9,255,000 | $12,900,000 |
| Grove Phase 2[40] | $3,498,930 | $9,549,163 | $13,048,093 |
| Totals | $9,029,417 | $32,002,572 | $41,031,990 |
| per Gross Foot[41] | $83 | $294 | $377 |

Table 4 shows that, at a gross cost of $377 per foot of floor area, the average cost of a 1,359 square foot unit would be $512,758; $112,836 for land and $399,922 for construction. This cost is used as the prototypical workforce housing cost in establishing the payment in-lieu of the required dedication. These costs are the actual costs incurred by the Housing Authority to provide affordable housing to the workforce. There is an expectation (perhaps hope) that units could be provided at lower costs by various private contractors. If so, the cost of the required dedication met by private contractors rather than payment in-lieu would be the preferred alternative.

35. Land in Teton County amounts to twenty-two percent of total cost, which is higher than typically seen.

36. *Supra* note 33 (Authors collected data from their specific requests for "Jackson/Teton County Housing Authority, June 2018").

37. Excluding Retail.

38. No land cost. Average land cost per foot calculated using only King St. and Redmond.

39. *Supra* note 33 (collecting data from the queries "Teton County Affordable Housing Department, 2018").

40. No land cost. Average land cost per foot calculated using only King St. and Redmond.

41. Total cost per foot assumes land cost of $83 per foot for Grove Phase 2.

Given economically active household income of $81,884,[42] and the distribution of individual household incomes about that mean, the expectation is that 8.59% of employee households could afford housing at a cost of $512,758.[43] Moreover, sales data[44] indicates that 5.9% of Teton County housing has sold at prices at or below what the median household could afford. These two data suggest that 14.5% of employee housing needs could be met by the market. Such calculation leaves 85.5% of workforce households unable to afford prototypical workforce housing in Teton County and, thus, in need of some type of housing assistance if they are to have affordable housing in Teton County.[45]

## *C. The Nexus for Residential and Non-Residential Development*

Residential and non-residential development in the City of Jackson/Teton County places a demand on labor (the workforce) and the need for affordable workforce housing in four ways:

1. The construction of the building (i.e., construction employees for both residential and non-residential development);

2. The operation and maintenance of the residential building (by employees that provide services to the residential building);

3. The use of the structure by the different types of non-residential businesses, once the building is constructed;

4. The critical service providers (fire and rescue personnel and law enforcement personnel) that support development (both residential and non-residential, to varying degrees).

All of these activities generate employment, and because of their wage levels and existing housing prices, their employment results in a need for affordable workforce housing. The demand for labor (employees) that both residential and non-residential development creates and the demand these employees place on the need for affordable housing is outlined in the following sections.

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42. This is the median household income of economically active households, which differs somewhat from the median income of all households shown above in Table 2. See *Wyoming Quarterly Census of Employment and Wages (QCEW)*, WYO. DEP'T OF WORKFORCE SERVICES, www.doe.state.wy.us/lmi/toc_202.htm (last visited Aug. 12, 2019) for employee salaries and earnings, which are factored upward to employee household incomes.

43. Income distribution data are from U.S. CENSUS BUREAU, Current Population Survey, 2016 Annual Social and Economic Supplement and adjusted to 2017 by the Consumers Price Index (CPI).

44. *See supra* tbl. 2.

45. *See* Clarion Associates, in association with Dr. James C. Nicholas, RRC Associates, *Employee Generation by Land Use Study: Teton County & Town of Jackson* app. G (Jul. 2018) [hereinafter, "Clarion Report"].

## *D. Nexus to Workforce Housing – Construction Employees*

Construction employees are essential for construction of both: residential and non-residential buildings. As a consequence, construction employment is common to both residential and non-residential workforce housing programs. As shown below, Table 5 correlates the amount of construction employment by type of building, with the size of building (employee years it takes to build 1,000 square feet of the building).[46] Data for this analysis originated from (1) building permit records for both the County and the Town of Jackson for a ten-year period, 2001-2011 and (2) information on construction employees from the Quarterly Report on Employment and Earnings.[47]

Table 5: Construction Employee Years per 1,000 $FT^2$ of Floor Area[48]

| | |
|---|---|
| Residential | 1.234 |
| Non-Residential | |
| Lodging | 1.234 |
| Office | 1.234 |
| Retail | 1.234 |
| Industrial | .514 |
| Institutional | .927 |
| Food & Drinking Places | 1.234 |

Table 6 shows construction employee housing needs by industry per 1,000 square feet of floor area of development, given thirty years of economic activity by the employee, and 1.774 employed persons per household:

46. *See infra* tbl. 5.

47. The analysis recognized employees and employee households will be active for many years. Teton County based their calculations on employees and employee housing having an active life of 30 years. *Wyoming Quarterly Census of Employment and Wages (QCEW) First Quarter 2018*, WYO. DEP'T OF WORKFORCE SERVS. (Mar. 7, 2018), http://doe.state.wy.us/lmi/toc_202.htm.

48. *See supra* note 33 (collecting data from the queries "Construction Data, Teton County and Town of Jackson Building Departments"); *see also* WYO. DEP'T OF WORKFORCE SERVICES, http://wyomingworkforce.org/data/ (authors collected data from their specific requests for employee workforce data).

Table 6: Construction Employee Housing Needs by Industry and per 1,000 square feet[49]

| | Residential per 1,000 ft² | Retail per 1,000 ft² | Eating & Drinking per 1,000 ft² | Office per 1,000 ft² | Industrial per 1,000 ft² | Institutional per 1,000 ft² | Lodging per Room |
|---|---|---|---|---|---|---|---|
| Construction Employees per 1,000 ft² | .041 | .041 | .041 | .041 | .017 | .031 | .041 |
| Employees per Household | 1.774 | 1.774 | 1.774 | 1.774 | 1.774 | 1.774 | 1.774 |
| Construction Employee Households per 1,000 ft² | .023 | .023 | .023 | .023 | .010 | .017 | .023 |
| Households able to Afford Market Housing | .005 | .005 | .005 | .005 | .002 | .003 | .005 |
| Available Affordable Housing per 1,000 ft² | .001 | .001 | .001 | .001 | .000 | .001 | .001 |
| Net Affordable Housing Need per 1,000 ft² | .017 | .017 | .017 | .017 | .007 | .013 | .017 |

After the affordable housing needs is determined for construction employees, the subsidy needed to make a prototypical unit is determined. Construction employee's earning income for 2018 was $50,163.[50] As noted earlier, census data report that the households of construction employees will, on average, have .774 additional employed persons in that household.[51] Because nothing is known about those other employees, it is assumed that they will earn the average employee salary of $44,281.[52] Moreover, local experience and employment records show that many employees have second seasonal jobs. Employment and earnings data suggest that seasonal second income would be approximately thirteen percent of base income.[53]

49. *Id.* Census data report that the households of construction employees will, on average, have .774 additional employed persons in that household.

50. *Wyoming Quarterly Census of Employment and Wages (QCEW), Fourth Quarter 2018 (2018Q4)*, WYO. DEP'T OF WORKFORCE SERVICES (July 15, 2019), http://doe.state.wy.us/lmi/18Q4QCEW/t2418Q4.htm.

51. Clarion Report, *supra* note 46, at app. D.

52. *Id.* at 49, tbl. 37.

53. *See id.* at app. B; *See infra* tbl. 7.

Table 7: Construction Employee Affordability Gap[54]

| | |
|---|---|
| Construction Worker Earned Income | $50,163 |
| Income from Others in Household | $36,310 |
| Average Seasonal Income | $1,152 |
| Total Household Income | $87,625 |
| Affordability Threshold (333% of Household Income) | $292,087 |
| Average Cost for Prototype Workforce Housing Unit | $512,758 |
| Workforce Housing Gap per Construction Employee | $220,671 |

## *E. Nexus to Workforce Housing – Non-Residential*

A survey of Jackson and Teton County businesses with respect to their employees was conducted to assist in determining the number of employees at different types of businesses in the community. The data sets were organized by industry and by land use.[55] This data was then converted to employee households by industry and land use.[56]

Table 8: Summary of Survey Results, Employees by Land Use[57]

| | | Employees | | Employees per 1,000 ft² | |
|---|---|---|---|---|---|
| Land Use | Floor Area | Year Round | Peak Season | Year Round | Peak Season |
| Retail | 505,677 | 619 | 3,304 | 1.224 | 6.534 |
| Bar/Restaurant | 45,000 | 88 | 411 | 1.956 | 9.133 |
| Office | 957,065 | 841 | 1,940 | .879 | 2.027 |
| Industrial | 111,342 | 182 | 114 | 1.635 | 1.024 |
| Hotel/Lodging | 1,233,200 | 78 | 503 | .063 | .408 |
| Special | 41,000 | 109 | 151 | 2.659 | 3.683 |
| Other | 96,399 | 277 | 312 | 2.873 | 3.237 |
| | | Employees | | Employees | |
| Hotel/Lodging | Rooms | Year Round | Peak Season | Year Round | Peak Season |
| Hotel/Lodging per Room | | | | .487 | .958 |

54. WYO. DEP'T OF WORKFORCE SERVICES, *supra* note 51.

55. *See infra* tbl. 8.

56. *See infra* tbl. 9.

57. *See* Clarion Report, *supra* note 46, at 52 (citing RRC, Associates, Inc., Teton County Employment Survey, 2012).

Table 9: Employee Households by Land Use[58]

| Land Use | Employees per Household | Households per 1,000 ft² | |
|---|---|---|---|
| | | Year Round | Peak Season |
| Retail | 1.706 | .718 | 3.830 |
| Bar/Restaurant | 2.000 | .978 | 4.568 |
| Office | 1.678 | .524 | 1.208 |
| Industrial | 1.652 | .990 | .620 |
| Hotel/Lodging | 2.000 | .032 | .204 |
| Special | 1.713 | 1.552 | 2.150 |
| Other | 1.713 | 1.677 | 1.889 |
| | Employees per Household | Households per Room | |
| Hotel/Lodging | | Year Round | Peak Season |
| Hotel/Lodging per Room | 2.000 | .244 | .479 |

The number of construction employee households was then added to the employee households from the different industries and land uses for non-residential total employment.[59]

Table 10: Non-Residential Employees and Employee Households by Land Use[60]

| | Construction | | Permanent | | Total | |
|---|---|---|---|---|---|---|
| | Employee | Household | Employee | Household | Employee | Household |
| Retail per 1,000 ft² | .041 | .023 | 1.224 | .718 | 1.265 | .741 |
| Eating & Drinking per 1,000 ft² | .041 | .023 | 1.956 | .978 | 1.997 | 1.001 |
| Office per 1,000 ft² | .041 | .023 | .879 | .524 | .920 | .547 |
| Industrial per 1,000 ft² | .041 | .023 | 1.635 | .990 | 1.676 | 1.013 |
| Institutional per 1,000 ft² | .017 | .010 | .063 | .032 | .080 | .042 |
| Lodging per Room | .031 | .017 | 2.659 | 1.552 | 2.690 | 1.569 |

58. *Supra* note 33 (collecting data from queries for "Employees per household, Bureau of the Census, Public Use MicroSample, Teton County, Wyoming, 2010"); *Id.* at app. D.

59. *See infra* tbl. 1.

60. Employment by industry provided by WYO. DEP'T OF WORKFORCE SERVICES, *supra* note 43 and land use data provided by Teton County Planning Department. Households by land use resulted by dividing employees by land use by employees for household. U.S. Census Bureau's 2011 American Community Survey Public Use Microdata Sample (PUMS). The Microdata Sample data must be retrieved and grouped for each individual enquiry. This enquiry was for number of employed persons in households by industry of employment.

Because the Town of Jackson and Teton County were also concerned about affordable workforce housing availability for critical employees (law enforcement and firefighting, including emergency medical personnel), as well as those directly employed at new development, Jackson/Teton County calculated a need for critical employee housing of .00224 units per 1,000 square feet of non-residential development.[61]

Table 11: Non-Residential Employee Households by Land Use[62]

| | Construction | Permanent | Critical | Total |
|---|---|---|---|---|
| Retail per 1,000 ft² | .023 | .718 | .00224 | .743 |
| Eating & Drinking per 1,000 ft² | .023 | .978 | .00224 | 1.003 |
| Office per 1,000 ft² | .023 | .524 | .00224 | .549 |
| Industrial per 1,000 ft² | .023 | .990 | .00224 | 1.015 |
| Institutional per 1,000 ft² | .010 | .032 | .00224 | .044 |
| Lodging per Room | .017 | 1.552 | .00224 | 1.571 |

## *F. Nexus to Workforce Housing – Residential*

The methodology for assessing the need for workforce housing resulting from residential development is similar to the approach used for non-residential development. A survey of residential occupants, homeowners' associations, and property managers was conducted by RRC Associates[63] to determine the number of construction, operational and maintenance employees used at different types and sizes of home. The survey requested the number of employees hired or retained to operate and maintain the residential properties or the amounts paid to services or managers to operate and maintain the property (e.g., property owners' association employees). Respondents were also asked for the type and size of the residence in square feet of floor area. Residences were divided into four groups based on whether it was a detached or attached dwelling:

- Detached dwelling
    - Occupied by local resident; or
    - Non-local seasonal, vacation, or part-time occupied

61. *See infra* tbl. 11.

62. Clarion Report, *supra* note 46, at app. E. Critical employee needs were calculated by allocating those employees to residential or nonresidential development based on calls for service between residential and non-residential development. The allocated personnel were divided into floor area by type to get critical employees per 1,000 feet if floor area. Employees were converted to employee households in the same manner as all other employee households.

63. *Id.*

- Attached dwelling (referred to in documents as "Other")
    - Occupied by local resident; or
    - Non-local seasonal, vacation, or part-time occupied

Table 12 summarizes the responses from the residential survey.

Table 12: Residential Survey Responses[64]

| | |
|---|---|
| Respondents Answering Employment Question | 648[65] |
| Full-Time Equivalent Employees Employed by Respondents | |
| HOA Employees | 10 |
| Property Management Employees | 9 |
| On-Site Caretakers | 13 |
| Contract Employees | 26 |
| All Other Employees | 29 |
| Total | 87 |
| Full-Time Equivalent Conversions per Year | |
| Full-time equivalent employees per year | .134 |
| Employee hours per year | 279 |

The results from the survey and the analysis of the results demonstrate that employment proved to be non-linear because operational and maintenance employment at residences grew at a greater rate than unit size. As might be expected, units occupied by non-local residents employed more operational and maintenance employees than units occupied by local residents. This expectation is based on the presumption that local residents would perform more operational and maintenance functions themselves simply because there are present and able to do them. Additionally, detached residences tended to employ fewer operational and maintenance employees than other residences. Regression analysis was used to determine employment by type, size, and occupancy of residence, as shown in the graphic.[66] The data for the regression analysis graphic are shown in Table 13.

64. *Id.* at 28.

65. *See id.* (surveying respondents which constituted a five percent survey of the 13,580 dwelling units in Teton County). *See also*, *Teton County, Wyoming 2018 Population Estimates*, U.S. CENSUS BUREAU, www.census.gov/search-results.html?searchType=web&cssp=SERP&q=Teton%20County,%20WY (noting number dwelling units).

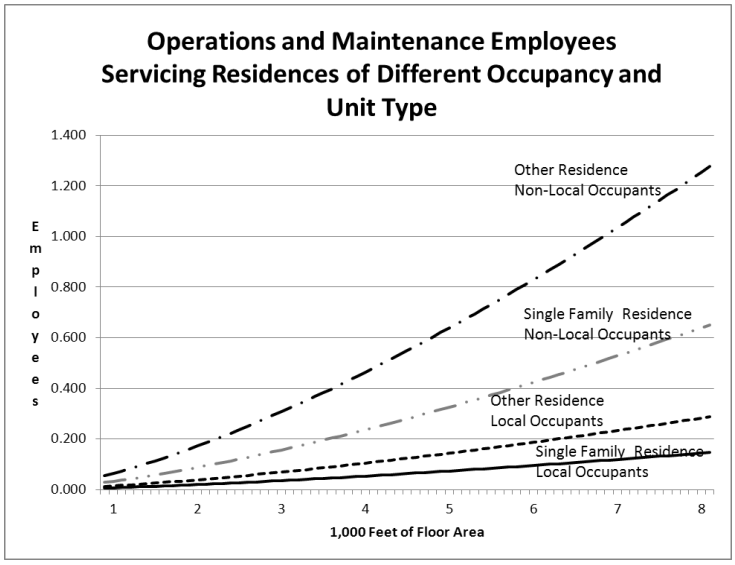
66. *See* Clarion Report, *supra* note 46, at 22-27 for detailed survey and regression analysis.

Table 13: Operations and Maintenance Employees, by Residential Unit Type and Size[67]

| $Ft^2$[68] | Non-Local | | | | Local | | | |
|---|---|---|---|---|---|---|---|---|
| | Other Unit | | SFD Unit | | Other Unit | | SFD Unit | |
| | Employees per Unit | Housing Units Needs for Employees | Employees per Unit | Housing Units Needs for Employees | Employees per Unit | Housing Units Needs for Employees | Employees per Unit | Housing Units Needs for Employees |
| 500 | .013 | .007 | .004 | .002 | .007 | .004 | .004 | .002 |
| 1,000 | .040 | .022 | .011 | .006 | .021 | .012 | .011 | .006 |
| 1,500 | .076 | .042 | .020 | .011 | .040 | .022 | .020 | .011 |
| 2,000 | .120 | .067 | .032 | .018 | .063 | .035 | .032 | .018 |
| 2,500 | .171 | .095 | .046 | .025 | .090 | .050 | .046 | .025 |
| 3,000 | .228 | .127 | .061 | .034 | .120 | .067 | .061 | .034 |
| 3,500 | .292 | .162 | .078 | .043 | .153 | .085 | .078 | .043 |
| 4,000 | .292 | .162 | .096 | .054 | .153 | .085 | .096 | .054 |
| 4,500 | .292 | .162 | .116 | .065 | .153 | .085 | .116 | .065 |
| 5,000 | .292 | .162 | .137 | .076 | .153 | .085 | .137 | .076 |
| 5,500 | .292 | .162 | .137 | .076 | .153 | .085 | .137 | .076 |
| 6,000 | .292 | .162 | .137 | .076 | .153 | .085 | .137 | .076 |
| 6,500 | .292 | .162 | .137 | .076 | .153 | .085 | .137 | .076 |
| 7,000 | .292 | .162 | .137 | .076 | .153 | .085 | .137 | .076 |

67. *Id.*

68. Unit size was capped at 3,500 square feet of floor area. The under of dwellings above 3,500 feet were not sufficient to establish a ratio that could be statistically supported.




Housing costs and prices, together with employee household income, show that housing availability is severely constrained. This is also true for critical employees. The goal of the Town of Jackson and Teton County workforce housing program is to increase the availability of housing affordable to Teton County employees. The preferred means of attaining the goal is to have private parties assist their employees in obtaining housing in Teton County. If it is impractical for private provision, a payment in-lieu is available.

As with non-residential development, residential development will also require construction and critical service employees. As outlined earlier, construction employment for residential development requires 1.243 employee years and .023 construction employee households per 1,000 ft² of a residential unit built.[69] Critical employees serving the residential development amount to .008 and .004 households per 1,000 ft².[70]

Table 14: Total Residential Employee Households, by Type and Size of Unit

| Ft² | Non-Local | | | | | | Local | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Other Unit | | | SFD Unit | | | Other Unit | | | SFD Unit | | |
| | O & M | Construction | Critical Employee | O & M | Construction | Critical Employee | O & M | Construction | Critical Employee | O & M | Construction | Critical Employee |
| 500 | .007 | .012 | .002 | .002 | .012 | .002 | .004 | .012 | .002 | .002 | .012 | .002 |
| 1,000 | .022 | .023 | .004 | .006 | .023 | .004 | .012 | .023 | .004 | .006 | .023 | .004 |

69. Clarion Report, *supra* note 46, at 56.
70. *Id.* at 32; *see infra* tbl. 14.

| | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1,500 | .042 | .035 | .006 | .011 | .035 | .006 | .022 | .035 | .006 | .011 | .035 | .006 |
| 2,000 | .067 | .046 | .008 | .018 | .046 | .008 | .035 | .046 | .008 | .018 | .046 | .008 |
| 2,500 | .095 | .058 | .010 | .025 | .058 | .010 | .050 | .058 | .010 | .025 | .058 | .010 |
| 3,000 | .127 | .069 | .012 | .034 | .069 | .012 | .067 | .069 | .012 | .034 | .069 | .012 |
| 3,500 | .162 | .081 | .014 | .043 | .081 | .014 | .085 | .081 | .014 | .043 | .081 | .014 |
| 4,000 | .162 | .092 | .016 | .054 | .092 | .016 | .085 | .092 | .016 | .054 | .092 | .016 |
| 4,500 | .162 | .104 | .018 | .065 | .104 | .018 | .085 | .104 | .018 | .065 | .104 | .018 |
| 5,000 | .162 | .115 | .020 | .076 | .115 | .020 | .085 | .115 | .020 | .076 | .115 | .020 |
| 5,500 | .162 | .127 | .022 | .076 | .127 | .022 | .085 | .127 | .022 | .076 | .127 | .022 |
| 6,000 | .162 | .138 | .024 | .076 | .138 | .024 | .085 | .138 | .024 | .076 | .138 | .024 |
| 6,500 | .162 | .150 | .026 | .076 | .150 | .026 | .085 | .150 | .026 | .076 | .150 | .026 |
| 7,000 | .162 | .161 | .028 | .076 | .161 | .028 | .085 | .161 | .028 | .076 | .161 | .028 |

Table 15 summarizes the total number of employee households required to construct and operate/maintain a residential unit, by type and size of unit. These data are for all employee households, some of which can obtain housing in Teton County without assistance.

Table 15: Total Employee Households Needed to Construct and Operate/Maintain Residential Unit, by Type and Size of Unit – Summary

| $Ft^2$ | Non-Local | | Local | |
|---|---|---|---|---|
| | Other Unit | SFD Unit | Other Unit | SFD Unit |
| | Total Employee Households | Total Employee Households | Total Employee Households | Total Employee Households |
| 500 | .021 | .015 | .017 | .015 |
| 1,000 | .049 | .033 | .039 | .033 |
| 1,500 | .083 | .052 | .063 | .052 |
| 2,000 | .121 | .072 | .089 | .072 |
| 2,500 | .163 | .093 | .117 | .093 |
| 3,000 | .208 | .115 | .148 | .115 |
| 3,500 | .257 | .138 | .180 | .138 |
| 4,000 | .270 | .162 | .193 | .162 |

## *G. Proportionality*

The RRC survey obtained data by type and size of development, thus providing a basis for the nexus between development and workforce housing for each type and size of development. The nexuses were the employee households needed to serve the residential or non-residential developments. These needs were apportioned to individual types and sizes of both residential and

nonresidential developments based on localized survey research in conjunction with census, state, and local data for the community. The proportional need for workforce housing for residential development and non-residential development are summarized below in Table 16 and Table 17:

Table 16: Summary of Workforce Employee Housing Need and Assistance by Type and Size of Residential Unit[71]

| | Non-Local | | | | | | Local | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Other Unit | | | SFD Unit | | | Other Unit | | | SFD Unit | | |
| $Ft^2$ | Total Employee | Able to Afford | Net Needs | Total Employee | Able to Afford | Net Need | Total Employee | Able to Afford | Net Need | Total Employee | Able to Afford | Net Need |
| 500 | .019 | .003 | .016 | .014 | .002 | .012 | .016 | .002 | .014 | .013 | .002 | .011 |
| 1,000 | .046 | .007 | .040 | .030 | .004 | .026 | .036 | .005 | .030 | .027 | .004 | .023 |
| 1,500 | .115 | .017 | .098 | .066 | .010 | .056 | .083 | .012 | .071 | .057 | .008 | .049 |
| 2,000 | .199 | .029 | .170 | .106 | .015 | .090 | .139 | .020 | .119 | .090 | .013 | .077 |
| 2,500 | .223 | .032 | .190 | .130 | .019 | .111 | .201 | .029 | .172 | .114 | .016 | .097 |
| 3,000 | .247 | .036 | .211 | .154 | .022 | .131 | .225 | .033 | .192 | .138 | .020 | .118 |
| 3,500 | .271 | .039 | .231 | .178 | .026 | .152 | .249 | .036 | .213 | .162 | .023 | .138 |
| 4,000 | .295 | .043 | .252 | .202 | .029 | .172 | .273 | .040 | .233 | .185 | .027 | .159 |

Table 17: Workforce Housing in Need of Assistance per 1,000 Square Feet of Non-Residential, Construction and Post Construction (Operation and Maintenance)[72]

| | Retail | Eating & Drinking Places | Office | Industrial | Institutional | Lodging per Room |
|---|---|---|---|---|---|---|
| Construction | | | | | | |
| Employees | .041 | .041 | .041 | .041 | .041 | .041 |
| Households | .023 | .023 | .023 | .023 | .023 | .023 |
| Able To Afford Units | .002 | .002 | .002 | .002 | .002 | .002 |
| Available Affordable Units | .001 | .001 | .001 | .001 | .001 | .001 |
| Net Affordable Units Needed | .020 | .020 | .020 | .020 | .020 | .020 |
| Post Construction | | | | | | |
| Employees | 1.202 | 3.911 | 1.598 | .710 | 1.598 | .487 |
| Households | .705 | 1.956 | .952 | .430 | .952 | .244 |
| Able To Afford Units | .0501 | .1555 | .0968 | .0354 | .0862 | .0214 |
| Available Affordable Units | .0416 | .1154 | .0562 | .0254 | .0562 | .0144 |
| Net Affordable Units Needed | .6134 | 1.6851 | .7990 | .3692 | .8097 | .2082 |
| Critical Service Providers | | | | | | |
| Employees | .0040 | .0040 | .0040 | .0040 | .0040 | .0040 |
| Households | .0022 | .0022 | .0022 | .0022 | .0022 | .0022 |
| Able To Afford Units | .0002 | .0002 | .0002 | .0002 | .0002 | .0002 |

71. Clarion Report, *supra* note 46, at 56.
72. *Id.*

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | Available Affordable Units | .0001 | .0001 | .0001 | .0001 | .0001 | .0001 |
| | Net Affordable Units Needed | .0019 | .0019 | .0019 | .0019 | .0019 | .0019 |
| Totals | | | | | | | |
| | Employees | 1.2471 | 3.9561 | 1.6431 | .7551 | 1.6431 | .5321 |
| | Households | .7302 | 1.9812 | .9772 | .4552 | .9772 | .2692 |
| | Able To Afford Units | .0518 | .1573 | .0987 | .0372 | .0880 | .0232 |
| | Available Affordable Units | .0431 | .1169 | .0577 | .0269 | .0577 | .0159 |
| | Net Affordable Units Needed | .6353 | 1.7070 | .8209 | .3912 | .8316 | .2302 |

Income and sales data show that 14.7% of employee households should be able to obtain housing in Teton County without assistance.[73] This reduction in need is shown in the previous tables. The net need shown are the employee households expected to be in need of housing assistance.

While the goal of the workforce housing program is private provision of such housing, private provision may not be desirable in all situations. Therefore, a payment in-lieu option was provided. The payment in-lieu is based on the net need for workforce housing multiplied by the affordability gap calculated for each group of employee households by land use type.[74]

Table 18: Affordability Gap per Employee Household, Residential and Non-Residential Development

| | Household Income | Affordability Limit | Housing Cost | Gap |
|---|---|---|---|---|
| Residential | | | | |
| Construction | 87,626 | 292,087 | 512,758 | 220,671 |
| Operation & Maintenance | 73,342 | 244,473 | 512,758 | 268,285 |
| Critical Service | 90,312 | 301,040 | 512,758 | 211,718 |
| Non-Residential | | | | |
| Construction | 87,626 | 292,087 | 512,758 | 220,671 |
| Permanent | | | | |
| Retail | 64724 | 215,747 | 512,758 | 297,011 |
| Eating & Drinking | 73668 | 245,560 | 512,758 | 267,198 |
| Office | 96368 | 321,227 | 512,758 | 191,531 |
| Industrial | 77758 | 259,193 | 512,758 | 253,565 |
| Institutional | 88213 | 294,043 | 512,758 | 218,715 |
| Lodging | 81165 | 270,550 | 512,758 | 242,208 |
| Critical Service | 90,312 | 301,040 | 512,758 | 211,718 |

The employee housing affordable gap is multiplied by the net need for workforce housing by land use type to establish the payment in-lieu.[75]

73. *Id.* at app. G.
74. *See infra* tbl. 18.
75. *See infra* tbls. 19-21.

Table 19: Total Workforce Housing Assistance Need Created by Local Residential Development (Single-Family Detached and All Other Units[76]

| Unit Size (ft²) | Local Tenancy Single-Family Detached | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Construction | | Operations and Maintenance | | Critical Service Providers | | Total | |
| | Affordable Housing Units Needed | Housing Assistance Needed | Affordable Housing Units Needed | Housing Assistance Needed | Affordable Housing Units Needed | Housing Assistance Needed | Affordable Housing Units Needed | Housing Assistance Needed |
| 500 | .010 | $2,185 | .001 | $258 | .0003 | $65.48 | .011 | $2,509 |
| 1,000 | .020 | $4,369 | .003 | $775 | .0007 | $13.97 | .023 | $5,276 |
| 2,000 | .040 | $8,739 | .008 | $2,197 | .0013 | $261.94 | .049 | $11,198 |
| 3,000 | .059 | $13,108 | .015 | $4,136 | .0020 | $392.91 | .077 | $17,637 |
| 4,000 | .079 | $17,477 | .015 | $4,136 | .0026 | $523.87 | .097 | $22,137 |
| 5,000 | .099 | $21,846 | .015 | $4,136 | .0033 | $654.84 | .118 | $26,637 |
| 6,000 | .119 | $26,216 | .015 | $4,136 | .0040 | $785.81 | .138 | $31,137 |
| 7,000 | .139 | $30,585 | .015 | $4,136 | .0046 | $916.78 | .159 | $35,638 |
| Unit Size (ft²) | Local Tenancy All Other Units | | | | | | | |
| | Construction | | Operations and Maintenance | | Critical Service Providers | | Total | |
| | Affordable Housing Units Needed | Housing Assistance Needed | Affordable Housing Units Needed | Housing Assistance Needed | Affordable Housing Units Needed | Housing Assistance Needed | Affordable Housing Units Needed | Housing Assistance Needed |
| 500 | .010 | $2,185 | .003 | $905 | .0003 | 65.4843 | .014 | $3,155 |
| 1,000 | .020 | $4,369 | .010 | $2,714 | .0007 | 13.9686 | .031 | $7,214 |
| 2,000 | .040 | $8,739 | .030 | $8,142 | .0013 | 261.9372 | .071 | $17,143 |
| 3,000 | .059 | $13,108 | .058 | $15,509 | .0020 | 392.9058 | .119 | $29,010 |
| 4,000 | .079 | $17,477 | .091 | $24,427 | .0026 | 523.8744 | .173 | $42,428 |
| 5,000 | .099 | $21,846 | .091 | $24,427 | .0033 | 654.8430 | .193 | $46,929 |
| 6,000 | .119 | $26,216 | .091 | $24,427 | .0040 | 785.8116 | .214 | $51,429 |
| 7,000 | .139 | $30,585 | .091 | $24,427 | .0046 | 916.7802 | .234 | $55,929 |

76. Clarion Report, *supra* note 46, at 42.

Table 20: Total Workforce Housing Assistance Need Created by Non-Local Residential Development (Single-Family Detached and All Other Units[77]

| Unit Size (ft²) | Non-Local Tenancy Single-Family Detached | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Construction | | Operations and Maintenance | | Critical Service Providers | | Total | |
| | Affordable Housing Units Needed | Housing Assistance Needed | Affordable Housing Units Needed | Housing Assistance Needed | Affordable Housing Units Needed | Housing Assistance Needed | Affordable Housing Units Needed | Housing Assistance Needed |
| 500 | .010 | $2,185 | .002 | $517 | .0003 | $65.48 | .012 | $2,767 |
| 1,000 | .020 | $4,369 | .005 | $1,422 | .0007 | $13.97 | .026 | $5,922 |
| 2,000 | .040 | $8,739 | .015 | $4,136 | .0013 | $261.94 | .056 | $13,136 |
| 3,000 | .059 | $13,108 | .029 | $7,884 | .0020 | $392.91 | .091 | $21,385 |
| 4,000 | .079 | $17,477 | .029 | $7,884 | .0026 | $523.87 | .111 | $25,885 |
| 5,000 | .099 | $21,846 | .029 | $7,884 | .0033 | $654.84 | .132 | $30,385 |
| 6,000 | .119 | $26,216 | .029 | $7,884 | .0040 | $785.81 | .152 | $34,886 |
| 7,000 | .139 | $30,585 | .029 | $7,884 | .0046 | $916.78 | .173 | $39,386 |
| Unit Size (ft²) | Non-Local Tenancy All Other Units | | | | | | | |
| | Construction | | Operations and Maintenance | | Critical Service Providers | | Total | |
| | Affordable Housing Units Needed | Housing Assistance Needed | Affordable Housing Units Needed | Housing Assistance Needed | Affordable Housing Units Needed | Housing Assistance Needed | Affordable Housing Units Needed | Housing Assistance Needed |
| 500 | .010 | $2,185 | .006 | $1,680 | .0003 | 65.4843 | .016 | $3,930 |
| 1,000 | .020 | $4,369 | .019 | $5,170 | .0007 | 13.9686 | .040 | $9,670 |
| 2,000 | .040 | $8,739 | .058 | $15,509 | .0013 | 261.9372 | .099 | $24,510 |
| 3,000 | .059 | $13,108 | .110 | $29,468 | .0020 | 392.9058 | .171 | $42,969 |
| 4,000 | .079 | $17,477 | .110 | $29,468 | .0026 | 523.8744 | .192 | $47,469 |
| 5,000 | .099 | $21,846 | .110 | $29,468 | .0033 | 654.8430 | .212 | $51,969 |
| 6,000 | .119 | $26,216 | .110 | $29,468 | .0040 | 785.8116 | .233 | $56,470 |
| 7,000 | .139 | $30,585 | .110 | $29,468 | .0046 | 916.7802 | .253 | $60,970 |

77. *Id.* at 41.

Table 21: Summary of Workforce Housing and Assistance Need for Non-Residential Construction[78]

| Land Use | Construction (per 1,000 ft² or Room) | | Post-Construction (per 1,000 ft²or Room) | | Critical Service Providers (per 1,000 ft²or Room) | | Totals (per 1,000 ft²or Room) | |
|---|---|---|---|---|---|---|---|---|
| | Workforce Housing Units | Housing Assistance Needed | Workforce Housing Units | Housing Assistance Needed | Workforce Housing Units | Housing Assistance Needed | Workforce Housing Units | Housing Assistance Needed |
| per 1,000 ft² | | | | | | | | |
| Retail | .020 | $4,335 | .613 | $182,172 | .0019 | $433 | .635 | $186,940 |
| Eating & Drinking | .020 | $4,335 | 1.685 | $450,251 | .0019 | $433 | 1.707 | $455,020 |
| Office | .020 | $4,335 | .799 | $153,036 | .0019 | $433 | .821 | $157,804 |
| Industrial | .009 | $1,885 | .369 | $93,627 | .0019 | $433 | .380 | $95,945 |
| Institutional | .015 | $3,204 | .810 | $177,087 | .0019 | $433 | .826 | $180,725 |
| per Room | | | | | | | | |
| Hotel/ Lodging | .020 | $4,335 | .208 | $50,421 | .0019 | $433 | .230 | $55,189 |

## III. EVALUATION OF WHETHER THE PROGRAMS MEET THE REQUIRED LEGAL/CONSTITUTIONAL STANDARDS TO BE VALID EXERCISES OF THE GOVERNMENT POLICE POWER

Section II, above, explains the Clarion programs and how they respond to the need to establish and demonstrate nexus and proportionality. The next question is - are there other constitutional/legal requirements or standards that such a developer mitigation program must meet? The authors believe that the standard for judging whether or not developer mitigation and infrastructure funding requirements constitute a taking or denial of due process is the Dual Rational Nexus test, formulated in connection with testing the validity of impact fees. The Dual Rational Nexus test requires (1) a nexus between the need for additional capital facilities and the growth generated by the development so that the developer cannot be required to provide or pay for more than her proportionate share of the government's infrastructure costs that are reasonably attributable to the new development; and (2) the funds collected must be used for the purposes for which they were collected and for infrastructure which will benefit the feepayor.[79] The Dual Rational Nexus test is more severe than *Nollan/Dolan*'s nexus and proportionality

78. *Id.* at 62.

79. *See* JUERGENSMEYER, ROBERTS, SALKIN & ROWBERRY, *supra* note 14, at § 9.9(4) (explaining the Dual Rational Nexus Test and its requirements).

requirements because a one-on-one analysis of the exact infrastructure needed and assessed for strict rather than "rough" proportionality are required pursuant to the dual rational nexus test and "rough' proportionality will not suffice.[80] It also has the advantage of avoiding the confusion created in the *Nollan/Dolan* cases and their progeny which conceptualize them as taking rather than due process issues as they should be. If the dual rational nexus requirement is violated then the exaction is void rather than giving rise to a takings/compensation analysis.[81]

In regard to this last point it should be noted that courts have continuously confused the takings inquiry with due process requirements. For example, according to the Court in *Agins v. City of Tiburon*, the city ordinance does not constitute a taking when it "substantially advanced the legislative purposes," which is a rational-basis review question associated with due process language, not a takings inquiry.[82] The *Nollan/Dolan* regulatory takings analysis continues the failure to separate the two. In *Nollan,* the Supreme Court perpetuated the mistake of conflating takings and due process requirements by claiming that a regulation is not a taking if it substantially advances legitimate state interests (that is, shows an essential nexus between the potential development impact and the required exaction – a due process inquiry) and does not deny an owner economically viable use of property (a takings inquiry).[83] In *Dolan,* the Supreme Court added the requirement of rough proportionality to *Nollan's* essential nexus requirement, but, again, did not separate the takings analysis from the due process inquiry.[84] That separation would have clarified that challenges to government authority, proper public purpose reviews, and rational basis essential nexus and proportionality analyses are all substantive due process inquiries. They should be distinguished from the takings challenges that should only look at whether the goal of the public regulation is a public purpose and whether there was diminution in the affected property's value. The separation would have established that the essential nexus and the rough proportionality are due process, not "regulatory takings" tests.[85]

In *Lingle v. Chevron U.S.A., Inc.*, the Supreme Court correctly applied the takings test to determine that a regulation was not a taking because it did not result in excessive diminution of property value.[86] The Court also invalidated *Agins*' "substantially advanced"

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80. *Id.*

81. Platter & O'Loughlin, *supra* note 28, at 789. The discussion which follows in the text relies heavily on Professor Platter's article. *See also* JUERGENSMEYER, ROBERTS, SALKIN & ROWBERRY, *supra* note 14, at §§ 9.9, 1.3, 1.4, 1.5.

82. Agins v. Tiburon, 447 U.S. 255, 261-62 (1980).

83. Platter & O'Loughlin, *supra* note 28, at 791.

84. Dolan v. City of Tigard, 512 U.S. 374, 383-96 (1994).

85. Platter & O'Loughlin, *supra* note 28, at 789.

86. *Id.* at 781 (referring to Lingle v. Chevron U.S.A., Inc., 544 U.S. 528

factor by declaring it an invalid takings test in *Lingle*.[87] Unfortunately, the *Lingle* decision has not received the attention it deserves, and courts have yet to sort out and appreciate the importance of the distinction between a due process and a takings claim. Confusion between the two inquiries is exemplified in the recent Supreme Court case, where the Court did not find any excessive diminution in value caused by the regulation and failed to engage in a proper due process inquiry.[88] Yet, upon remand, the plaintiff was awarded compensation and the grant of a permit.[89] Understanding the distinction between the inquires is paramount because a due process remedy is different. While, as mentioned above, the remedy for a successful takings claim is compensation, the appropriate remedy for a due process challenge is ordinance invalidation such that the challenged ordinance becomes void.[90]

Having concluded that the Clarion programs do not violate takings and due process requirements, the next issue to consider is – Have the Clarion programs formulated an impact fee? First, it may not matter since at least, according to Professor Callies,[91] the same legal standards apply to all developer funding requirements. However, in states like Georgia, where the state legislatures enacted so-called "impact fee enabling acts." The infrastructure that can be the basis for an impact fee program is limited to a set list, and neither affordable nor workforce housing are on the list.[92] It is worth noting that the proper term for such statutes should be "impact fee disenabling acts" because without them, local government would have had the power – especially in a home-rule jurisdiction such as Georgia – to levy impact fees for many more types of infrastructure than permitted by the statute. Consequently, if a local government in such states were to enact a Clarion-type program, and the courts were to label it an impact fee, the program would presumptively be invalid.

The Clarion program, however, should not be labeled an impact fee even though, as already discussed, the methodology for calculating the developer provision requirement is similar to that used in impact fee formulae. First, the Georgia Development Impact Fee Act and similar ones in other states relate exclusively to *public* infrastructure. The preferred method under the Clarion program for developers to meet their workforce housing responsibility is to construct and continue to own and manage the housing – in which event it never becomes public infrastructure but remains private

(2005)).

87. *Id.* at 781.

88. *Id.* at 781-82.

89. *Id.* at 800; *see* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013).

90. Platter & O'Loughlin, *supra* note 28, at 789, 801.

91. Callies, *supra* note 8.

92. Georgia Development Impact Fee Act, GA. CODE ANN., §§ 36-71 (2017).

infrastructure that serves the developers' interests in having housing for employees necessary to the success of their developments. Of course, under the Clarion program, a developer, under limited circumstances (e.g., where it is unrealistic to construct affordable workforce housing) may pay an in-lieu fee instead of constructing affordable workforce housing. Even then, the ownership would not necessarily be in the local government but perhaps a public-private entity or a non-profit, such as the Habitat for Humanity.

Second, the workforce housing construct is not a system improvement but a project improvement. Many state enabling acts confine impact fees to system improvements.[93] For example, the Georgia Act clearly states: "Nothing in this chapter shall prevent a municipality or county from requiring a developer to construct reasonable project improvements in conjunction with a development project."[94]

Lastly, the Clarion approach to workforce housing may be vulnerable to the unfortunate trend of state pre-emption of local government's power to require developer funding of affordable housing through inclusionary zoning and set asides.[95] To date, at least twenty-eight states have preempted municipal enactment of rent control ordinances through explicit statutory prohibitions.[96] In at least an additional four states, their respective courts have found that municipalities did not have authority to adopt rent control ordinances.[97] Such rent control restrictions frustrate mandatory inclusionary zoning. Again, the authors submit that the Clarion program's approach would not be affected by these preemptions since it does not fit under the inclusionary zoning' set-asides approach that state legislatures are trying to preclude; any rent control would be at the option of the developer.

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93. Sometimes referred to as "off-site improvements" or non-site related infrastructure.

94. GA. CODE ANN. § 36-71-13(a) (2017). This point raises the possible argument that the Clarion programs are grounded in the more mitigation oriented required dedications approach from subdivision regulation law rather than monetary impact fees. Courts general apply less stringent reasonableness requirements to them. *See* JUERGENSMEYER, ROBERTS, SALKIN & ROWBERRY, *supra* note 14, at § 7.1.

95. Erin Adele Schraff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469 (2018); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018); Richard Briffault, *The Challenge of New Preemption*, 70 STAN. L. REV. 1995 (2018).

96. Rent control establishes a certain maximum in rent price and may curb increases thereafter. Julian C. Juergensmeyer & Andrew F. Prater, *Is State Preemption Weakening the Authoritarian Resilience of Local Governments in the United States?* 79 STUDIA IURIDICA 148, 154 (2019).

97. *Id.* at 155.

## IV. CONCLUSION

The Clarion approach presents an ideal method to provide workforce housing in new residential and commercial developments. Rather than following the common approach of set-asides through inclusionary zoning, Clarion offers a formula to calculate the exact need for workforce housing units generated by a new development. Using this formula avoids an arbitrary percentage of units being set aside for workforce housing. Additionally, by precisely calculating the number of employees generated by a development, and then the number of those employees that need affordable housing because of their income levels, the approach complies with the nexus/proportionality test required by *Nollan/Dolan* as well as the dual rational nexus test.