Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and its Potential to Meet Affordable Housing Needs

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1. Introduction: The Complex World of Inclusionary Zoning

Our chronic affordable housing crisis is generally well-recognized, including how the need expanded to the middle class during the housing boom that preceded the financial crisis. In large measure, the contemporary debate focuses on what particular goals government ought to pursue, with what priorities, and by what means to address the needs.

One set of strategies that has been widely embraced in several states is “inclusionary zoning.” As its name suggests, inclusionary zoning is the opposite of “exclusionary zoning”—the practice of zoning out housing that would serve low-income households and people of color.

Whether local inclusionary zoning (IZ) ordinances can make significant contributions towards meeting affordable housing needs depends in large part on its legality. 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.

After a brief introduction, this article will explore why framing is possible and likely in judicial review of IZ as well as why it matters. Next, the article will analyze the key law to demonstrate how framing has operated to affect the legal vitality of IZ. Then the article will identify issues local governments contemplating adopting IZ should consider in light of the framing effects. A brief conclusion looks forward.

Mandatory local IZ has been, and continues to be, a controversial policy. Affordable housing
advocates have embraced and promoted IZ because it increases the supply of affordable units without large financial subsidies.\textsuperscript{4} They support the potential for "mixed income housing" to promote economic and racial integration. Affordable units created by IZ policies can be integrated into middle class or "high opportunity" neighborhoods, i.e. those with access to good schools, jobs, transportation, shopping, and other amenities.\textsuperscript{5} Proponents argue that since land is a scarce commodity, IZ serves the public welfare because if localities do not ensure for the provision of affordable housing the developable land will be used up, amounting to \textit{de facto} exclusion.\textsuperscript{6}

Opponents argue that mandatory IZ is unfair and ineffective (or even counter-productive).\textsuperscript{7} They argue that incentives and regulatory relief often do not completely offset the additional costs to development. And if they do not, the added development costs unfairly burden a small subset of the community: either other housing consumers pay higher housing prices if developers can pass on the costs; landlords receive less money for their property if it is to be developed for residential use; or developers' profits are reduced. In addition, opponents argue that in the long run IZ ordinances will reduce the units available to low and moderate income households because the additional development costs they impose will lead to less overall housing production in the jurisdiction.

Some empirical research about outcomes (e.g. numbers of affordable units produced and at what income levels) has been conducted. Most of this research demonstrates reasonably positive results and minimal negative side effects.\textsuperscript{8} However, such research has been limited. Moreover, in spite of the evaluation research, the policy debates surrounding IZ ordinances remain largely unresolved because they stem from conflicting assumptions about how housing markets actually work as well as contrasting normative views of law and policy.
II. Framing Inclusionary Zoning: How and Why Framing is Possible and Common in Inclusionary Zoning

a. Conceptually Distinct Forms of Inclusionary Zoning

A city could adopt an ordinance requiring commercial developments to pay impact fees into an affordable housing trust fund to mitigate the impacts on the housing needs of the community caused by the additional lower wage workers that the development attracts to the city. This is a paradigmatic exaction-type IZ, often called a “linkage fee.” The justification of the measure sounds in mitigating negative impacts caused by the development, the resulting obligation is to pay an impact fee to offset these impacts.

Alternatively, a city could enact a land use regulation that requires certain residential developments to set aside a percentage of its units for low income families without offering any alternative means of compliance or incentives and regulatory relief to reduce the developer’s costs in providing those units. This is a paradigmatic land use regulation-type IZ. The ordinance is justified, like all zoning, as a law that serves the general health, safety and welfare of the public by regulating the use of land.\(^9\)

b. Modifications Blur the Meaning of Inclusionary Zoning

Each paradigmatic ordinance can be modified by changing the primary requirement, altering what types of developments it regulates, making alternative means of compliance available, and providing incentives and regulatory relief. Individually and cumulatively, these modifications make the types of local inclusionary ordinance overlap and blur what a “local inclusionary ordinance” is or means.

For example, under variants of the paradigms, the commercial developer could be required to build affordable units, while the residential de-veloper could be allowed to pay fees instead of building units. Either developer could be offered a range of ways to comply with the ordinance, e.g. build units (on or off-site), donate land, or pay a fee. These modifications make land use regulation-type IZ ordinances appear more like exaction-type, and the exaction-type more the like land use regulation-type.

In addition, an “impact fee” is conceptually distinct from an “in lieu” (literally “instead of”) fee. They are justified by different reasons, and they are calculated in by different formulae.\(^10\) Governments may offer in lieu fees to give developers flexibility. In principle, if a developer then elects to pay an in lieu fee, she is making a choice about how to comply with the ordinance. However, both in lieu fees and impact fees can be called exactions because “exaction” is a contested concept. While paying in lieu fees suggests a “voluntary” choice, paying an exaction has a mandatory resonance. If in lieu fees are exactions like impact fees, this blurs the distinction between a land use regulation-type IZ ordinance with a primary set-aside requirement and an exaction-type IZ ordinance that requires payment of impact fees. As shown below, the actual IZ ordinances that many cities have adopted do in fact blur the paradigms regularly.\(^11\)

Some cities have adopted ordinances to promote or preserve the development of affordable housing that have the form of an impact-type exaction which is imposed as a condition of development. These include commercial or office development “linkage fee programs” which highlight the demand for additional affordable housing created by new jobs due to the proposed non-residential development,\(^12\) “conversion ordinances” which focus on the development’s reduction of the city’s supply of affordable housing units,\(^13\) and other affordable housing preservation ordinances.\(^14\) Some of these impact-type exaction ordinances require a project applicant to build (or otherwise provide) affordable units and offer in lieu fees as
an alternative means of compliance. Others simply require the payment of “impact fees.”

Many cities have enacted a mandatory set-aside IZ ordinance. These laws typically require a residential developer who is subject to the ordinance to sell or rent a certain percentage of units for low or moderate income households at a range of specified prices. Local governments present these ordinances as a form of land use regulation akin to open space requirements, designating the use of the land to promote public welfare. Most contemporary set-aside ordinances offer developers a range of means to comply, including donating developable land or paying in lieu fees. Many of these ordinances also provide incentives and regulatory relief, such as density bonuses, fee waivers, and fast-track permitting. They may also allow partial or complete waivers from the inclusionary requirement.

c. Ambiguity Invites Framing Contests: Is it “land use regulation,” an “exaction,” “rent control,” or something else?

The overlap in the design of ordinances by local governments and the consequent blurring of the meaning of what IZ is makes it vulnerable to different framings by opponents and the courts. Lacking a clear definition, IZ ordinances can elicit conflicting perceptions and evaluations, like the famous drawing that can be perceived as a beautiful young woman or an ugly old one.

Land use regulation and exactions are subject to most of same legal claims. One set of challenges argue that the local government lacked the authority to adopt and enforce the requirement. Another includes traditional constitutional claims such as due process, equal protection, and regulatory takings.

While there is not a one-to-one correspondence between the framing of an IZ ordinance and the legal claims brought to challenge it, each of these characterizations implies different possible legal tests. And while several courts may apply the same legal test with differing levels of actual scrutiny, some tests typically demand more of the local government, and therefore are more likely to lead to invalidation of an IZ ordinance.

In light of this, opponents might selectively present the developer’s situation, e.g. treating a land use regulation-type as an “exaction” by isolating the “in lieu fee” and urging the court to treat the “in lieu” fee as an “impact fee.” Moreover, if a local requirement offers a developer several options for compliance, there is no clear legal rule directing the court how to frame its review of each option or how to interpret severability clauses. Some courts may infer some voluntariness of choice from the fact that developers are given alternative means of compliance; other courts may not. When challenged, local government might be tempted to exploit the ambiguity of the ordinance, claiming whichever frame improves its defenses.

d. Other Factors Promoting Framing

Most law on local IZ is state law. To date, the U.S. Supreme Court has not considered a challenge to a local IZ ordinance. Most claims rely on state constitutional and statutory law. And state courts do not necessarily look to, much less follow, other states courts’ case law in their review of IZ ordinances.

In view of the opportunity for both governments and opponents to frame IZ ordinances, courts have sometimes been confused or expressed themselves in unclear ways. Unfortunately, courts may ignore or avoid being explicit about framing issues and their decisions.

e. The Result: Much is Unresolved

Considering the geographical extent and long period of time many ordinances have been in effect, there are not many published cases. In these cases, courts have come to different conclusions, often based upon different legal theories and as-
sumptions. The result is that many significant legal issues concerning IZ remain unresolved in many states. And the case law as a whole can be characterized fairly as favoring or disfavoring IZ. On the one hand, several courts have invalidated local IZ ordinances on various grounds. On the other hand, other states’ courts have upheld similar ordinances against similar attacks. And many of the both positive and negative decisions have had limited influence with other states’ courts, in part because they are based in the state’s own specific constitution or statutes. Finally, local governments interested in pursuing IZ ordinances have adapted in response to negative decisions and/ sought state legislative changes to reverse or reduce the effect of negative decisions.

III. Framing Matters in Judicial Review of Inclusionary Zoning

Local governments consistently frame mandatory set-aside IZ ordinances as a form of traditional land use regulation.27 When courts adopt this framing, they apply relatively deferential standards of review, and the ordinance is usually upheld. Opponents consistently frame IZ as “exactions,” and then attack them as failing to meet the legal requirements for an exaction. Or they frame it as “rent control” and urge the court to invalidate it as conflicting with a state statute banning local rent control. When courts employ the opponents’ frames, they are more likely to invalidate the ordinance at issue.

a. Inclusionary Zoning as Land Use Regulation

i. Claims Challenging Local Government Authority

Sub-state governments, either counties (townships) or municipalities can only act with sufficient authority, otherwise they are acting ultra vires (literally “beyond their powers”). There are several different ways that a local ordinance can be invalid for lack of authority. The local government may have no authority at all to perform the act. A court may find that the locality lacked authority because it conflicts with or is preempted by a state statute. A court may frame an act of local government as a “fee” or a “tax” and find that the locality had no authority to impose that kind of charge.

Generally, courts have been favorable to mandatory IZ framed as land use regulation when it is applied by virtue of an established policy enacted by a legislative body with authority to impose land use requirements. However, courts have rejected attempts by local governments to impose IZ requirement in an ad hoc manner or by local government bodies deemed without sufficient legislative authority.28 And, in 1973, Virginia’s Supreme Court invalidated such an ordinance framing it as pursuing “socio-economic zoning,” an illegitimate governmental objective.29 This framing was rejected by other state courts in New Jersey, New York, and California.30

ii. Other Constitutional Claims

Local governments’ authority to control land use within its jurisdiction is limited by property owners’ constitutional rights under both the U.S. Constitution and the state’s constitution. The result of such constitutional challenges is often determined by the level of scrutiny of the legal standard that the court applies to the case which, in turn, depends upon how the ordinance is framed. Mandatory inclusionary zoning framed as land use regulation generally stands up well to traditional constitutional challenges.

1. Substantive Due Process and Equal Protection

In Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp.,31 New Jersey’s Supreme Court upheld local IZ ordinance as not violating substantive due process. The court had previously held that developing jurisdictions had a duty under the state constitution to provide for a reasonable opportunity for housing opportunities for all economic segments of the community. Given this constitutionally-endorsed government objective,
jurisdictions could impose a variety of inclusionary policies that rationally pursued it, including a set-aside requirement. The court also upheld the ordinance against an equal protection claim.\textsuperscript{32}

In 2001, a California appellate court rejected a facial substantive due process claim in \textit{Home Builders Ass’n of N. California v. City of Napa}\textsuperscript{33} because of the availability of a waiver.\textsuperscript{34} Since, in reviewing a facial attack, the court must assume that the City would exercise its authority in accordance with the Constitution, this claim failed.\textsuperscript{35}

The same court reviewed the ordinance under the “substantially advances” test first announced in \textit{Agins v. City of Tiburon}.\textsuperscript{36} The plaintiff builders’ association claimed that the city’s inclusionary zoning ordinance, containing a requirement that 10% of all newly constructed units must be affordable, was a \textit{facial} regulatory taking under the federal and state constitutions under the “substantially advances” test because it failed to substantially advance legitimate state interests. Applying the test, the court affirmed that it “had no doubt that creating affordable housing for low and moderate income families is a legitimate state interest.”\textsuperscript{37} Next, the court found that “it is beyond question” that the inclusionary requirement will substantially advance that interest because “by requiring developers in City to create a modest amount of affordable housing (or comply with one of the alternatives), the ordinance will necessarily increase the supply of affordable housing.”\textsuperscript{38}

In \textit{Sintra, Inc. v. City of Seattle},\textsuperscript{39} Washington’s Supreme Court reviewed a part of Seattle’s Housing Preservation Ordinance that required “developers to either replace any low income housing they destroyed, or to pay a fee, based on the number of units, into a housing replacement fund.”\textsuperscript{39} Like the \textit{Napa} court, the \textit{Sintra} court found that the ordinance was a proper exercise of city’s police power. However, unlike the \textit{Napa} court, the \textit{Sintra} court found that the ordinance violated the state’s Substantive Due Process test as “unduly oppressive” to the landowner.\textsuperscript{41}

\subsection*{2. Regulatory Takings Claims}

When courts treat mandatory set-aside ordinances as land use regulations, they generally fare well against regulatory takings challenges.\textsuperscript{42} \textit{South Burlington County N.A.A.C.P. v. Mount Laurel Twp. (Mount Laurel I)},\textsuperscript{43} decided in 1983, upheld the mandatory set-aside requirement against a regulatory taking claim. And, \textit{Holmdel Builders Ass’n v. Township of Holmdel},\textsuperscript{44} decided in 1990, upheld mandatory in lieu fees as an alternative to mandatory set-aside of affordable units when they are imposed under standards established by a state agency.

To date, no court has found that a mandatory set-aside ordinance amounts to a regulatory taking under either of the categorical takings tests, “Permanent Physical Occupation” test derived from \textit{Loretto v. Teleprompter Manhattan CATV Corp.}\textsuperscript{45} and “Total Taking” test (derived from \textit{Lucas v. South Carolina Coastal Council}).\textsuperscript{46}

Liability under the Ad Hoc Balancing Test derived from \textit{Penn. Central Transportation Co. v. City of New York}\textsuperscript{47} is not likely. An IZ ordinance could probably be characterized as the type of government regulation not tending to constitute a taking (e.g., considering the development of affordable housing as an attempt to balance economic benefits and burdens in order to serve the general welfare). The economic impact would be mitigated by the regulatory relief offered (analogous to the transferrable development rights in \textit{Penn Central}). And the impact on distinct reasonable investment-backed expectations would be limited.

\section*{b. Inclusionary Zoning as an Exaction}

IZ opponents who convince courts to treat IZ as an exaction have had moderate success.
i. Claims Challenging Local Government Authority

1. Inclusionary Zoning as an Illegal Fee

State statutes regulate what development fees local governments can charge developers and provide legal requirements to justify them. Typically, these statutes list which kinds of capital improvements and infrastructure for “public facilities” are eligible for localities to collect “impact fees.” If affordable housing is not an approved “public facility,” then framing an “in lieu fee” as an “impact fee” can lead a court to invalidate the ordinance.

In *Kamaole Pointe Development LP v. County of Maui*, a federal district court found that a county’s mandatory set-aside ordinance’s in lieu fee provision did not constitute an “impact fee” under the state’s statute, and therefore was valid and not in conflict with the statute. In distinguishing the in lieu fee from an impact fee, the court stated that “the ordinance’s assessment of a fee for a general affordable housing fund stands in marked contrast to payments made for the specific purpose of offsetting the cost of capital improvement projects directly attributable to a development.” In contrast, in 2011, Rhode Island’s Supreme Court invalidated a similar mandatory set-aside ordinance’s ordinance when it treated the in lieu fee as conceptually analogous to “impact fees” in *North End Realty, LLC v. Mattos*.

2. Inclusionary Zoning as an Illegal Tax

If the court finds that a local government does not have the authority to impose the charge as a “fee,” then usually it will inquire into its authority to impose it as a “tax.” A local government’s taxation authority is often more limited than its authority to impose fees, so this analysis can lead to a finding that the exaction is an “illegal tax.”

In 1986, a California appellate court found that City and County of San Francisco’s residential hotel conversion ordinance was not invalid as a “special tax” under California’s Constitution. The ordinance conditioned permits for converting residential hotels to tourist hotel use on the property owner either providing relocation assistance to hotel residents and a “one for one replacement” for the hotel units being converted or contributing an in lieu fee to a city fund for the purpose of constructing replacement units. The in lieu fees appeared like a “special tax” because they would be levied for a specific purpose rather than placed into San Francisco’s general fund to be used for general governmental purposes. However, relying on prior case law, the court upheld the IZ ordinance because the Constitutional provision at issue did not include “fees for land-use regulatory activities, where the fees charged to particular applicants do not exceed the reasonable cost of the regulatory activities and are not levied for unrelated revenue purposes.”

In contrast, a trial court found that Boston’s “Development Impact Project Exaction” was invalid for lack of authority because it so closely resembled a tax. In *Bonan v. City of Boston*, the Supreme Judicial Court of Massachusetts, reversed the trial court’s finding as premature but without reaching the merits of the trial judge’s conclusion. Similarly, in *San Telmo Associates v. City of Seattle*, Washington’s Supreme Court invalidated the housing replacement provisions in Seattle’s Housing Preservation Ordinance as an illegal tax as opposed to a regulation on development.

3. Inclusionary Zoning as an Exaction Subject to the Reasonable Relationship Test

Some state law jurisprudence tests the validity of an “exactions” by testing whether there is a sufficient relationship between a development’s impacts and the locality’s justification for imposing the requirement. States have developed different tests for different types of requirements and of varying strictness. In some states and cases, this same test is applied to decide regulatory takings claims. While inclusionary opponents
urge courts to apply these tests, most courts have upheld ordinances in such challenges.

The New Jersey Supreme Court entertained plaintiff’s framing the in lieu fees of a mandatory set-aside ordinance as an “exaction” in Holmdel Builders Ass’n v. Township of Holmdel.57 However, the court rejected application of the strict “but-for” type relationship between development and the harm caused that state law applied to certain exactions. It stated that the “relationship between the private activity that gives rise to the exaction and the public activity to which it is applied,” must be “founded on [an] actual, albeit indirect and general, impact.”58

In Commercial Builders of No. California v. City of Sacramento,59 the Ninth Circuit held that an ordinance which conditioned certain types of non-residential building permits upon the payment of a fee dedicated to an affordable housing trust fund did not amount to an unconstitutional taking. Citing Nollan,60 the plaintiff argued that the ordinance constituted an impermissible means of advancing that interest, because it placed a burden of paying for low-income housing on non-residential development without establishing a sufficient nexus between such development and the need for the affordable housing. The court was not persuaded. Refusing to require a direct causal relationship, it held that Nollan did not materially change the level of scrutiny, and because the ordinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be addressed, this nexus was sufficient to pass constitutional muster.

In San Remo Hotel L.P. v. City and County of San Francisco,61 California’s Supreme Court upheld San Francisco’s imposition of affordable housing fees as a condition of approval for a permit to convert a hotel from long-term residential use to tourist use against various challenges. Because the imposed fees were calculated according to a non-discretionary formula, the court characterized them as “generally applicable legislation” and applied the state’s “reasonable relationship” standard. It found that because the housing replacement fee bore a “reasonable relationship” to the loss of housing caused by converting residence hotels to tourist hotels, the fee was valid.

In contrast, in 2009, the California appellate court deciding Bldg. Indus. Ass’n of Cent. California v. City of Patterson62 invalidated an in lieu affordable housing fee that was part of a development agreement finding “[n]o connection [was] shown ... between this ... figure and the need for affordable housing associated with new market rate development.” The court of appeal assumed that an inclusionary in lieu fee was a generally applicable impact fee without ever considering (at least in the published opinion) whether the underlying requirement was an exaction or a land-use requirement. The court characterized the in lieu fee as not substantively different from the affordable housing fee reviewed in San Remo Hotel v. City and County of San Francisco, and therefore subject to the requirement that there be a reasonable relationship between the amount of the fee and the “deleterious public impact of the development.” Because the fee had been determined based on the city of Patterson’s entire need for affordable housing rather than on any need created by the project at issue, the court concluded there was nothing in the record showing this “reasonable relationship,” and hence the fee was not “reasonably justified.” While this case invalidated an inclusionary requirement through the application of the relatively deferential “reasonable relationship” test, this case may be of limited impact because of the city’s idiosyncratic calculation of the fee.

4. Inclusionary Zoning as an Exaction Subject to the Nollan/Dolan Test under the Doctrine of Unconstitutional Conditions

IZ opponents have long urged courts to apply the Nollan “essential nexus” test63 and Dolan “proportionality test”64 to IZ ordinances.65 They reasonably believe that some or most IZ mandates would not meet these tests’ standards. Both prior to the Lingle decision66 and after it67
courts generally have refused to apply these tests to IZ ordinances. At issue is whether Nollan and Dolan are limited to government’s exactions of real property interests in ad hoc individualized land use bargains, or whether these tests also apply to legislatively adopted exactions applied ministerially (without discretion) and to other kinds of exactions, such as monetary fees. These issues have been presented to the United States Supreme Court in the Koontz v. St. Johns River Water Management District case which will be decided by June 2013.68

c. Inclusionary Zoning as Rent Control69

Claims challenging local government authority include those arguing that state legislation preempts a local ordinance or that there is a sufficient conflict between the local ordinance and a state ordinance that the local ordinance must give way.

When courts frame mandatory IZ ordinances as “rent control” in states with anti-rent control statutes, IZ opponents often win.

In Town of Telluride v. Lot Thirty-Four Venture, L.L.C.,70 Colorado’s Supreme Court invalidated the Town of Telluride’s affordable housing mitigation requirements for new developments because they constituted “rent control” within meaning of a state statute prohibiting municipalities from enacting rent control for private residential property, and the ordinance conflicted with the state statute. Despite Telluride’s status as a “home rule” jurisdiction, the court, adopting a plain meaning interpretation of the term “rent control,” found that Telluride lacked authority to impose the requirement.

Similarly, in Apartment Ass’n of S. Cent. Wisconsin, Inc. v. City of Madison,71 the court held that a mandatory set-aside ordinance was preempted by Wis. Stat. Ann. § 66.1015(1), which provided that “[h] no city, village, town or county may regulate the amount of rent or fees charged for the use of a residential rental dwelling unit.” The city’s arguments that the statute permitted it to “enter into an agreement with a private person who regulates rent for a residential dwelling unit,” and that the ordinance was an agreement between property owners and the city were rejected as based upon an unreasonable construction of the statute.72

In Palmer/Sixth St. Properties, L.P. v. City of Los Angeles,73 a California appellate court held that the city’s specific plan’s set-aside requirement was preempted by the state’s rent control statute, the Costa-Hawkins Act. As in Telluride, the defendant argued that rent control statute was intended only to apply to ordinances restricting general rents of private housing in the community and not to IZ. However, the court, applying a “plain meaning” interpretation to the statute, held that “Palmer’s involuntary compliance with...affordable housing requirements is hostile or inimical to Palmer’s right under the Costa-Hawkins Act to establish the initial rental rates for the project’s dwelling units.”74 The Palmer decision has essentially halted rental IZ in California, except where a developer enters into a development agreement which includes inclusionary elements.75

IV. Issues to Consider: What Can Local Governments and Inclusionary Zoning Proponents Do?

If a local jurisdiction is considering adopting a land use regulation-type IZ ordinance,76 it should consider each of the following issues.

How will you frame/structure the ordinance?

In light of litigation challenging IZ ordinances to date, local governments should carefully consider how to structure an IZ ordinance. Commentators have proposed three options: (a) a voluntary ordinance with generous incentives or using a development agreement;77 (b) a traditional land use regulation without in lieu fee option and without incentives;78 and (c) an exaction, including the option of a comprehensive exaction applying to both residential and
non-residential development. Each structure has tradeoffs as discussed by the commentators. For example, voluntary compliance (sometimes called “incentive zoning”) avoids most, but not all, potential legal problems. However, it may not result in the development of many units unless the incentives are very generous. Density bonuses can be the most generous incentives, but can create pushback by neighbors resisting density increases.

Will incentives and regulatory relief be provided and, if so, what kinds?

Giving developers incentives and regulatory relief may reduce potential legal liability and promote compliance and effectiveness. A variety of types of regulatory relief are offered: density bonuses (including sliding scale—depending upon how much and how affordable units are), fast-track permitting, fee waivers and more. Some states require regulatory relief to be provided to housing proposals which include affordable housing units. In such states, an IZ ordinance could require that the developer provide affordable housing that would trigger the state-mandated incentives.

What types of housing (tenure and populations) will be targeted?

Will the ordinance apply to ownership housing, rental housing or both? For what populations will the ordinance promote affordable housing? Most ordinances target housing for families, but some assist seniors.

To what zones will the ordinance apply?

Will the ordinance apply to residential zones all over the jurisdiction or only to certain parts? Most local IZ ordinances apply to all similar zones in the whole jurisdiction. Limiting the application to certain areas of the city may make the ordinance vulnerable to particular legal challenges.

What will trigger the application of the ordinance?

For voluntary ordinances, what will make a development proposal eligible for the benefits of the ordinance? For mandatory ordinances, what characteristics of the proposal will trigger the application of these requirements to it? Many ordinances use a threshold number of proposed units as the trigger, e.g. more than five.

What level(s) of affordability will be required, for how many units and for how long?

Local IZ ordinances vary considerably in these dimensions. Some only require “moderate income” affordability (typically measured by the U.S. Department of Housing’s “area median income” standard). Others require some moderate income and some “lower income” or “low income.” A few require “very low income” or “extremely low income.” The amount of units is usually expressed as a percentage of the total units in the development. Orinances range widely, from as low as 3% to as high as 25% of the units. Most are in the 10% - 20% range. The time for affordability ranges from “ten to ninety-nine years to perpetuity.” Obviously, all else being equal, the more demanding the affordability requirements, the more likely the IZ ordinance will serve a jurisdiction’s affordability goals. However, with strict requirements come more potential for legal challenges as well as potential implementation problems.

What alternative means of compliance or waiver, if any, will be offered?

Most contemporary IZ ordinances, especially mandatory ones, offer a developer subject to the ordinances options for fulfilling its requirements. Usually options include: build affordable housing units on site or off-site, contribute land to a land bank, or contribute in lieu fees to an affordable housing fund. This flexibility is likely to assist in meeting goals. Many contemporary local IZ ordinances also offer partial or complete waivers from the requirement. Flexibility in forms of compliance and offering waivers may also help the ordinance withstand legal attacks, but not necessarily.
What studies or other documentation will be provided to support the requirement?

Depending upon the type of IZ ordinance, different kinds of factual data and analysis would be required to defend the ordinance in the event of a legal challenge. The exaction version would require the most backup.

How will inclusionary requirements be enforced?

Both ownership and rental inclusionary programs require ongoing enforcement and supervision of inclusionary requirements, e.g., ensuring that subsequent residents meet household eligibility and the resale price or the rent level requirements. Usually, enforcement begins with the ensuring that inclusionary requirements are recorded against the relevant properties.

Will the results of the ordinance be evaluated for possible revision?

Because real estate, land use, and housing markets are dynamic, it is useful to consider at the outset when and how the results of a newly-adopted IZ ordinance will be evaluated. An evaluation offers the opportunity to revise the ordinance in light of experience.

V. Conclusion: The Legality of Inclusionary Zoning and its Possible Contribution

Depending upon numerous factors, e.g. revitalized housing markets and local conditions (e.g. attractiveness of location and availability of buildable land), local IZ can be a partial contribution to meeting affordable housing needs. However, it can possibly be a significant one, both in terms of additional numbers of units and promoting integrated living patterns. It is best when it is a component of a comprehensive affordable housing strategy.

Because of its various forms, IZ is primed for framing contests between local governments, opponents and courts. A review of leading cases reveals a relatively clear pattern of ordinances being upheld when courts employ local govern-
ments’ preferred frames and being invalidated when courts adopt opponents’ preferred frames. Going forward, in the absence of widely-applicable decision grounds in the U.S. Constitution, the legal status of local IZ ordinances will be decided largely by: (1) how localities design and justify them; (2) how opponents and courts frame the government’s action in the face of legal challenges; and (3) how courts decide the cases in the context of that particular state’s law (including any pro-affordable housing laws).

Local governments have the opportunity to frame proactively, but are faced with complex tradeoffs and uncertainty. Local governments and housing advocates can reduce the risk of unfavorable framing by promoting inclusionary-friendly state statutes. And, if they suffer a loss in litigation, they can seek statutory revisions to authorize local IZ. If the ordinance is invalidated as rent control, they will need to either change the state statute or modify their ordinance to comply. If the IZ ordinance is found to be an illegal impact fee, the government can readopt it after it has conducted the needed impact studies, although the ordinance is likely to be less productive. If all else fails, the government can offer voluntary IZ options by incentive zoning or development agreements.

NOTES

1. See, e.g. Out of Reach 2012: America’s Forgotten Housing Crisis (National Low Income Housing Coalition, March 2012); The State of the Nation’s 2012 (Housing Joint Center for Housing Studies of Harvard University, June 2012).

2. This article presents selected leading cases to shed light on the effects of framing. It is not a comprehensive survey of cases and it will not discuss every claim in each case. For a comprehensive survey of cases see Patricia E. Salkin, 3 Am. Law. Zoning Sects. 22:42 – 22:43 (5th ed., April 2012).

3. This article will not review all of the scholarly literature on IZ. Representative articles critical of IZ include: Ellickson, The Irony of “Inclusionary” Zoning; 54 Cal. L. Rev. 1167 (1981); Burling and Owen, The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary

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5. For an IZ ordinance that explicitly attempts to serve these additional objectives, see description of the 2010 revision to IZ ordinance in Palm Beach County (Florida) see 63 Planning & Environmental Law No. 10, p. 3 (at 6 – 7).


7. See, e.g., articles by Ellickson and Burling, cited supra.


10. See “Calculating In-Lieu Fees” in Local Government Financing Powers and Sources of Funding, chapter 11 in The Legal Guide to Affordable Housing Development, supra note 3 at 325.

11. And see In Defense of IZ, supra note 3 at 1018 (“Most inclusionary ordinances are neither fish nor fowl.”).

12. See, e.g. ordinance at issue in Commercial Builders of No. California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991).


15. See, e.g. ordinance at issue in San Remo Hotel, supra note 13.
16. See, e.g. ordinance at issue in *Commercial Builders, supra* note 12.


18. Ibid.

19. Ibid.

20. Ibid. Procedural requests that governments provide for applicants to obtain a waiver may also blur the categories. For example, the *Napa* ordinance, *supra*, note 17, included a clause that allowed the city to reduce, modify or waive the inclusionary requirements “based upon the absence of any reasonable relationship or nexus between the impact of the development and ...the inclusionary requirement.” Id. at 199. This language articulates a test usually applied to exactions not land use regulations.

21. The application of framing to inclusionary zoning was first discussed in Barbara Kautz, In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing, 36 U.S.F. L. Rev. 971 (2002). This article expands and updates the framing analysis.

22. But note there is no consensus on what test applies to an IZ ordinance framed as an “exaction.”

23. See, e.g. *infra* at III.b.1.

24. For this reason, opponents seek a clear case grounded in the United States Constitution, such as an application of the “essential nexus” test in Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987); and the “rough proportionality test” in Dolan v. City of Tigard, 512 U.S. 374 (1994).


26. See, e.g. In Defense of IZ *supra* note 3 at 1017.

27. Only a few claims have challenged the application voluntary IZ ordinances. These usually challenge permit approvals questioning the jurisdiction’s authority to enable affordable housing develop-
32. Id. at 208 – 209.
34. The ordinance included a clause that allowed the city to reduce, modify or waive the inclusionary requirements “based upon the absence of any reasonable relationship or nexus between the impact of the development and ...the inclusionary requirement.” Id. at 199.
35. The court rejected the plaintiffs’ argument that, under Dolan v. City of Tigard, 512 U.S. 374 (1994), the ordinance’s waiver clause improperly placed the burden on the developer to prove that a waiver would be appropriate because the court found that the burden shifting standard described in the Dolan case did not apply.
36. Agins v. City of Tiburon, 447 U.S. 255 (1980). At the time the case was decided, this test was considered a “regulatory takings” test. However, in 2005, in Lingle v. Chevron, 544 U.S. 528 (2005) the USSC held that the “substantially advances” test was actually a “due process” inquiry, Id. at 540. Because that test is now considered a due process inquiry, this article will discuss it under the due process rubric.
38. Id. at 195 – 196.
40. Id. at note 1.
41. The court remanded for a determination if it violated the federal statute Section 1983 entitling the plaintiff to money damages. The opinion also remanded for consideration of whether the ordinance constituted a regulatory taking.
42. In accordance with the Lingle court’s categorization of “regulatory takings claims,” supra note 36, this article treats the Nollan and Dolan tests as a special application of the “doctrine of unconstitutional conditions.” Lingle v. Chevron, 544 U.S. at 547.
45. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). See Florida Home Build-
46. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Travis v. County of Santa Cruz, 2004 WI 2801083, unpublished California court of appeal decision (holding that county JZ ordinance was not an unlawful regulatory taking since the conditions... did not deprive the owner of all economically viable use of the property.)
48. For example, Hawaii’s impact fee statute, Hawaii Revised Statutes §§ 46-141 to 148, expressly excludes housing fees from the authority granted to Hawaii’s four counties to levy impact fees for “public facilities.” The argument has been made that “affordable housing” is a type of “public facility” or infrastructure.
50. Id. at 13.
52. Terminal Plaza Corp. v. City and County of San Francisco, 177 Cal. App. 3d 892 (1st Dist. 1986). See also, Holmdel Builders Ass’n v. Holmdel, 121 N.J. 530 (1990) (holding in lieu fees were not “taxes”).
53. Id. at 906.
58. Id. at 288.
59. Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991).
60. Nollan, supra note 24.
61. San Remo Hotel L.P. v. City And County of San Francisco, 27 Cal. 4th 643, 41 P.3d 87 (2002).
63. Nollan, supra note 24.
64. Dolan, supra note 24.
66. See, e.g., Commercial Builders, supra note 12 (finding Nollan did not materially differ from state's "reasonable relationship" test and decided before Dolan); Ehrlich v. City of Culver City 12 Cal.4th 854 (1996); Santa Monica Beach, Ltd. v. Superior Court, 19 Cal.4th 952 (1999); San Remo, supra note 13; Napa, supra note 17. Accords: Travis v. County of Santa Cruz, 2004 WL 2801083 (unpublished) (refusing to apply the Nollan/Dolan heightened scrutiny standard to legislatively enacted set-aside ordinance).
68. Case SC09-713, Docket No. 11-1447, June 1, 2012.
69. Inclusionary ordinances that apply to homeownership housing can be challenged as illegal "price controls." See In Defense of IZ, supra note 3 at 1012 – 1015.
70. Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30 (Colo. 2000).
72. Id. at 190 – 193.
74. Id. at 1410 – 1411.
75. Although technically the opinion only binds localities within its jurisdiction, cities and counties with IZ ordinances have withdrawn or are not enforcing their ordinances for fear of lawsuits. Affordable housing advocates are seeking a legislative fix that would explicitly limit the scope of the rent control law to not cover local IZ ordinances, or to explicitly affirm that localities may adopt them.
76. IZ ordinances are usually adopted by local ordinance (a legislative act). In some jurisdictions, they could be adopted by a local voter initiative. But see Hessey v. District of Columbia Bd. of Elections and Ethics, 601 A.2d 3 (D.C. 1991) (en banc) (invalidating initiative ordinance establishing a linkage trust fund based on developer fees as improperly interfering with the city council's allocation authority). Sometimes inclusionary requirements are included in a development agreement. See, e.g., Ngai Pindell, Developing Las Vegas: Creating Inclusionary Affordable Housing Requirements in Development Agreements, 42 Wake Forest L. Rev. 419 (2007). For examples of model inclusionary housing ordinances, see 4 Matthews Municipal Ordinances Sect. 52A:24 (May 2012) (owner-occupied); Institute for Local Self Housing, Annotated Sample Inclusionary Housing Ordinance, California Inclusionary Housing Reader 121-149 (2003).
77. See In Defense of IZ at 1019 ("the density bonus approach"); Ngai Pindell, Developing Las Vegas: Creating Inclusionary Affordable Housing Requirements in Development Agreements, 42 Wake Forest L. Rev. 419 (2007).
78. See In Defense of IZ at 1019 – 1020 ("the pure land use regulation approach").
80. Napa, supra note 17 (offering range of ways to comply including density bonus, expedited processing, fee deferrals, and loans or grants).
82. See In Defense of IZ at 1017.
83. The vast majority of IZ ordinances only regulate residential development. Some impact-type ordinances regulate commercial and industrial development. For a detailed description of a "comprehensive housing mitigation program" in Islamorada (Village of Islands) in the Florida Keys, see 63 Planning & Environmental Law No. 10, p. 3 (at 7 – 8) ("based on a nexus study that assesses the affordable and workforce housing needs of both residential and nonresidential developments").


87. In NJ, a 25% requirement was found invalid. Urban League of Essex County v. Mahwah Tp., 207 N.J. Super. 169 (Law Div. 1984). A program in the City of Key West (Florida) set a 30% set-aside requirement. 63 Planning & Environmental Law No. 10, p. 3 (at 5).

88. See In Defense of IZ at 980.

89. Kansas-Lincoln, I.C. v. County Bd. of Arlington, 66 Va. Cir. 274 (2004) (provide units or make payments); Napa, supra note 17 (offering range of ways to comply and permitting developer to appeal for a reduction, adjustment, or complete waiver of the ordinance's requirements). One program allowed for a developer that has produced more than the required number of units to transfer the "excess" low income unit credit to another developer. See, Orange County, California program, discussed in Bozung, Inclusionary Housing: Experience Under a Model Program, 6 Zoning & Plan. L. Rep. 90 (1983). The program was designed to be phased out after three years.

90. See, e.g. ordinance at issue in Napa, supra note 17. For an example of an IZ ordinance that offers developers a "release of obligation process," i.e. providing the developer an opportunity to pay a post-development in lieu fee if an affordable unit is not sold within six months, see 63 Planning & Environmental Law No. 10, p. 3 (at 7).

91. Compare Napa (discussed infra note 17 at 194) (finding options, including possible waiver, precluded facial attack) to Palmer (discussed infra note 25 at 888) (finding in lieu fees not severable because they were "inextricably intertwined" with the invalidated parts of the ordinance).