An Uphill Battle: Nashville's Fight for Affordable Housing

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Abstract

Nashville, Tennessee adopted an inclusionary zoning ordinance in September 2016 that aims to incentivize affordable housing creation by requesting that new developments that contain five or more units or use public resources or property shall set aside a percentage of their units for affordable housing, so long as adequate financial incentives are available from the City to subsidize these units. The ordinance was created as a direct result of the rapid gentrification and displacement that long term residents have been experiencing since development skyrocketed in Nashville after 2010. In April 2017, The Beacon Center of Tennessee filed a suit on behalf of the Homebuilders Association of Middle Tennessee against the City of Nashville, claiming that Nashville's inclusionary zoning ordinance is illegal and unconstitutional because it violates state law and the Fifth Amendment's Takings Clause. Although Nashville was able to get the Beacon Center of Tennessee's suit against it dismissed, the state of Tennessee stepped in and passed bill SB 0363, in March 2018, that nullified Nashville's inclusionary zoning ordinance. This thesis gives an overview of inclusionary zoning jurisprudence and assesses the legality of Nashville's policy through inclusionary zoning as a valid land use regulation adopted to ensure a proper balance of housing within a community and inclusionary zoning as an exaction. It also highlights the state government versus local government political barriers that Nashville's ordinance faced during its short-lived existence.

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Introduction

With its increase in cultural attractions, and a booming job market, Nashville has become the "it" city of the south for tourists looking to explore and a place for newcomers to call home.[1] In addition to welcoming thousands of tourists a year, Nashville's resident population increases by over a hundred people per day.[2] With this population growth, land prices and real estate prices have skyrocketed.[3] While this new found attractiveness has been exciting for some residents in Nashville, the rapid increases in home prices and rents have far outpaced wage increases for many Nashville residents, resulting in a housing affordability crisis for long-term residents.[4]

Many Nashville residents are fighting to continue to live in the place that many of them have called home for generations, but that fight is an uphill battle.[5] One out of every four Nashville homeowners and half of Nashville renters pay more than 30% of their income on housing costs alone, making it difficult for

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[1] *See* Peter Lane Taylor, *Nashville is One of America's Hottest Cities Right Now and It's Not Just the Hockey*, FORBES MAGAZINE (Jun. 2, 2017), https://www.forbes.com/sites/petertaylor/2017/06/02/nashville-is-on-a-red-hot-roll-and-its-not-just-the-predators/#5e53eb3c7a58 (stating that Nashville unique culture has been its most attractive point for newcomers because it's a progressive city that is also pro-business).

[2] *Id.*

[3] Economic & Planning Systems, Inc. & James Fraser, *Housing Policy and Inclusionary Zoning Feasibility Study,* THE ECONOMICS OF LAND USE *1, 2* (2017), http://www.nashville.gov/Portals/0/SiteContent/Planning/docs/InclusionaryHousing/Final%20Report-April%205%202017.pdf. The average price of a house in Nashville went from $198,000 in 2000 to greater than $418,000 by 2015. *Id.* This is a 5.1% increase each year. *Id.* Rents have also skyrocketed since 2000, with rents going from $624 a month in 2000 to $1,083 a month by 2015. *Id.*

[4] *See* David Plazas, *Affordable Housing in Nashville: Not Now, Not Ever*, TENNESSEAN (Dec. 16, 2017), https://www.tennessean.com/story/opinion/columnists/david-plazas/2017/12/17/affordable-housing-nashville-not-now-not-never/940356001/ (stating that a person must make at least $70,000 to live comfortably in Nashville, a salary that is far above Nashville's median salary of $49,891).

[5] *See id.* (highlighting the story of Kennetha Patterson, a native Nashville resident, who was evicted from her apartment after it was sold causing her and her family of six to move to rural Chapmansboro in Cheatham County).

them to afford other necessities such as food, medical care, and transportation.[6] As a response to Nashville's affordable housing crisis, Nashville's Mayor, Megan Barry, along with the City Council and community stakeholders created a robust plan to create more affordable housing in the city.[7] First, Barry's administration invested ten million to the Barnes Housing Trust Fund to subsidize affordable housing developments countywide.[8] To date, the housing trust fund has invested twenty seven million in affordable housing, resulting in the creation of 1300 affordable housing units.[9] Second, Barry's administration also announced the launch of the Affordable Housing Incentive Pilot Program (HIPP), which would incentivize developers to include affordable units in their developments by providing them with a grant that would cover the difference between the price of market-rate housing and the price of the affordable housing units.[10] Third, Nashville created a voluntary inclusionary zoning ordinance that would

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[6] OFFICE OF THE MAYOR MEGAN BARRY, HOUSING NASHVILLE REPORT 5 (2017). Renters and homeowners are considered cost-burdened when they spend more than 30% of their income on housing costs. *Id.* This restricts where and how they spend their income in the local economy, resulting in a $345 million impact on the local economy. *Id.*

[7] *Id*. at 1 (acknowledging that the *Housing Nashville Report* received input and feedback from multiple community stakeholders). In 2000, Nashville was an affordable city with an estimated 2,000-unit surplus of affordable rental housing. *Id.* at 12. However, by 2015 Nashville had a deficit of 18,000 affordable units. *Id.* This deficit is on schedule to increase to as many as 31,000 units by 2025. *Id.* In order to address this crisis, the city received feedback from residents and community stakeholders and created the *Housing Nashville* Report. *Id.*

[8] Office of the Mayor Megan Barry, *Barnes Housing Trust Fund*, NASHVILLE.GOV, https://www.nashville.gov/Mayors-Office/Housing/Barnes-Fund.aspx (last visited Apr. 10, 2018) (stating that the fund was created in 2013 by former Mayor Karl Dean). The fund gives grants to developers in order to create and/or preserve affordable rental and homeownership units for households making at or below 60% of Median Household Income (MHI). *Id.* According to the 2014 U.S. Census, the MHI for Nashville for a family of four is $60,074. Office of the Mayor Megan Barry, *Mayor Barry Announces Affordable Housing Incentive Pilot Program*, NASHVILLE.GOV (July 12, 2016) https://www.nashville.gov/News-Media/News-Article/ID/5461/Mayor-Barry-Announces-Affordable-Housing-Incentive-Pilot-Program.aspx.

[9] Office of the Mayor Megan Barry, *Barnes Housing Trust Fund*, NASHVILLE.GOV, https://www.nashville.gov/Mayors-Office/Housing/Barnes-Fund.aspx (last visited Apr. 10, 2018) (stating that Nashville has also leveraged 127 million of federal and private funding to create these 1,300 affordable units).

[10] Office of the Mayor Megan Barry, *Mayor Launches Housing Incentive Pilot Program*, NASHVILLE.GOV (Apr. 12, 2017), https://www.nashville.gov/News-Media/News-Article/ID/6309/Mayor-Launches-Housing-Incentive-Pilot-Program.aspx. For example, if a market rate unit would typically rent for $1,500 and the developer decides to make that unit affordable and rent it for $1,200, then the city would pay the developer the $300 difference under the HIPP program. *Id.*

incentivize affordable housing creation by requesting that new developments that contain five or more units or use public resources or property must set aside a percentage of their units for affordable housing, so long as adequate financial incentives are available from the City to subsidize these units.[11] It also adds that in lieu of meeting the affordable housing requirements on site, developers could construct the affordable units offsite, within a half a mile of the development, or contribute funds to the housing trust fund in order to aid in the creation of affordable housing in the city.[12]

Nashville's inclusionary zoning ordinance was extremely controversial since its inception.[13] Many conservatives felt that it interfered with the free market and would ultimately halt development in the city because it added additional regulations to the development process.[14] They believed that although

[11] Second Substitute Ordinance No. BL2016-133, An ordinance to amend various sections of Title 17 of the Metropolitan Zoning Code to incentivize Inclusionary Housing with any residential development that seeks additional development entitlements beyond that permitted by the current base zoning district (2016). This Note uses the terms "inclusionary housing" and "inclusionary zoning" interchangeably. Office of Policy Development & Research, *Inclusionary Zoning and Mixed-Income Communities*, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (2013), https://www.huduser.gov/portal/periodicals/em/spring13/highlight3.html. Inclusionary zoning is a regulatory tool used by state and local governments to require or incentivize private developers to set aside a specific percentage of affordable housing units within market-rate housing developments. Laura Swanson, *Inclusionary Zoning & Other Potential Incentives for Affordable Housing Development in Tennessee*, Tennessee Housing Development Agency (Nov. 2, 2016), https://s3.amazonaws.com/thda.org/Documents/Research-Planning/Research-Publications/IZ-Book-FINAL.pdf.

[12] Second Substitute Ordinance No. BL2016-133, An ordinance to amend various sections of Title 17 of the Metropolitan Zoning Code to incentivize Inclusionary Housing with any residential development that seeks additional development entitlements beyond that permitted by the current base zoning district (2016). In lieu fee options are extremely common in inclusionary zoning polices because they offer developers alternatives to on-site construction. Grounded Solutions Network, *Inclusionary Housing: In-Lieu Fees*, https://inclusionaryhousing.org/designing-a-policy/off-site-development/in-lieu-fees/ (last visited April 7, 2018). In communities where municipalities set the in-lieu fees below the cost of constructing the units onsite, most developers choose to pay the fee instead of constructing the units. *Id.* Other cities set the in-lieu fee at a higher level in an effort to promote on-site construction instead of the payment. *Id.*

[13] Joey Garrison, Nashville Affordable Housing Law Under Threat in Tennessee Legislature, Tennessean (Feb. 10, 2017), https://www.tennessean.com/story/news/2017/02/10/nashville-affordable-housing-law-under-threat-tennessee-legislature/97744608/ (stating that House Republican Majority Leader Glen Casada and Senator Ferrell Haile introduced legislation in February 2017 that singled out the Nashville inclusionary zoning ordinance). If the legislation passed, it would prevent local governments from requiring that developers include below-market rate units in exchange for greater development rights. *Id.*

[14] Beacon Center of Tennessee, *HBAMT vs. Metropolitan Government of Nashville and Davidson County*, BEACON CENTER OF TENNESSEE BLOG (April 24, 2017), http://www.beacontn.org/hbamt-vs-metropolitan-

the ordinance aimed to help the city and surrounding Davidson County, it would stymie the industry that had the strongest ability to alleviate the housing supply issue in Nashville, resulting in less housing production.[15] A few months after Nashville's inclusionary zoning ordinance was passed, the Beacon Center for Tennessee, a conservative think tank, brought a suit on behalf of the Homebuilders Association of Middle Tennessee against the city of Nashville in the Davidson County Chancery Court.[16] The Plaintiff alleged that Nashville's inclusionary zoning ordinance was illegal and unconstitutional because it violated state law and the Fifth Amendment's takings clause.[17] The City motioned to dismiss on the grounds of ripeness and standing because the plaintiff could not show an injury to a specific developer or property.[18] The court ordered the motion.[19] Although the dismissal was seen as a victory for the city and other cities that have inclusionary zoning policies, it leaves a few legal questions that could advance inclusionary zoning jurisprudence and aid other municipalities unanswered, such as what would happen if there is a plaintiff with standing and a ripe claim?[20] Could Nashville's inclusionary zoning ordinance survive state

government-of-nashville-and-davidson-county/ (highlighting the reasoning behind the criticism of Nashville's Inclusionary Zoning Ordinance).

[15] *Id.*

[16] *Id.* (highlighting the updates of the *HBAMT vs. Metropolitan Government of Nashville and Davidson County* and the plaintiff's reasoning behind challenging Nashville's ordinance).

[17] Complaint at 3, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Apr. 24, 2017) (arguing that Nashville's ordinance was an unconstitutional condition that conditioned development entitlements of the developer's right to seek market rate rent).

[18] Motion to Dismiss at 1, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville).

[19] Court's Memorandum of Law and Order at 12, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Oct. 31, 2017).

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preemption and takings clause objections?[21] Would framing the ordinance as land use regulation subject to rational basis review, rather than an unconstitutional conditions subject to the exactions test from *Nollan-Dolan,* make a difference in the ordinance's legality?[22]

Part I of this thesis describes the history and development of inclusionary zoning with an emphasis on the legal cases that have shaped inclusionary zoning jurisprudence.[23] Part II focuses on the current Fifth Amendment takings and state preemption challenges to Nashville's inclusionary zoning ordinance in *Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County*.[24] Part III assesses the legality of Nashville's inclusionary zoning policy using the courts' application of the *Penn Central* test and the *Nollan-Dolan* test, while also highlighting the political tension and power dynamics that played out between the state government and the local government over Nashville's inclusionary zoning ordinance.[25]

Background

The Role of Zoning in Regulating Housing

Zoning has historically played an important role in housing regulation and community development, and at times has exacerbated housing affordability and

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[22] *See* Tim Iglesias, *Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and its Potential to Meet Affordable Housing Needs*, 36 ZONING AND PLANNING LAW REPORT (2013) (stating that the legality of inclusionary zoning ordinances depends upon how they are framed by the governments who enact them, the opponents who challenge them, and the courts that decide the cases.")

[23] *See infra* notes and accompanying text.

[24] *See infra* notes and accompanying text.

[25] *See infra* notes and accompanying text.

equity challenges.[26] Zoning laws derive from the police powers that are granted to the individual States by the Tenth Amendment of the United States Constitution which can then be delegated to municipalities and townships by their respective states.[27] The Tenth Amendment provides States with the power to enact laws that protect the health, safety and welfare of their local communities.[28] Courts have consistently ruled that as long as zoning protects health, safety and welfare, it is considered a sound constitutional exercise of the police powers.[29]

Historically, municipalities have used zoning to regulate development, and it is still used today as an important aspect of planning for growth and development.[30] In general, zoning laws regulate the types of land uses, as well as the dimensional requirements that new developments must meet.[31] While there are many merits to zoning, especially the ways in which it protects health, safety, and welfare, there are also criticisms and new challenges.[32] One criticism is that zoning limits development potential, thereby limiting the creation of new housing which can result in higher housing costs.[33] By extension, critics argue that zoning

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[26] Richard Florida, How Zoning Restrictions Make Segregation Worse, CITY LAB (Jan. 4, 2016), https://www.citylab.com/equity/2016/01/how-zoning-restrictions-make-segregation-worse/422352/ (highlighting that zoning tools, such as density restrictions, are used to segregate the wealthy and the poor).

[27] Mark Bobrowski, Scenic Landscape Protection Under the Police Power, 22 B.C. ENVTL. AFF. L. REV. 697, 706–07 (1995).

[28] U. S. CONST. amend. X (stating, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Donna Patalano, *Police Power and the Public Trust: Prescriptive Zoning Through Conflation of Two Ancient Doctrine*, 28 B.C. ENVTL. AFF. L. REV. 683, 688-89 (2001).

[29] Brian Lerman, *Mandatory Inclusionary Zoning: The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV.383, 384-85 (2006) (highlighting that this rational basis standard gives deference to local governments to create regulations that best address their communities' land use needs).

[30] *Id.* at 384 (mentioning that the US Supreme Court's holding in *Village of Euclid v. Amber Realty* gave cities and towns the ability to use zoning to plan for development).

[31] *Id.* at 385.

[32] Vinit Mukhija, et al., *The Tradeoffs of Inclusionary Zoning: What Do We Know and What Do We Need to Know?*, 30 PLANNING PRACTICE & RESEARCH 222, 223 (2015) (mentioning that some critics believe that zoning restricts housing supply and raises housing costs, making it difficult to create affordable housing).

[33] *Id.* (arguing that zoning constrains development and increase racial and class segregation).

regulations can inhibit the creation of affordable housing which can have other indirect adverse impacts such as exacerbated racial and class segregation.[34]

One of zoning's downsides is that it can be manipulated to intentionally exclude groups of people.[35] Zoning can prohibit specific types of residential projects, such as multifamily residential buildings and mobile homes, which are often intended for lower income groups.[36] It can also utilize more subtle zoning mechanisms like minimum lot size, which can increase the cost of development and housing costs.[37] These practices often exclude marginalized racial and socio-economic groups from specific areas.[38] As such, inclusionary zoning emerged to combat some exclusionary zoning practices which limit certain kinds of residential development.[39]

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[34] Mukhija, *supra* note 32 at 223*; see* Jonathan Rothwell & Douglas Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOCIAL SCIENCE QUARTERLY 1123 (2010) (discussing that a study shows that there is a causal relationship between density zoning and income segregation because metropolitan areas that restrict the density of residential development have more segregation than other cities with more density and zoning allowances).

[35] Lerman, *supra* note 29 at 386 (stating that this is done by creating strict minimum and maximum lot sizes, prohibiting mobile homes, and limiting development to single family housing).

[36] *Id.*

[37] Edward Glaeser et al, *Regulation and the Rise of Housing Prices in Greater Boston: A Study Based on New Data from 187 Communities in Greater Boston*, Working paper, Pioneer Institute for Public Policy Research and the Rappaport Institute for Greater Boston, Kennedy School of Government, Harvard University1, 4 (2006) (showing that towns and cities with minimum lot sizes also have less housing and often have less development).

[38] Lerman, *supra* note 29 at 387 (stating that although cities and towns used exclusionary practices as a way to preserve the community character, the practices were motivated by prejudice).

[39] Lance Freeman & Jenny Schuetz, *Producing Affordable Housing in Rising Markets: What Works?*, 19 CITYSCAPE: A JOURNAL OF POLICY DEVELOPMENT AND RESEARCH 217, 221 (2016) (analyzing local and state policies that create and preserve affordable housing in the face of gentrification).

Overview of Inclusionary Zoning

Inclusionary zoning is a market-based land use strategy that many municipalities use to address the shortage of workforce housing and affordable housing.[40] Created through local ordinances or policy statements, inclusionary zoning policies require or encourage developers to set aside between 10 to 20 percent of housing units in new or rehabilitated residential projects for low- and moderate-income residents.[41] This mixing of affordable units into market-rate projects allows people from diverse socioeconomic backgrounds to live in the same developments and have access to the same community services and resources.[42] By leveraging private-sector development, inclusionary zoning allows municipalities to expend significantly less funding to create affordable housing.[43]

Given the unique housing needs in cities across the nation, municipalities have taken various approaches in order to create inclusionary zoning policies that best serve their respective cities and residents' needs.[44] In general, there are five main categories of inclusionary zoning program design to consider, including: 1)

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[40] Nico Calavita & Alan Mallach, *Inclusionary Housing, Incentives, and Land Value Recapture,* LINCOLN INSTITUTE OF LAND POLICY: LAND LINES 15, 15, 20 (January 2009), https://www.lincolninst.edu/sites/default/files/pubfiles/1552_777_Article%203.pdf (discussing the evolution of inclusionary zoning and the importance of treating inclusionary housing as a vehicle to recapture for public benefit some part of the gain in land value resulting from public action).

[41] *Id.*

[42] *See* Office of Policy Development & Research, *supra* note 11 (discussing the benefits of inclusionary zoning policies on municipalities and highlighting that beneficiaries of these ordinances include not only minimum-wage workers, but also teachers, police officers, and service workers – productive citizens who form the foundation of any community).

[43] *Id.* (highlighting that municipalities federal and state funding have decreased over the years due to smaller or stagnant budgets for affordable housing creation and preservation).

[44] *See generally* Timothy S. Hollister et al., *National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances*, NATIONAL ASSOCIATION OF HOMEBUILDERS 2 (2007) (surveying state inclusionary zoning enabling acts and suggesting ways to structure inclusionary zoning ordinances).

the type of program (voluntary or mandatory); 2) the scope of the program (neighborhood based or citywide); 3) specific affordable housing requirements (longevity of affordability restrictions and targeted households); 4) potential incentives (density bonuses, tax abatements, etc,); and 5) whether or not to provide in-lieu options (allow for off-site development or payment into an affordable housing trust fund).[45]

Some inclusionary zoning policies are voluntary, while others are mandatory.[46] Voluntary programs entice developers with incentives in order for them to add affordable units to their market rate developments.[47] On the other hand, with mandatory programs a developer project is approved on the condition that he/she set aside a certain percentage of affordable units in the project.[48] Proponents of voluntary programs tend to assume that there will be enough ways to offset the costs associated with inclusionary development, in turn incentivizing developers to create affordable units.[49] Yet, proponents of mandatory programs do not think that voluntary programs will provide enough motivation to deliver affordable units, even if there is no additional financial burden to the developer.[50]

At the core of inclusionary zoning programs are the affordable housing

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[45] Mukhija, *supra* note 32 at 224 (stating that although inclusionary zoning policies must be personalized to address a municipalities unique housing needs there is still a framework that must be addressed in order to create a well-developed inclusionary zoning policy).

[46] *Id.*

[47] Laura Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 HOFSTRA L. REV. 539, 552 (1995) (discussing the legal challenges to 'inclusionary housing programs, including challenges on the grounds that inclusionary housing constitutes a taking, violates substantive due process and equal protection, imposes invalid restraints on alienation, and violates antitrust law).

[48] *Id.*

[49] Mukhija, *supra* note 32 at 224.

[50] *Id.* Some research has shown that mandatory inclusionary zoning programs have had a higher rate of success in creating housing for low- income households than voluntary programs. *Id*. at 227.

specifications, and there are several important elements that should be considered.[51] First, local governments have to decide what the appropriate set-aside proportion of inclusionary zoning housing will be.[52] Set-aside requirements vary a great deal based on each city's individual needs, and can range anywhere from five to thirty percent of the total housing units being developed.[53] Nonetheless, it is most common for the set-aside percentage to be between ten to fifteen percent.[54] In addition to the percentage of units that must be set aside as affordable, local governments have to clarify the period of the affordable housing restrictions.[55] This can be as short as ten years and as long as ninety-nine years.[56] Finally, localities must establish income level thresholds for the set-aside units.[57] In general, programs that require the set-aside units to be for lower income levels usually have a smaller set-aside proportion in order to offset the cost of providing more deeply subsidized units.[58]

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[51] Jenny Schuetz, et al, *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC, and Suburban Boston*, 75 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 441, 446 (2009) (highlighting that in addition to determining how many units should be affordable, municipalities must also addresses the income levels that will be eligible for the affordable units and the length of the affordability restriction on the units).

[52] *Id.*

[53] Antonio Bento., et al., *Housing Market Effects of Inclusionary Zoning*, 11 CITYSCAPE: A JOURNAL OF POLICY DEVELOPMENT AND RESEARCH 7, 9 (2009) (explaining inclusionary zoning's multiple features and highlighting how the set aside percentages are based on each municipalities affordable housing needs).

[54] Vinit Mukhija, et. al, *Can Inclusionary Zoning Be an Effective and Efficient Housing Policy? Evidence from Los Angeles and Orange Counties*, 32 JOURNAL OF URBAN AFFAIRS 229, 229 (2010). Survey results from 98 out of 107 known IZ programs in California at the time indicated that the majority of programs required 10– 14% affordable units, while a follow-up study found that the most common inclusionary percentage was 10; approximately, half the jurisdictions required at least 15%; and a quarter required 20% or more. *Id*. at 235.

[55] Bento *supra* note 53.

[56] *Id.*

[57] Mukhija, *supra* note 32 at 225; Kalima Rose et. al, *Increasing Housing Opportunity in New York City: The Case for Inclusionary Zoning*, POLICYLINK & PRATT INSTITUTE CENTER FOR COMMUNITY AND ENVIRONMENTAL DEVELOPMENT 1, 33 (2004) (stating "A jurisdiction that wants to provide housing for moderate-income households, such as public sector employees, might set an income target at 80 percent of the AMI. Jurisdictions seeking to create affordable units for lower-income wage earners might choose an income target of 50 percent of AMI. Jurisdictions with affordability challenges across income categories often tier their income target to serve diverse needs (e.g., half the units at 50 percent of AMI, half the units at 80 percent of AMI).")

[58] Mukhija, *supra* note 32 at 225.

Many inclusionary zoning programs include different types of incentives to encourage the creation of affordable housing and lessen the impacts on the cost to developers of providing those units.[59] Some forms of incentives include: density bonuses; expedited permitting; fewer design requirements; fee waivers; subsidies from federal, state and local governments; and tax breaks.[60] Incentives can help ensure that it will be financially feasible to build the housing development, including the set-aside proportion of affordable units intended for individuals and households of lower incomes.[61] Municipalities can offer anywhere from one to an entire suite of incentives.[62]

A final consideration in the design of inclusionary zoning programs is whether or not there will be other options available to the developer.[63] Many municipalities offer alternatives to creating inclusionary housing units on-site.[64] For example, instead of constructing units on-site, developers may be permitted to pay a fee to the municipality's housing trust fund in lieu of providing units.[65] The developer may even be able to provide units off-site in another neighborhood.[66] Usually, these alternatives are allowed when they would result in the creation of

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[59] *Id.*

[60] *Id.* at 225-226 (stating that it is unclear exactly how cities decide which incentive to offer or how they update these fees as time passes).

[61] *See id.* (stating that it's assumed that local governments go through a stakeholder review and negotiation process before crafting their inclusionary zoning policies).

[62] *See* Mukhija, *supra* note 32 at 225. In California, density bonuses are the most common incentive. *Id.* In addition, some Californian jurisdictions offer expedited permits and approvals. *Id.* Others have relaxed design standards regarding setback and parking reductions and give developers fee waivers. *Id.*

[63] Rick Jacobus, *Inclusionary Housing: Creating and Maintaining Equitable Communities*, LINCOLN INSTITUTE OF LAND POLICY 28 (2015), https://www.lincolninst.edu/sites/default/files/pubfiles/inclusionary-housing-full_0.pdf.

[64] *Id.*

[65] *Id.* Off-site development is a much more flexible options for developers. *Id.* However, cities need to ensure that off-site properties are located in appropriate neighborhoods and built to a high standard of quality. *Id.*

[66] *Id.* at 30.

substantially more affordable units than would have been created on-site, or the inclusion of affordable units on a particular site (particularly in high-end residential developments) would result in an undue financial hardship for either the developer or the potential occupant.[67] These options provide flexibility but it is unclear how local governments decide on these options and how they are updated over time and as changes occur in the marketplace.[68]

History of Inclusionary Zoning

The first inclusionary zoning policies were created in the early 1970s as an effort to counter years of exclusionary practices.[69] Inclusionary policies were created in affluent suburbs around Washington, D.C. and San Francisco and were designed to integrate people from different racial and socioeconomic background, to combat sharp housing costs, and to manage urban sprawl through the use of exactions.[70] Furthermore, during the 1980s, inclusionary zoning was used to curb the effects of the Reagan administration's severe cuts in federal funding for affordable housing.[71] Although inclusionary zoning policies originally focused on creating mixed-income suburban communities, it quickly expanded to more urban

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[67] *Id.* Most cities allow for offsite affordable housing development when condo fees and other amenities fees are extremely high, making it difficult for affordable housing residents to afford to pay them in addition to rent. *Id*. at 38.

[68] Mukhija, *supra* note 32 at 226. More in depth case studies are needed to assess how successful in lieu fees are at creating affordable housing. *Id.*

[69] Calavita, *supra* note 40 at 15-16 (discussing the evolution of inclusionary zoning and the importance of treating inclusionary housing as a vehicle for recapturing for public benefit some part of the gain in land value resulting from public action).

[70] *Id*. Exactions are burdens or requirements a local government places on a developer to dedicate land or construct or pay for all or a portion of the costs of capital improvements needed for public facilities as a condition of development approval. Michael Kersten, *Exactions, Severability, and Takings: When Courts Should Sever Unconstitutional Conditions from Development Permits?*, 27 B.C. ENVTL. AFF. L. REV. 279, 280 (2000).

[71] Calavita, *supra* note 40 at 16.

cities.[72] To date, roughly five hundred municipalities across the United States have adopted inclusionary housing policies.[73]

Benefits of Inclusionary Zoning

The United States is facing an affordable housing crisis in which more and more people are unable to afford decent shelter.[74] Approximately twelve million renters and homeowners pay more than fifty percent of their annual incomes on housing costs, making it difficult for them to afford other necessities such as food, medical care, and transportation.[75] In addition, most major U.S. cities cannot provide affordable housing for moderate to low income families and individuals, including the elderly and disabled residents.[76] Thus, inclusionary zoning is a major tool that is used to address this affordable housing crisis, since it provides a wide range of housing options.[77] In fact, inclusionary zoning utilizes private sector development to create affordable housing without large amounts of public

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[72] *Id.*

[73] Brentin Mock, *Inclusionary Zoning Does Not Drive up Housing Costs*, CITY LAB (June 1, 2016), https://www.citylab.com/equity/2016/06/what-we-know-about-inclusionary-zoning-thus-far/485072/ (stating that while there are over 500 cities and counties with inclusionary zoning policies they are mostly concentrated in just three states: California, New Jersey, and Massachusetts).

[74] Office of Community Planning and Development, *Affordable Housing*, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (2017), https://www.hud.gov/program_offices/comm_planning/affordablehousing/ (highlighting the programs and funding that the United States Department of Housing and Urban Development provides to support affordable housing including the HOME Investments Partnerships Program and The National Housing Trust Fund).

[75] *Id.* In fact, a family with one full-time minimum wage worker cannot afford to pay market-rate for a two-bedroom apartment anywhere in the United States. *Id.*

[76] Nick Brunick et al., *Large Cities and Inclusionary Zoning*, BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST 2 (Nov. 2003), http://www.wellesleyinstitute.com/wp-content/uploads/2013/01/ResourceUS_BPI_IZLargeCities.pdf.

[77] *Id.* at 3.

subsidies.[78] This allows large cities to use their federal, state, and local funding to address other pressing public needs.[79]

Inclusionary zoning alleviates racial and social segregation by mixing affordable housing units with market rate units.[80] Scholars actually believe that the location of the affordable units in higher opportunity areas allow for neighborhood integration which has a greater impact on lower income households.[81] Overall, the communities that have inclusionary zoning units have seen higher levels of income and racial integration than communities that do not have affordable housing units created through inclusionary zoning.[82]

Lastly, inclusionary zoning helps to prevent sprawl and disinvestment.[83] A lack of affordable housing in cities promotes sprawl because buying homes further away from the city are generally cheaper.[84] Therefore, with inclusionary zoning programs, large cities can use density bonuses and incentives to increase

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[78] Brunick, *supra* note 76 at 2; Lerman, *supra* note 29 at 392. However, it is important to remember that the premise of inclusionary housing depends on a strong housing market, as private developers must be confident that they will be able to sell or rent the market-rate units before they commit to delivering below-market-rate units. *Id*. at 393. This has important implications for cities that have a weak housing market, or when economic recessions impact even strong housing markets. *Id.* In essence, inclusionary zoning programs are very susceptible to macroeconomic trends. *Id.* If a city is in need of affordable housing and it does not have a strong housing market, or it is not experiencing economic investment, inclusionary zoning will likely not be a viable tool. *Id.*

[79] Brunick, *supra* note 76 at 2-3.

[80] *Id.* at 3 (stating that racial and socioeconomic segregation have contributed to increased crime rates, failing schools, and a lack of social stability).

[81] Rick Jacobus, *In Defense of the "Poor Door,"* ROOFLINES (Oct. 14, 2015), http://www.rooflines.org/4267/in_defense_of_the_poor_door/ (stating that concentrating affordable housing in low-income areas and poverty stricken areas result in bad outcomes for those residents). However, integration affordable units into mixed income areas have positive effects on low income youth. *Id*.

[82] Constantine Kontokosta, *Mixed- Income Housing and Neighborhood Integration: Evidence from Inclusionary Zoning Programs*, 36 Journal of Urban Affairs 716, 736 (2014) (exploring whether inclusionary zoning programs encourage stable and sustainable neighborhood integration over time). "The findings indicate that the effect of inclusionary zoning units on neighborhood racial and income transition is dependent on the siting of inclusionary zoning units, the initial characteristics of the neighborhoods in which they are built, and the institutional framework of the inclusionary zoning program." *Id*. at 1.

[83] Nick Brunick et al., *supra* note 76 at 3.

[84] *See id.* (stating that land prices impact housing prices, so land further away from the city center is cheaper that land directly located in the center of a city).

affordable housing and reduce the pressure to continually sprawl to the outer edges of cities and surrounding neighborhoods to create affordable units.[85]

Mount Laurel Paved the Way for Inclusionary Zoning

Southern Burlington County NAACP v. Township of Mount Laurel (hereinafter *Mount Laurel I*) was the first case where a court declared that municipalities have an obligation to craft regulations in a way that make a wide variety of housing options available to residents, including low-income housing.[86] The NAACP brought a suit against the town of Mount Laurel when it refused to change its minimum half acre zoning ordinance, which eliminated the proposed development of low-income housing.[87] The NAACP claimed that the township of Mount Laurel was abusing New Jersey's delegation of zoning power to the municipality by not zoning the land to benefit all Mount Laurel constituents equally.[88] In a unanimous decision, the New Jersey Supreme Court ruled that zoning ordinances that make it physically and economically impossible for low and moderate income families to afford housing are unconstitutional.[89] The court

[85] *Id*. If affordable housing cannot be found in the city, developers and citizens will look to the fringe of the metropolitan region, where land costs are lowest, in order to develop and buy housing that is more affordable. *Id.* Increased sprawl in a large metropolitan region can mean reduced public and private investment in large urban cores. *Id.*

[86] John Payne, *Reconstructing the Constitutional Theory of Mount Laurel II*, 3 WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 555, 557-558 (2000). The New Jersey Supreme Court's 1983 ruling in the Mount Laurel fair-housing case is regarded as one of the most important civil rights decisions of modern times because it limited the use of exclusionary zoning as a means of preventing the construction of affordable housing in wealthy communities. Fair Share Housing Center, *What is the Mount Laurel Doctrine?*, FAIR SHARE HOUSING CENTER, http://fairsharehousing.org/mount-laurel-doctrine/ (last visited April 8, 2018).

[87] Southern Burlington County NAACP v. Mount Laurel Tp., 336 A.2d 713, 719,722 (N.J., 1975).

[88] *Id.* at 724.

[89] *Id.* at 729, 732.

found the scheme violated the state's obligation to protect equally all its citizens because the land use ordinance aided one group of inhabitants while harming the general population.[90]

Eight years later, *Mount Laurel II* clarified the obligation of all developing municipalities in New Jersey to provide an opportunity for low-income families to afford housing through inclusionary zoning provisions.[91] The Mount Laurel Doctrine requires that all municipalities in New Jersey address the regional need for low and moderate income housing by providing a realistic plan for the construction of affordable residential units.[92] The court placed the burden on the municipalities to develop a comprehensive plan to provide a fair share of affordable housing in their cities or towns.[93]

Criticism and Legal Challenges to Inclusionary Zoning

Over the years, there have been challenges to inclusionary zoning policies.[94] Many of these challenges stem from private developers who do not believe the burden of solving the affordable housing crisis should be carried by the public at large, and not private companies like themselves.[95] By requiring

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[90] *Id.* at 724, 727-28.

[91] Southern Burlington County NCAPP v. Mount Laurel Tp., 456 A.2d 390, 420 (N.J., 1983) (stating that the obligation to provide affordable housing should be "phased in" over the years).

[92] Kenneth Meiser, *Mount Laurel Doctrine: A 25(plus)-year Personal Perspective*, 188 NEW JERSEY LAWYER 8, 10 (1997) (showing that *Mount Laurell II* went further and required municipalities to provide inducements and incentives in order to create more affordable housing).

[93] Fair Share Housing Center, *supra* note 86.

[94] Renee Willis, *From the Field: California Supreme Court Upholds Inclusionary Housing*, NATIONAL LOW INCOME HOUSING COALITION (June 29, 2015), http://nlihc.org/article/field-california-supreme-court-upholds-inclusionary-housing (citing *Cal. Bldg. Indus. Ass'n v. City of San Jose* as a major victory for affordable housing because it determined that inclusionary zoning ordinances in California do not amount to a takings).

[95] Maura Dolan, *Developers Can Be Required to Include Affordable Housing, California High Court Rules*, LA TIMES (Jun. 15, 2015), http://beta.latimes.com/local/lanow/la-me-ln-affordable-housing-20150615-story.html

subsidized housing, inclusionary zoning makes it harder for developers to build and increase housing supply.[96] Since the creation of the first inclusionary zoning policy, opponents, especially developers subjected to these policies, have argued that they are a regulatory taking.[97]

The constitutional authorization to enact zoning ordinances stems from the states' police power.[98] The police power justifies government action if the action promotes and preserves public health, safety, and welfare.[99] However, the power granted to the municipality through the state is limited by the Fifth Amendment of the United States Constitution, which prohibits the taking of private property without just compensation.[100] A taking can be either physical or regulatory.[101] A physical taking is when the government uses eminent domain to take ownership of a private party's property.[102] A regulatory taking is when a government regulation goes "too far" and removes a property interest from the owner, weakening owners' rights to use their property in the manner that they desire.[103] The underlying rationale against takings is that that property owners have a vested right in their property and should be able to receive a return on their investment.[104] Thus, to some, inclusionary zoning's affordability requirement is a

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(highlighting how Los Angeles' inclusionary zoning ordinance was affirmed by the California Supreme Court and paved a way for other cities and counties to create mandatory inclusionary zoning policies) .

[96] *Id.*

[97] *Id.*

[98] Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 390, 392 (1926) (recognizing legality of municipal zoning by upholding zoning measures aimed at designating industrial zoning areas in Euclid).

[99] *Id.* at 395 (recognizing that urban development needed land use control tools in order for a municipality to govern itself as it sees fit).

[100] Jacobus, *supra* note 63 at 43.

[101] Audrey G. McFarlane & Randall K. Johnson, *Cities, Inclusion and Exactions*, 102 IOWA L. REV. 2145, 2168 (2017).

[102] *Id.* at 2169.

[103] *Id.*

[104] *Id.*

regulatory taking because it forces developers to lose some income, which is in conflict with individual property rights.[105]

Inclusionary Zoning as an Ordinary Land Use Regulation

When there is a takings challenge to an inclusionary zoning ordinance, courts apply the regulatory takings balancing test created by the United States Supreme Court in *Penn Central Transportation Co. v. New York City*.[106] There, the Court held that the New York City Landmarks Preservation Commission's refusal to approve the construction of a 50-story office building over Grand Central Terminal did not constitute a "taking" of the property without just compensation because the city did not take control of the property.[107] It only limited its use.[108] The Court assessed three factors to determine whether a taking occurred.[109] First, the Court measured the economic impact of the regulation on the claimant.[110] Second, the Court evaluated the extent to which the regulation interfered with "distinct investment backed expectations."[111] And third, the Court looked at the character of the government action.[112]

For the first factor, the Court found that in relation to the plaintiff's entire bundle of property rights, the restricted use imposed by the regulation was

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[105] *Id.*

[106] *See* Jacobus, *supra* note 63 at 43. Under this doctrinal lens, inclusionary zoning is a valid land use regulation adopted to ensure a proper balance of housing within the jurisdiction. *Id.* Thus, the Penn Central test is appropriate. *Id.*

[107] *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 121 (1978).

[108] *Id.*

[109] *Id.* at 124.

[110] *Id.*

[111] *Id.*

[112] *Id.* (finding that the regulation's purpose of preserving historical buildings was a valid exercise of authority and promoted the general welfare).

inadequate to find a taking.[113] In regard to the second factor, the court found that the even though the regulation affected the plaintiffs "investment-backed expectations," the Court found that there was no taking because the plaintiff could still generate revenue from the property.[114] Last, the Court held that the regulation was substantially related to the promotion of the general welfare.[115] Thus, to be considered a taking under the *Penn Central* test, a local ordinance would essentially have to allow the government to physically invade and take control of the property.[116]

Courts have upheld land use regulations that resulted in severe decreases in economic value since *Penn Central*.[117] These holdings show that courts may uphold the validity of a regulation when its purpose is beneficial to the public, even though the regulation prevents owners from selecting the most lucrative land use.[118] These holdings also speak to the importance of judicial deference to the legislature for local land use regulations unless the regulation is arbitrary and capricious.[119] A regulation is seen as arbitrary and capricious when it stops an owner from using his land in the way that he sees fit, both physically and financially, without a rational public benefit or serious justification for the limitation.[120]

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[113] *Penn Cent. Transp. Co.*, 438 U.S. at 130.

[114] *Id.* at 131.

[115] *Id*. at 132.

[116] Jacobus, *supra* note 63 at 42.

[117] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1064 (1992) (Stevens, J., dissenting) (noting that 95% would not be a taking but 100% would constitute a taking).

[118] *See* Avery Emison Carson, Comment, *Integrating Conservation Uses into Takings Law: Why Courts Should View Conservation as a Possible Highest and Best Use*, 86 N.C. L. REV. 274, 281-87 (2007) (indicating inconsistencies in how courts determine "highest and best use" in valuing land).

[119] McFarlane & Johnson, *supra* note 101 at 2170.

[120] *Id.*

Inclusionary Zoning as an Exaction

In *Nollan v. California Coastal Commission* (hereinafter *Nollan*) and *Dolan v. City of Tigard* (hereinafter *Dolan*), the Supreme Court outlined a stricter standard for development conditions imposed ad hoc or through negotiation as part of the land use approval process.[121] Under the *Nollan-Dolan* standard, such a requirement must (1) have an "essential nexus" to the impact of the development that is being mitigated by the condition; and (2) the condition must be "roughly proportional" to the impact that the development is likely to have on the problem that the condition is intended to mitigate.[122]

In *Nollan*, the Court held that a regulation requiring the plaintiff to have an easement across his beach front property in order for the public to visually access the beach violated the Fifth Amendment.[123] Even though plaintiff retained considerable value, the Court found that there was not a nexus between the easement and the government's purpose which was to protect the public's visual access to the coastline.[124] A few years later in *Dolan*, the court added that in addition to there being a nexus between the imposed condition on the plaintiff and the government's purpose, the condition also had to be "roughly proportional" to the impact of the proposed development.[125] There, the plaintiff owned an

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[121] *Id.*
[122] See *id.* at 2176- 77.
[123] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987).
[124] *Id.* at 836-37.
[125] *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994) (explaining that a reviewing court "must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city" before examining the degree of connection between the exaction and projected impact of the proposed construction (quoting *Nollan*, 483 U.S. at 837)).

electrical supply store and wanted to expand the store on her parcel.[126] When she applied for a permit to do just that, the city conditioned her permit on the dedication of two portions of her land to the city as a public access pedestrian/bicycle pathway.[127] The Court found that the City of Tigard failed to establish that the burden it was imposing on the plaintiff was "roughly proportional" to the impact that she would create through her building proposal.[128] Thus, these conditions constituted a taking.[129] *Nollan* and *Dolan* focus on the "unconstitutional conditions" doctrine, which limits the government's authority to condition a benefit on the waiver of a constitutionally protected right.[130]

The rulings in *Nollan-Dolan* convey judicial concerns that property owners may often be powerless against far reaching governmental action.[131] Under these cases, inclusionary zoning could be viewed as an "unconstitutional condition" because the right to build is conditioned on including affordable units.[132] The affordable units must be directly proportional to the impact that the specific development at hand has on the community.[133] Inclusionary zoning opponents advocate for courts to assess inclusionary zoning ordinances by using

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[126] *Id.* at 379.

[127] Id. at 378-80 (one part of the plaintiff's land that the city wanted to take was a flood plain area. The city explained to the plaintiff that the municipality had enacted a master drainage plan as part of its community development code that suggested the floodplain of a local creek be free from structures and remain a green space in order to minimize flood damage).

[128] *Id.* at 394 (stating "We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.").

[129] *Id.* at 396.

[130] Rick Jacobus, Inclusionary Housing: Creating and Maintaining Equitable Communities, LINCOLN INSTITUTE OF LAND POLICY 1, 43 (2015), https://www.lincolninst.edu/sites/default/files/pubfiles/inclusionary-housing-full_0.pdf.

[131] *See* Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 14-15 (2000) ("[T]he choice of the word 'exaction' ... amounts to a linguistic stacking of the deck. ... [I]t connotes something done by one (powerful) party to another (powerless) party.".

[132] *See* McFarlane & Johnson, *supra* note 101 at 2179.

[133] *Id.*

the the *Nollan* "essential nexus" test and *Dolan* "proportionality test."[134] Under this test, they believe that most inclusionary zoning standards would fail.[135] However, *Nollan* and *Dolan* concern government's exactions of real property interests in ad hoc individualized land use bargains.[136] There is still a lack of case law to fully determine whether the *Nollan-Dolan* test also applies to legislatively adopted exactions applied to the public at large.[137]

In the most recent exactions case, *Koontz v. St. Johns River Water Management District*, the United States Supreme Court ruled that the *Nollan-Dolan* test could apply to monetary exactions.[138] In *Koontz*, the plaintiff owned fourteen acres of land that contained extensive wetlands area.[139] Plaintiff wanted to build a shopping mall on the land, and because the construction included dredging and filling the wetlands, he needed to obtain a permit from the Water Management District and mitigate for the loss of the wetlands.[140] The Water Management District conditioned the permit on the plaintiff reducing the size of the shopping mall to one acre and deeding a conservation easement to the District for the remaining acres or pay to perform offsite mitigation on other properties within the river's drainage area.[141] The Court ruled that the *Nollan- Dolan*

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[134] Tim Iglesias, *Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and its Potential to Meet Affordable Housing Needs*, 36 ZONING AND PLANNING LAW REPORT 8 (2013).
[135] *Id.*
[136] *Id.* at 9.
[137] *Id.*
[138] Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 2586, 2591 (2013) (noting "the Court's holding that monetary exactions are subject to scrutiny under Nollan and Dolan will not work a revolution in land use law or unduly limit the discretion of local authorities to implement sensible land use regulations. The rule that Nollan and Dolan apply to monetary exactions has been the settled law in some of our Nation's most populous States for many years, and the protections of those cases are often redundant with the requirements of state law.")
[139] *Id.* at 2592.
[140] *Id.*
[141] *Id.* at 2593.

standard applied to monetary exactions in addition to real property exactions.[142] Thus, *Koontz's* outcome clarified that all development exactions—whether a requirement to dedicate land, or payment of a fee in lieu of dedication, or imposition of a development impact fee—must meet the *Nollan-Dolan* standard.[143] This means that any exaction must have a rational nexus to the regulatory purposes of the permit and the exaction must be "roughly proportional" to the impact of the development on the community.[144] However, it did not specify whether the *Nollan-Dolan* test also applies to legislatively enacted impact fee that broadly applies to developer and not just administratively enacted impact fees applied ad hoc.[145]

In 2015, the California Supreme Court addressed the use of the *Nollan-Dolan* test to a takings challenge to the City of San Jose's inclusionary housing ordinance in *California Building Industry Association v. City of San Jose*.[146] There, the ordinance required that developers of residential projects with 20 or more units must either set aside 15 percent of on-site for-sale units as affordable, provide affordable housing off-site, or pay an in-lieu fee.[147] The court ruled that

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[142] *Id.* at 2603.

[143] *Id.*

[144] *Id.* at 2595 (stating "The principles that undergird our decisions in Nollan and Dolan do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine.").

[145] Audrey G. McFarlane & Randall K. Johnson, *Cities, Inclusion and Exactions*, 102 IOWA L. REV. 2145, 2168 (2017).

[146] *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 977-78 (Cal. 2015), cert. denied, 136 S. Ct. 928 (2016).

[147] *Id.* at 991 ("Rather than being an exaction, the ordinance falls within what we have already described as municipalities' general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large.").

the inclusionary zoning ordinance did not impose conditions upon developers' property in a manner that would violate either the federal or California takings clause.[148] The court observed that the city's legitimate purposes in adopting the ordinance were to increase the supply of affordable housing and to distribute affordable housing across economically diverse neighborhoods.[149] The court clarified that the "unconstitutional conditions" doctrine applies when the government takes a property interest from a property owner.[150] For San Jose's inclusionary housing ordinance, the court ruled that it operated as a price control on housing and did not take any property interest from owners, thus it was only subject to the *Penn Central* test.[151]

The victory in San Jose surprised many affordable housing advocates because a few years earlier in 2009, the California Court of Appeal suspended the enforcement of the City of Los Angeles' inclusionary zoning ordinance for rental housing development on the grounds of state preemption in *Palmer/Sixth Street Properties v. City of Los Angeles*.[152] There, Los Angeles had a plan for Central City West, which required developers to either reserve 15 percent of new units for low-income households, or replace any low-income units that had been demolished, which ever created more affordable units.[153] The requirements were

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[148] *Id.* at 992.
[149] *Id.*
[150] *See* Jacobus, *supra* note 130 at 44.

[151] *Id.*
[152] National Low Income Housing Coalition, *From the Field: California Supreme Court Upholds Inclusionary Housing* (June 29, 2015), http://nlihc.org/article/field-california-supreme-court-upholds-inclusionary-housing.
[153] Barbara E. Kautz, Goldfarb & Lipman LLP, & Ethan Walsh, McDonough Holland & Allen, Adjusting to Palmer, CALIFORNIA REDEVELOPMENT ASSOCIATION (March 10-12, 2010), http://nonprofithousing.org/wp-content/uploads/CRA-Journal-Article-on-Palmer-February-2010.pdf.

based on a study the showed that new development in the area was negatively impacting the affordable housing stock.[154] The plaintiff, a developer, challenged the ordinance by arguing that it violated Costa-Hawkins, a state law that allowed "landlords to set the initial rent for a new unit and to increase the rent to market levels whenever a unit is vacated."[155] The court agreed with the plaintiff and found inclusionary zoning ordinances for rental housing to be an illegal form of rent control and was preempted by state law.[156]

Given the case law, the use of the *Nollan-Dolan* test appears to depend upon whether an inclusionary zoning program is implemented legislatively or administratively.[157] If the legislation conditions development, it means that the government has created generally applicable requirements that apply to every developer, and the *Nollan-Dolan* test does not apply.[158] However, if the inclusionary zoning program involves case-by-case implementation, with different requirements being imposed on different developers, then the process would seem to be more administrative than adjudicative and would deserve closer review under the *Nollan-Dolan* standard.[159]

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[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] McFarlane & Johnson, *supra* note 101 at 2174 (citing Dolan, 512 U.S. at 391 (noting that this distinction is mentioned in Dolan only). "[I]n Dolan, the Court placed the burden of proof to uphold the exaction on the city, with the unconvincing explanation that the city was engaged in making an adjudicative decision." Id. at 367; *see also* Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in the denial of certiorari) (noting the split between lower courts over the legislative-administrative distinction and expressing "doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking"' (quoting Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116, 1117-18 (1995))).

[158] *Id.*

[159] *Id.*

Tennessee's Prohibition Against Inclusionary Zoning

Only, two states —Texas and Tennessee—have explicit prohibitions against inclusionary housing.[160] In fact, in April 2016, the Tennessee General Assembly passed Senate Bill 1636 that prohibits local governments from enacting zoning regulations that require the allocation of a percentage of existing or newly constructed private residential or commercial rental units for long-term retention as affordable or workforce housing.[161] Senate Bill 1636 was introduced by Republican Senator Ferrell Haile and Republican Representative Glen Casada as a direct result of Nashville's early efforts to develop its affordable housing program through inclusionary zoning.[162] The bill, which was codified to law, prohibits mandatory inclusionary zoning, but allows for an incentive-based approach that encourages the construction and rehabilitation of lower-cost private residential or commercial rental units.[163] This prohibition applies to all current and future zoning regulations.[164]

The Republican led legislature passed the bill after outcries from the business community that it was unfair for them to bear the additional expenses associated with affordable housing.[165] Furthermore, Republican lawmakers feared

[160] Grounded Solutions Network, *Is Inclusionary Housing Legal?*, https://inclusionaryhousing.org/inclusionary-housing-explained/what-are-the-downsides/is-it-legal/.

[161] Joey Garrison, Nashville Sued Over New Affordable Housing Law, TENNESSEAN (Apr. 24, 2017), http://www.tennessean.com/story/news/2017/04/24/nashville-sued-over-new-affordable-housing-law/100460976/.

[162] Joey Garrison, State Eyes Nashville Affordable Housing Debate, WAUSAU DAILY HERALD (Oct. 30, 2015), https://www.wausaudailyherald.com/story/news/politics/2015/10/30/state-eyes-nashville-affordable-housing-debate/74684580/.

[163] Tenn. Code Ann. §66-35-102, 109 Reg. Sess. (2015-2016).

[164] *Id.*

[165] See Garrison, *supra* note 161.

that an inclusionary zoning policy in Nashville could stunt development in middle Tennessee, an area that just recently began experiencing a boost in its economy.[166]

Nashville is Subject to Dillon's Rule

Under Dillon's Rule, municipalities can only create legislation based on the powers that are specifically delegated to them by state law.[167] The rationale behind this rule is that local governments are an extension of the state and must carry out the state's goals and not legislate outside of the scope set for them.[168] Because of Dillon's Rule, Tennessee's passage of Senate Bill 1636 was within its jurisdiction even though it had delegated zoning police powers to its municipalities.[169]

In 1944, the Supreme Court of Tennessee clarified that municipalities are tenants of Tennessee in *Miller v. City of Memphis*, when it stated that:

> A municipality has no inherent authority to enact ordinances whose validity and enforcement rest on general police powers. All powers of a

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[166] *Id.* (stating that "'This is an issue I think all of us are watching very closely on the state level because it is one where if developers stop coming to Nashville, and Nashville stops growing, that will potentially have a chilling effect on the entire region,' Lamberth said. 'That's what all of us, I think, want to avoid. I'm very hopeful that Nashville will make the right choice in how to deal with affordable housing.'").

[167] John Russell & Aaron Bostrom, *Federalism, Dillon Rule and Home Rule*, White Paper A Publication of the American City County Exchange (Jan. 2016), https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf (stating that "local governments across America follow one of two types of governing authority: Home Rule or the Dillon Rule. Home Rule, as it sounds, gives local governments governing authority to make a wide range of legislative decisions that have not been addressed by the state. By contrast, the Dillon Rule creates a framework where local governments can only legislate what the state government has decreed. Both forms of governing authority were created by the states to help carry out the mission of the states at a local level.")

[168] *Id.*

[169] Department of Economic & Community Development Local Planning Assistance Office, *Tennessee Planning Commissioner Training Handbook: "A Closer Look at Zoning,"* (May 2004) (stating, "Tennessee's planning legislation, which includes zoning authority, was adopted in 1935 and was patterned after model legislation drawn up by the Federal government in the 1920's. The planning legislation delegates to municipalities and counties the power to adopt and enforce zoning regulations, based on the concept of 'police powers'. Police powers are the powers a community has to control the activities of private parties in the name of the public good. Public 'health, safety, and welfare' is often cited to enforce police powers.").

> municipality are derived from the state, but it cannot be doubted that the state may delegate its authority or some portion of it. The police power primarily inheres in the state, but if the state constitution does not forbid, the legislature may delegate a part of such power to the municipal corporation of the state, either in express terms or by implication.
>
> By the same token, the State may, without offering rationale, withhold or limit its delegation, and over the years the General Assembly has modified the activities which localities may regulate through zoning.[170]

Thus, even though Tennessee delegated zoning rights to Nashville, Senate Bill 1636 took back some of those rights and gave explicit guidelines on the types of inclusionary zoning programs that would be permitted.[171]

Nashville's Inclusionary Zoning Ordinance

Although Nashville was aware that it was being heavily watched by the state legislature, it defied state law and passed an Inclusionary Zoning Ordinance, BL2016-133, a few months later in September 2016.[172] Nashville's Inclusionary

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[170] *Id.*; Miller v. City of Memphis, 178 S.W.2d 382, 382 (1944). In 2002, the Tennessee Supreme Court reaffirmed the validity of Dillon's Rule in Tennessee in *Southern Contractors, Inc. v. Loudon County Board of Education* against the plaintiff's desire that it be eliminated. Southern Contractors, Inc. v. Loudon County Board of Education, 58 S.W.3d 706 (Tenn. 2001). The court found Dillon's Rule to be reasonable and consistently applied to determine the scope of local government authority in Tennessee for more than a century. *Id.* at 710.

[171] *See* Tenn. Code Ann. §66-35-102, 109 Reg. Sess. (2015-2016).

[172] Garrison, *supra* note 159; Second Substitute Ordinance No. BL2016-133, An ordinance to amend various sections of Title 17 of the Metropolitan Zoning Code to incentivize Inclusionary Housing with any residential development that seeks additional development entitlements beyond that permitted by the current base zoning district (2016). The purposes of this ordinance are:

> to promote the public health, safety and welfare by increasing the production of inclusionary housing units to meet existing and anticipated housing and employment needs; mitigating the impacts of increasing housing cost and provide housing affordable to low and moderate income households; providing for a range of housing choices throughout the city to avoid the concentration of poverty; and to provide a mechanism by which residential development can contribute in a direct way to increasing the supply of affordable and workforce housing in exchange for additional development entitlements other than those otherwise permitted as a matter of right. *Id.*

Zoning Ordinance requires residential apartment developers in Nashville building five or more units to include a percentage of new affordable or workforce units when they request a zoning variance for greater development rights, develop public property, or receive public assistance.[173] The developer also has the option to pay an in lieu contribution to the housing trust fund.[174] This in lieu contribution would differ based on the location of the proposed development and the needs of the residents in those areas.[175] For onsite construction, the ordinance requires that the affordable units be comparable in size, location, and appearance as the market rate units.[176] In addition, the owner is responsible for ensuring that the units are occupied by eligible occupants and each affordable unit remains affordable for at least 15 years for rental units and 30 years for sale units.[177] For offsite construction, the ordinance requires that the affordable units are developed within a mile of the market rate development.[178] Nonetheless, the ordinance and all of its requirements will only apply when there is adequate financial incentives from the City of Nashville to help developers with the cost of providing this housing.[179]

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[173] Second Substitute Ordinance No. BL2016-133, An ordinance to amend various sections of Title 17 of the Metropolitan Zoning Code to incentivize Inclusionary Housing with any residential development that seeks additional development entitlements beyond that permitted by the current base zoning district (2016).

[174] *Id.*

[175] *Id*.; Metro Zone Ann. Tit.17.36.430 (2000) (quoting "The primary intent of the urban zoning overlay district is to preserve and protect existing development patterns that predate the mid-1950's in portions of metro Nashville that were originally developed before that time and to ensure the compatibility of new development in those older portions of the city. In addition, the urban zoning overlay district is intended to promote reinvestment in areas of metro Nashville originally developed before the mid-1950s by modifying development standards that could add unnecessary expense without improving the safety or compatibility of resulting development. The urban zoning overlay district is also intended to implement provisions of adopted plans that call for particular areas to evolve to a development pattern characterized predominantly by lot sizes, street patterns, and alley systems commonly used before the mid-1950s.").

[176] Metro Zone Ann. Tit.17.40.055 (2016).

[177] *Id.*

[178] *Id.*

[179] *Id.*

Prior to passing this ordinance, Nashville's Planning Department brought together a community task force to work collaboratively to engage the community and best shape the housing policy.[180] This community task force, which also received the support of Nashville's City Council, were directed to pursue an inclusionary zoning policy that required at least fourteen percent of units in all residential development in Davidson County be reserved for affordable or workforce housing.[181] After meeting with stakeholders during an extensive community engagement process and conducting research on a range of affordable housing approaches, the task force contracted out to produce their findings in the Inclusionary Housing Feasibility Study (hereinafter the Study).[182] The Study found that a countywide inclusionary zoning ordinance that is applied to both rental and ownership housing would be the best plan for Nashville.[183] It recommended that Nashville offer the highest incentives in Urban Zone Overlay where development is dense, and along all multimodal corridors designated in the Major and Collector Street Plan.[184]

The task force also recommended that the ordinance be triggered when a project requests a zoning variance or receives public financing.[185] Furthermore, since Tennessee prohibits towns and cities from creating rent control mandates,

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[180] David Plazas, *Affordable Housing in Nashville: Not Now, Not Ever*, TENNESSEAN (Jan. 11, 2018), https://www.tennessean.com/story/opinion/columnists/david-plazas/2017/12/17/affordable-housing-nashville-not-now-not-never/940356001/.

[181] *Id.*

[182] *Id.*

[183] James Fraser, *Housing Policy and Inclusionary Zoning Feasibility Study* (April 5, 2017), http://www.nashville.gov/Portals/0/SiteContent/Planning/docs/InclusionaryHousing/Final%20Report-April%205%202017.pdf

[184] *Id.*

[185] *Id.*

Nashville's inclusionary zoning policy would have to be voluntary for both rental housing and for sale homes and be incentives-based.[186] Thus, in addition to giving developers more height and bulk density, the city would also have to subsidize the difference between the market and affordable rents within the urban zoning overlay.[187] This subsidy would offset the development costs and make it more feasible for developers to include affordable units.[188]

Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County

Since Nashville's inclusionary zoning planning stage, there has been resistance and legal challenges to the policy by the business community. In April 2017, The Beacon Center of Tennessee filed a suit on behalf of the Homebuilders Association of Middle Tennessee against the City of Nashville, claiming that Nashville's inclusionary zoning ordinance was illegal and unconstitutional because it violated state law and the Fifth Amendment's Takings Clause.[189] The Beacon Center sought a declaratory judgment declaring that BL2016-133 was an unconstitutional taking.[190] The Beacon Center of Tennessee viewed Nashville's ordinance as one that forces homebuilders to bear the cost of addressing

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[186] *Id.*

[187] *Id.* (stating "In addition to the value created by the additional density, a rental project that chooses to comply with this policy (and in the UZO or along multimodal corridors) would receive an annual incentive from the City equal to the difference between the market and affordable rents provided in the development up to 50 percent of the difference between the pre- and post-development property taxes.")

[188] Joey Garrison, Nashville Takes Landmark Action on Affordable Housing, The Tennessean (Sept. 7, 2016), https://www.tennessean.com/story/news/2016/09/07/nashville-approves-landmark-affordable-housing-proposals/89909976/.

[189] Wendy Wilson, Beacon Center Sues Metro Nashville Government Over Affordable Housing Law, THE TENNESSEE STAR (May 3, 2017), http://tennesseestar.com/2017/05/03/beacon-center-sues-metro-nashville-government-over-affordable-housing-law/.

[190] Complaint at 15, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Apr. 24, 2017).

affordable housing, resulting in them losing money in an investment in order to promote social welfare.[191] The Beacon Center for Tennessee alleged that homebuilders would rather address affordable housing creation through increasing the supply of housing, but the ordinance stands in the way of that by adding restrictions on their ability to build homes.[192] It also believes that even though Nashville's inclusionary zoning ordinance purports to be "voluntary" because it is only triggered when a developer applies for a variance, since Nashville is already heavily developed, every new development would most likely need a variance.[193] Thus, the policy, in application, is mandatory and not voluntary.[194]

The Beacon Center of Tennessee framed Nashville's inclusionary zoning ordinance as an unconstitutional condition that ultimately constitutes a taking in the Tennessee and United States Constitutions.[195] According to their Complaint, with the ordinance, Nashville conditions the approval of development entitlements needed to build more than five units on a private property owner's surrender of its constitutional right to seek market rate value on their rental or for-sale properties.[196] Thus, with this action the city essentially takes "private property for a public purpose without providing just compensation."[197]

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[191] *Id.*
[192] *Id.*
[193] *Id.* at 7 ("Aside from a sparse few remaining properties that are zoned r-15 or better and do not need to be rezoned to allow a density for a property that makes economic sense to develop, or where Metro has already approved a specific plan district, Metros current zoning map contains no known properties that would allow for development of five (5) or more units without an amendment to the zoning map that would permit additional development entitlements.").
[194] *Id.*
[195] Complaint at 2, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Apr. 24, 2017).

[196] *Id.*
[197] *Id.*

Furthermore, using the *Nollan-Dolan* test, the Beacon Center of Tennessee argued that this affordability requirement "bears neither an essential nexus nor rough proportionality to any alleged adverse impact that private property owners building rental or for-sale residential units supposedly have on affordable housing in the boundaries of Metro Nashville."[198]

In regard to their state preemption claim, the Beacon Center argued that Nashville is a political subdivision of the state and all of its powers are delegated to them by the state.[199] Thus, by creating the inclusionary zoning ordinance out of conformity with Tenn. Code. Ann. § 66-35-102(b), which prohibits all cities and towns from conditioning development on the allocation of a percentage of affordable housing, Nashville violated state law.[200] In addition, even though Tenn. Code. Ann. § 66-35-102(c) permits towns to create an incentive-bases program that is designed to increase affordable housing construction, the state has never given localities "the authority to condition approval of additional development entitlements through amendments to the zoning map."[201] Thus, Nashville exceeded its delegated authority by passing the inclusionary zoning ordinance.[202]

The City of Nashville motioned to dismiss under Tenn. R. Civ. P. 12.02(6) on the grounds that the Beacon Center lacked ripeness and standing for its

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[198] *Id.* at 11.
[199] *Id.* at 12.
[200] *Id.*
[201] Complaint at 12, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Apr. 24, 2017).

[202] *Id.*

claims.[203] In its motion to dismiss, Nashville emphasized that creating affordable housing in the city was such an urgent need that the city would subsidize affordable rental units, dollar for dollar, to meet that need.[204] Thus, their commitment to subsidizing these units was evident in Ordinance BL 2016-342, which was passed on the same day as the inclusionary zoning ordinance and which provides grants that will subsidize the amounts that developers will lose from the reduced rents.[205] Furthermore, the city is aware that if they run out of grant funding, then they will not require developers to set aside a certain percentage of their development to affordable housing and they state that explicitly in the inclusionary zoning ordinance, emphasizing that the ordinance is incentive based. [206]

According to the City, the case is not ripe because the Beacon Center never sought compensation through the ordinance or through state law.[207] In fact, the Beacon Center did not list a property in its Complaint and the ordinance was not applied to any specific property.[208] Thus, a regulations interference with "reasonable investment-backed expectations cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it

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[203] Defendant's Memorandum of Law In Support of Motion to Dismiss at 1, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Jun. 6, 2017).

[204] *Id.*
[205] *Id.*
[206] *See id.*
[207] *Id.* at 4.
[208] *Id.* (stating "A claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property as issue.").

will apply the regulations at issue to the particular land in question."[209] Furthermore, Tennessee has its additional guidelines that an injured party should follow when he or she believes that he or she has suffered a regulatory taking.[210] These guidelines include pursuing state remedies through an inverse condemnation lawsuit or appealing the decision through a writ of certiorari.[211] Here, the plaintiff did not apply for a rezoning to develop a rental property of five or more units.[212] Furthermore, the plaintiff did not apply for a grant to reimburse them for lost rental revenue due to the affordable units.[213] Thus, the City never gave the plaintiff a decision about how the ordinances would apply to the specific property at issue, resulting in the plaintiff inability to exhaust the entire takings process.[214]

The City also argued that the Plaintiff did not have standing to challenge the inclusionary zoning ordinance because there was no private right of action allowing it to enforce state law.[215] According to the City, the Plaintiff did not present a distinct injury.[216] Even though the Plaintiff represents home builders, it did not list a specific home builder who had been injured because it sought rezoning, applied for a grant, and asserted that the dollar for dollar reimbursement

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[209] Defendant's Memorandum of Law In Support of Motion to Dismiss at 4, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Jun. 6, 2017).

[210] *Id.*

[211] *Id.* at 5.

[212] *Id.* at 6.

[213] *Id.*

[214] *Id.*

[215] Defendant's Memorandum of Law In Support of Motion to Dismiss at 7, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Jun. 6, 2017).

[216] *Id.* at 6.

was constituted a taking.[217] Thus, the court was dealing with future and contingent rights which do not create standing. Furthermore, the anti-inclusionary zoning state law, Tenn. Code Ann. §66-35-102, that the Plaintiff relies on does not create a private right of action for private litigants, which must be expressly created in Tennessee.[218] Without this express right of action, enforcing the statute is left to the state.[219]

On August 17, 2017, the Davidson County Chancery Court agreed with the City of Nashville that the case was premature and dismissed it on the grounds of ripeness and standing.[220]

Another State Challenge to Nashville's Inclusionary Zoning Ordinance

While *Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County* was being reviewed by the court, State Senator Ferrell Haile and State Representative Glen Casada, filed SB 0363.[221] This bill clarified that no local government had the authority to require

[217] *Id.*

[218] Tenn. Code Ann. 66-35-102 (2000) (stating" A private right of action must be expressly created: (a) In order for legislation enacted by the general assembly to create or confer a private right of action, the legislation must contain express language creating or conferring the right. (b) In the absence of the express language required by subsection (a), no court of this state, licensing board or administrative agency shall construe or interpret a statute to impliedly create or confer a private right of action except as otherwise provided in this section.")

[219] Defendant's Memorandum of Law In Support of Motion to Dismiss at 7, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Jun. 6, 2017).

[220] Court's Memorandum of Law and Order at 1,7, 9, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Oct. 31, 2017).

[221] Mike Reicher, One of Nashville's Affordable Housing Initiatives Nears Nullification in Tennessee Senate, The Tennessean (Mar. 3, 201), https://www.tennessean.com/story/money/2018/03/02/nashville-affordable-housing-inclusionary-zoning-tennessee-legislature/389549002/.

developers to create affordable units when they requested a variance, any type of permit, or any authorization from the local government.[222] The legislators drafted the bill with the aid of the Tennessee Apartment Association, the National Federation of Independent Business, the Beacon Center of Tennessee, the Tennessee Chamber of Commerce, and the Associated Builders and Contractors.[223] The bill passed the House in February 2017, and although it stalled for a while in the Senate, it passed the Senate on March 5, 2018.[224] Once it is signed into law by the Governor, it will nullify Nashville's Inclusionary Zoning Ordinance.[225]

Discussion and Analysis

Nashville's fight for affordable housing was cut short by the state legislature. Nonetheless, its fight speaks to hurdles that some municipalities have to face when trying to address local government affairs. This Part analyzes the strength of Nashville's inclusion zoning ordinance and highlights how it could have passed both the *Penn Central* test and *Nollan-Dolan* test if it were ever challenged on substantive grounds. It also discusses the weaknesses of municipalities that are subject to Dillon's Rule.

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[222] *Id.* The authors of the bill believed that even though Nashville's inclusionary zoning ordinance was incentive based, it was still mandating a price control on private developers. *Id.*

[223] *Id.*

[224] *Id.* (stating that the bill's author mentioned at the senate committee hearing that "cities will still be able to "incentivize" affordable housing, but won't be able to "devalue" property with price requirements.").

[225] *Id.*

Nashville's Inclusionary Zoning Ordinance Analyzed With the Penn Central Test and the Nollan-Dolan Test

Nashville's inclusionary zoning ordinance was able to dismiss the Beacon Center's claims on procedural grounds alone.[226] Nonetheless, the substantive elements of the Plaintiff's claims were never addressed.[227] While this was definitely a win for affordable housing advocates, it failed to add to the inclusionary zoning jurisprudence regarding the legality of inclusionary zoning policies.[228] Since the Supreme Court has yet to rule on the legality of inclusionary zoning, states and municipalities look to each other for guidance.[229] Thus, the results of *Homebuilders Association of Middle Tennessee v. The Metropolitan Government of Nashville and Davidson County*, failed to address if Nashville's ordinance would have passed a taking and state preemption challenges if a plaintiff had standing and the claims were ripe.[230]

The question that needed to be addressed was: where did Nashville's inclusionary zoning ordinance fit within the context of a land use regulation?[231] Based on the parameters of the ordinance, it appeared to fall under an ordinary land use regulations because it was a valid exercise of a municipality's police power and was rationally related to legitimate government interest.[232] Here,

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[226] *Id.*

[227] *See id.*

[228] *See* Tim Iglesias, Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and its Potential to Meet Affordable Housing Needs, ZONING AND PLANNING LAW REPORT (2013) (stating that "Unfortunately, courts have not developed a consistent jurisprudence regarding IZ ordinances. Upon analysis, the legality of IZ ordinances depends upon how they are framed by the governments who enact them, the opponents who challenge them, and the courts that decide the cases.").

[229] *Id.*

[230] *See id.*

[231] *See* Audrey G. McFarlane & Randall K. Johnson, *Cities, Inclusion and Exactions*, 102 Iowa L. Rev. 2145, 2168 (2017)

[232] *See id.*

Nashville could have strongly argued that the creation of affordable housing in order prevent resident displacement was a legitimate government interest.[233] This legitimate government interest in supported by the city's *Housing Nashville* Plan that highlighted the city's concern about ensuring that longtime Nashville residents were able to continue to live in the city that they have called home for generations. Thus, without the inclusionary zoning ordinance and its mandate for low-income housing within market-rate developments there would have likely been no remedy for Nashville residents, especially long term residents, who were at a high risk of displacement.[234] Thus, the ordinance promoted residents' welfare by providing an opportunity to have stable housing.[235]

When assessed under the *Penn Central* test, Nashville's inclusionary zoning ordinance would have most likely not constituted a regulatory taking.[236] In *Penn Central*, the Court assessed three factors to determine whether a taking occurred[237]. First, the Court measured the economic impact of the regulation on the claimant.[238] Second, the Court evaluated the extent to which the regulation interfered with distinct "investment backed expectations."[239] And third, the Court looked at the character of the government action.[240] Here, Nashville had a strong argument that that there was no real economic impact on the developers because

[233] Defendant's Memorandum of Law In Support of Motion to Dismiss at 1, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Jun. 6, 2017).

[234] *See* McFarlane & Johnson, *supra* note 223.

[235] *Id.*

[236] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[237] *Id.*

[238] *Id.* at 130-131.

[239] *Id.*

[240] *Id.*

the city government would have subsidized the costs of the affordable housing dollar for dollar.[241] Thus, if a developer rented a two bedroom apartment for $1,200 instead of the market rent of $1,500, the city would have covered the $300 rent loss for the owner.[242] Thus, the ordinance would not have interfered with the owner's investment backed expectations because he would have still been in the financial position that he would have been in with all market rate rental units.[243] Lastly, any court could have easily found that the inclusionary zoning ordinance promoted the general welfare because it created socioeconomically integrated neighborhoods.[244] The threshold for the rational standard is low, and deference is given to the municipality to determine what is needed for their community. Thus, providing housing for people of all socioeconomic backgrounds has been upheld as promoting the general welfare.

Nashville's inclusionary zoning ordinance would have also most likely passed the *Nollan-Dolan* test if applied.[245] Under the *Nollan-Dolan* standard, Nashville's inclusionary zoning ordinance must (1) have an "essential nexus" to the impact of the development that is being mitigated by the condition; and (2) the condition must be "roughly proportional" to the impact that the development is likely to have on the problem that the condition is intended to mitigate.[246] Thus,

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[241] Defendant's Memorandum of Law In Support of Motion to Dismiss at 6, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Jun. 6, 2017).

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[244] *See* McFarlane & Johnson, *supra* note 223.

[245] Dolan v. City of Tigard, 512 U.S. 374, 386 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 841-43 (1987).

[246] McFarlane & Johnson, *supra* note 223 at 2175.

Nashville could have strongly argue that there was a strong nexus between creating affordable housing through the development of market rate housing, because these developments were displacing long term residents.[247] Thus, the affordable units played a role in offsetting the displacement that market rate developments in rapidly gentrifying neighborhoods created by virtue of rent increases.[248] Given the data on the loss of affordable housing and the high percentage of cost-burdened Nashville residents highlighted in the *Housing Nashville Plan*, the at most fourteen percent affordability requirements in new developments with more than five units was proportional to the impact that the new developments would have had on Nashville communities.[249]

Prior to the "clarifying" bill, SB 0363, the only issue that Nashville's inclusionary ordinance could have potentially had was with the state preemption claim because of Tenn. Code. Ann. § 66-35-102(b), which prohibited all cities and towns from conditioning development on the allocation of a percentage of affordable housing.[250] Nonetheless, the statute still permitted municipalities to create incentive based programs that spurred affordable housing creation.[251] Nashville had a strong argument that its inclusionary zoning ordinance was

[247] *See* Defendant's Memorandum of Law In Support of Motion to Dismiss at 6, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Jun. 6, 2017).

[248] *Id.*

[249] *See* James Fraser, *Housing Policy and Inclusionary Zoning Feasibility Study* (April 5, 2017),http://www.nashville.gov/Portals/0/SiteContent/Planning/docs/InclusionaryHousing/Final%20Report-April%205%202017.pdf

[250] *See* Complaint at 12, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Apr. 24, 2017).

[251] *Id.*

incentives based because it was only triggered when a variance was needed, public property was being developed, or public funds were used.[252] It was not taking away a developer's ability to build by right, it was just incentivizing affordable housing creation when a developer needed additional rights.[253] Furthermore, the incentives include height and density bonuses in addition to grants to subsidize the loss rents.[254] The state legislators that introduced SB 0363 knew that Nashville's ordinance was written in a way that could have withstood a state preemption challenge under Tenn. Code. Ann. § 66-35-102(b).[255] Thus, they pushed for and eventually passed SB 0363 to show the state's authority and the power of Dillon's Rule.[256]

CONCLUSION

Nashville fought hard to ensure that all Nashville residents, regardless of socioeconomic status, could afford to live in the city that they call home. However, it's fight for affordable housing faced hurdles from the beginning and was stunted by the state's fear that an inclusionary zoning policy would negatively impact the state's economic growth. Nashville's inclusionary zoning ordinance was probably one of the most subsidized ordinances in the nation

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[252] *See* Defendant's Memorandum of Law In Support of Motion to Dismiss at 6, Home Builders Association of Middle Tennessee vs. Metropolitan Government of Nashville and Davidson County, No. 17-386-II (Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville Jun. 6, 2017).

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[254] *Id.*

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because it would have reimbursed developers dollar for dollar. Thus, developers would have been able to get the same return on their investment as they would if all of their units were rented at market rate. In fact, Nashville's ordinance had the potential to benefit both lower income tenants and developers, but given the intense objection to it, the ordinance never created one affordable unit. Nashville's experience highlights the challenges that most large cities are grappling with as more and more people move back to cities and rents skyrocket. It also sheds light on the intense challenges that municipalities face when trying to create policies that protect their residents amidst strong forces, such as state legislatures, that are more concerned with financial impact than human impact. Although Nashville will not be able to use inclusionary zoning to increase affordable housing, there are other tools that it can use to create and preserve affordable housing. Even though Nashville faces an uphill battle, its fight for affordable housing is not over.