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Maximizing Inclusionary Zoning's Contributions to Both Affordable Housing and Residential Integration

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Maximizing inclusionary zoning's contributions to both affordable housing and residential integration

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Introduction

Inclusionary zoning is a policy that can uniquely serve both affordable housing and fair housing at the same time. It has already being enacted in dozens of states.¹ The U.S. Department of Housing and Urban Development is close to finalizing its proposed “Affirmatively Furthering Fair Housing” regulation.² Once this regulation is adopted, affordable housing and fair housing advocates are expected to pursue inclusionary zoning more aggressively in states and localities, making it an even more important policy. But more extensive use of inclusionary zoning poses both opportunities and risks for housing advocates because of the following three issues: (1) Unacknowledged tradeoffs between affordable housing and fair housing goals in inclusionary zoning design and implementation; (2) Conflicting concepts of residential integration; and (3) Legal challenges to inclusionary zoning.

Given these issues, this article explores the challenge facing inclusionary zoning supporters:

How can we maximize the complementary nature of inclusionary zoning's affordable housing and fair housing goals?³ For purposes of this article, the critical decision in the design of an

¹ See, e.g. Robert Hickey, Lisa Sturtevant, and Emily Thaden, *Achieving Lasting Affordability through Inclusionary Housing* (hereafter “Achieving Lasting Affordability”), Lincoln Institute of Land Policy Lincoln Institute of Land Policy Working Paper, 2014 (naming 27 states and D.C.) available at: <http://communitylandtrust.org/wp-content/uploads/2014/08/CLT-inclusion-July2014-LincLandInst.pdf> (last visited Mar. 13, 2015). For a vast amount of information about inclusionary zoning see Innovative Housing Institute's website at <http://www.inhousing.org/> (last visited Mar. 13, 2015).

² The proposed Affirmatively Furthering Fair Housing rule can be found at: <https://www.federalregister.gov/articles/2013/07/19/2013-16751/affirmatively-furthering-fair-housing>

³ This article will not review all of the scholarly literature on IZ. Representative articles critical of inclusionary zoning 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 Exactions*, 28 Stan. Envtl. L. J. 397 (2009). Representative articles supportive of inclusionary zoning include: Barbara Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing (“In Defense of IZ”)*, 36 U.S.F. L. Rev. 971 (2002);

inclusionary zoning ordinance is whether it includes alternative compliance options to on-site development of the affordable units (e.g. off-site development, land dedication and *in lieu* fees).⁴

The inclusion of these options generally makes on-site development of affordable units less likely, and this result in turn affects whether and how much a particular inclusionary zoning ordinance will promote residential integration and whether a court might find it valid.

Based upon my analysis of the opportunities and risks, I propose the following three directions for further research, analysis and action. We need to be aware of and deliberate about the tradeoffs between affordable housing and fair housing goals in inclusionary zoning ordinance design, including the legal issues. We need to clarify what we mean by “integration.” And, more research needs to be done, with the goal of producing a comprehensive tradeoff analysis.

I. The Promise of Inclusionary Zoning to Serve Affordable Housing and Fair Housing Goals

Many communities in the U.S. have both significant affordable housing needs and residential segregation problems.⁵ In these localities, there are typically many (often complex) tradeoffs.⁶

Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 *Fordham Urb. L.J.* 23 (1996) (criticizing Ellickson's argument and concluding that inclusionary zoning will increase the supply of affordable housing); Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 *Hofstra L. Rev.* 539 (1995). And see chapters 3 – 4 and 11 in *THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT*, Tim Iglesias and Rochelle E. Lento eds. 2nd ed. (American Bar Association 2011).

⁴ There are many other important inclusionary zoning design issues: (1) whether the requirement should be voluntary or mandatory; (2) whether the requirement should apply to whole jurisdiction or just specified areas; (3) what type(s) of project(s) should be subject to the requirement and at what number of units; (4) what percentage of set-aside to require; (5) what depth of affordability to require; (6) the relative quality and amenities of affordable housing units and market-rate units; (7) how much to accommodate developers' economic interests; and (8) what should be the length of required affordability.

⁵ See, e.g., Douglas S. Massey, “The residential segregation of Blacks, Hispanics, and Asians, 1970 – 1990,” pp. 44 – 61 in Gerald David Jaynes, *IMMIGRATION AND RACE: NEW CHALLENGES FOR AMERICAN DEMOCRACY* (2000) (documenting long-standing residential patterns of segregation).

Most proposed policies and programs only aim to serve one of these goals, e.g. Fair Housing Improvement Program grants for fair housing enforcement. And some policies that serve one goal can conflict with the other. For example, the siting of affordable housing units created through the Low Income Housing Tax Credit program based upon criteria in some States' Qualified Allocation Plans may increase affordable housing opportunities but also maintain or increase racial residential segregation.⁷ There is a related "place vs people" debate regarding what are the best uses of limited government resources.⁸

In contrast to other affordable housing programs and fair housing programs, local inclusionary zoning ordinances can uniquely serve both affordable housing and fair housing goals.⁹ Local inclusionary zoning ordinances require market-rate developers to produce affordable housing and (usually) to integrate the affordable housing units with the market-rate units on the same site.

⁶ See, e.g. J. Peter Byrne and Michael Diamond, "Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed," 34 Fordham Urb. L. J. 527 (2007) (analyzing tradeoffs within affordable housing policies).

⁷ See, e.g. a case currently before the U.S. Supreme Court, *Texas Dept. of Housing and Community Affairs v. The Inclusive Communities Project*, <http://www.scotusblog.com/case-files/cases/texas-department-of-housing-and-community-affairs-v-the-inclusive-communities-project-inc/> (The lawsuit alleges that the state housing agency's criteria for awarding federal tax credit subsidies to build affordable housing violated the federal Fair Housing Act under the disparate impact theory by perpetuating racial segregation in Dallas by disproportionately approving projects housing African-American families in poor minority areas and elderly developments in mostly-white, middle-class neighborhoods).

⁸ Crane, Randall and Michael Manville, *Revisiting the Who Versus the Where of Urban Development*, Land Lines, July 2008 (Lincoln Institute) (characterizing the "place-based" and "people based" approaches to combating poverty, housing affordability, chronic unemployment, and community decline as "one of the longest standing debates in community economic development"). Most advocates would now agree that a "both/and" approach is required.

⁹ "...inclusionary zoning laws can be designed to effectively decrease both economic and racial segregation..." Lisa C. Young, *Breaking the Color Line: Zoning and Opportunity in America's Metropolitan Areas* (hereafter "Breaking the Color Line"), 8 J. Gender Race & Just. 667, 668 (2005); Brian R. Lerman, Note, *Mandatory Inclusionary Zoning--The Answer to the Affordable Housing Problem* (hereafter "Mandatory Inclusionary Zoning"), 33 B.C. Envtl. Aff. L. Rev. 383, 389 (2006) ("Ultimately, inclusionary zoning prohibits exclusionary zoning and effectively provides for affordable housing..."); Benjamin Powell & Edward Stringham, "The Economics of Inclusionary Zoning Reclaimed": How Effective Are Price Controls?, 33 Fla. St. U. L. Rev. 471, 475 (2005) ("Most often, the below-market units must be of similar size and quality as the market-rate units and must be spread throughout the project in order to create integration and avoid 'ghettoization.' Some jurisdictions allow off-site construction or allow developers to pay a fee *in lieu* of building a below-market unit, but the intent of inclusionary zoning is to have the below-market units 'included' among the market-rate units.") Of course, without employing explicitly racial selection criteria, an inclusionary zoning ordinance cannot be certain to serve a racially integrative goal. It will rely on statistics (the correlation between race and income) and affirmative fair housing marketing plans.

This form of inclusion serves both affordable housing goals by making new affordable housing opportunities available and fair housing goals by enabling low-income households of color to live in “better neighborhoods”¹⁰ that were previously segregated. This confluence of objectives is appropriate because historically inclusionary zoning developed as a response to a long history of exclusionary zoning and both racial and economic discrimination.¹¹

Currently, there is a great variety of inclusionary zoning ordinances nationwide.¹² Some only apply to homeownership housing; others apply to rental housing. They vary on the size of proposed development to which they apply, the amount and level of affordability required, and many other dimensions. This flexibility is generally a strength because it allows inclusionary zoning to be adapted to fit local housing conditions, history and politics.

Generally, the results of inclusionary zoning so far are promising, albeit not perfect.¹³ They have created additional affordable housing opportunities for both new homeowners and renters and at

¹⁰ Note that, as discussed *infra* at XX, one’s model of integration determines what constitutes a “better neighborhood.”

¹¹ Nicholas Benson, *A Tale of Two Cities: Examining the Success of Inclusionary Zoning Ordinances in Montgomery County, Maryland and Boulder, Colorado* (hereafter “*Tale of Two Cities*”), 13 J. Gender Race & Just. 753, 755 (2010) (“The concept of inclusionary zoning arose during the late 1960s and 1970s as a response to suburban zoning practices that many housing advocates perceived as segregating racial minorities and the poor from the rest of the community.”); *Mandatory Inclusionary Zoning*, *supra* note XX at 386 - 388 (discussing inclusionary zoning as a response to exclusionary zoning).

¹² See generally *Achieving Lasting Affordability*, *supra* note XX; Timothy S. Hollister, Allison M. McKeen and Danielle G. McGrath, *National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances*, sponsored by National Association of Home Builders (June 2007).

¹³ See e.g. *Affordable By Choice: Trends in California Inclusionary Housing Programs* (Non Profit Housing Association of Northern California 2007), available at: http://www.nonprofithousing.org/pdf_attachments/IHIREport.pdf (last visited Mar. 2, 2013); *Inclusionary Housing Survey: Measures of Effectiveness* (Innovative Housing Institute 2010), available at: <http://www.inhousing.org/PDFs/finaldocument102610.pdf> (last visited Mar. 2, 2013); Schuetz, Jenny, Vicki Been, Rachel Meltzer, *Silver Bullet or Trojan Horse? The Effects of Inclusionary Zoning on Local Housing Markets in the United States*, *Urban Studies*, June 2010; Schuetz, Jenny, Vicki Been, Rachel Meltzer, *31 Flavors of Inclusionary Zoning: Comparing Policies From San Francisco, Washington, DC, and Suburban Boston*, *Journal of the American Planning Association*, Volume 75, Issue 4, September 2009; Amy Armstrong, Vicki Been, Rachel Meltzer, Jenny Schuetz, *The Effects of Inclusionary Zoning on Local Housing Markets* (Furman Center for Housing Policy at New

varied levels of affordability.¹⁴ Some, but not all, inclusionary zoning units also serve integration goals.¹⁵ And, to a large extent, inclusionary zoning avoids problems posed by the "place vs. people" debate because it increases the housing opportunities of low-income and people of color households without using limited funding for affordable housing and community development.¹⁶

But inclusionary zoning is neither a panacea nor a silver bullet. It works better in some communities and some housing markets than others. The results depend upon many factors, including the strength of relevant housing market and several elements of ordinance design and

York University School of Law, March 2008); Nicholas Benson, A Tale of Two Cities: Examining the Success of Inclusionary Zoning Ordinances in Montgomery County, Maryland and Boulder, Colorado, 13 J. Gender Race & Just. 753 (2010) (comparing the two ordinances); *After the Downturn: New Challenges and Opportunities for Inclusionary Housing* (National Housing Conference, February 2013). But see Schwartz and Johnston, Measures for Increasing the Supply of Moderate-Cost Housing in California (University of California, Davis Institute of Governmental Affairs, 1980). Caplan, Johnston, Schwartz, and Wandesforde-Smith, "Selling Zoning: Do Density Bonus Incentives for Moderate-Cost Housing Work?" 36 Wash. U.J. of Urb. & Contemp. L. 45 (1989). The primary critics of the effectiveness of inclusionary zoning (besides Professor Ellickson) are Benjamin Powell and Edward Stringham who publish through a libertarian policy organization called The Reason Foundation. For a critique of many of the inclusionary zoning critic's analysis and methodology, see David Rusk, He Who Pays the Piper: An Assessment of Research on Inclusionary Zoning (2008) Innovative Housing Institute, available at: <http://inclusionaryhousing.ca/wp-content/uploads/sites/2/2010/05/Rusk-CHBAcritique-fin2-2008.pdf> (last visited Mar. 13, 2015). And see Victoria Basolo & Nico Calavita, Policy Claims with Weak Evidence: A Critique of the Reason Foundation Study on Inclusionary Housing Policy in the San Francisco Bay Area 11 (2004), http://www.nonprofithousing.org/actioncenter/campaigns/download/IH_countering_critics.pdf.

¹⁴ See, e.g. Inclusionary Housing Survey: Measures of Effectiveness (hereafter "Measures of Effectiveness") (Innovative Housing Institute 2010) 14, available at: <http://inhousing.org/wp-content/uploads/InclusionaryHousingSurvey2010.pdf> (last visited Mar. 12, 2015); Affordable by Choice (hereafter "Affordable by Choice"), Non Profit Housing Association and California Coalition for Rural Housing 14 (2007), available at: <http://www.wellesleyinstitute.com/wp-content/uploads/2013/01/NPH-IHinCA2006.pdf> (last visited Mar. 13, 2015).

¹⁵ See, e.g. Is Inclusionary Zoning Inclusionary? A Guide to Practitioners (RAND Corp. 2012), available at: http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR1231.pdf (last visited Mar. 13, 2015); Alex F. Schwartz, Housing Policy in the U.S. 395 – 403 (2015); Affordable by Choice, *supra* note XX at 14.

¹⁶ This assumes that if a jurisdiction uses an *in lieu* fee option that the *in lieu* fees are set at the full cost of building the affordable housing units. But see critiques of inclusionary zoning by political progressives. *Inclusionary Housing: Some Doubts*, Michael Pyatok in California Inclusionary Housing Reader, Institute for Local Self Government (hereafter "California Inclusionary Housing Reader") 47 - 50 (2003), available at: http://www.ca-ilg.org/sites/main/files/file-attachments/resources_California_Inclusionary_Housing_Reader.pdf (last visited Mar. 13, 2015) (criticizing inclusionary zoning as sometimes potentially undermining diverse functional (albeit formally "segregated") communities, undermining self-determination and diluting political power); Accord, [Lisa C. Young, BREAKING THE COLOR LINE ZONING AND OPPORTUNITY IN AMERICA'S METROPOLITAN AREAS \(2005\) 8 J. Gender Race & Just. 667](#), ("If inclusionary programs are effective in breaking the color barrier and moving racial minorities into the white suburbs, they will also scatter African-American political power.") *Id.* at 704.

implementation. They work best in high-housing demand jurisdictions and especially if there is ample land available for development or redevelopment.¹⁷ They are not very useful in areas with high levels of segregation but low housing demand. They are more effective if they are mandatory than voluntary.¹⁸ They are best if adopted throughout a regional housing market because there is less chance of developers who want to develop in the region evading the requirement. Of course, there are both political limits¹⁹ and legal limits (discussed *infra* at II(C)). And, finally, inclusionary zoning is only *one* policy that needs to be combined and coordinated with many others to address our affordable housing and segregation problems effectively.²⁰

Moreover, inclusionary zoning has many longtime and committed opponents. As fair housing and affordable housing advocates urge localities to adopt inclusionary zoning ordinances as part of their affirmatively furthering fair housing programs,²¹ these opponents can be expected to generate obstacles to new inclusionary zoning programs.

¹⁷ Tale of Two Cities, *supra* note XX at 761 – 62. ("Designing a successful inclusionary zoning program begins with an assessment of the local housing market.")

¹⁸ Id. at 762. ("Whatever the particular features of an inclusionary zoning ordinance, a key factor in predicting its success is whether its requirements are voluntary or mandatory. Mandatory programs produce more affordable housing units than voluntary programs."); Mandatory Inclusionary Zoning, *supra* note XX.

¹⁹ Tale of Two Cities, *supra* note XX at 763 and 772 ("Inclusionary zoning is most effective in jurisdictions where there is political will for the process, coupled with strong community support. ... "The commitment of local governments and community organizations to provide affordable housing is the final factor in determining the success of an inclusionary zoning program. A study of inclusionary zoning programs in California in the 1980s found that programs where the government was highly supportive of inclusionary zoning were more successful than programs where the city council was hesitant to support inclusionary zoning.")

²⁰ "Creating and sustaining broad inclusivity requires a multi-pronged approach that no single policy can deliver: inclusionary zoning, public land disposition and development strategies, zoning reforms that support multi-unit housing, community benefit agreements, revenue-generating strategies tied to rising property values or new commercial development, accessory dwelling units, and community land trusts." "This session will discuss creative approaches such as facilitating partnerships between market-rate and affordable housing developers, linking inclusionary housing with Housing Choice Vouchers, and creating incentives for deeper affordability." Descriptions of Session 1 ("Local Tools and Strategies for Achieving Inclusion") and Session 2 ("Fundamentals of Inclusionary Housing") under "Solutions for Inclusive Communities" at the Inclusive Communities Conference, available at: <http://www.nhc.org/Solutions-2013-Speakers.html> (last visited Mar. 13, 2015).

²¹ Fair housing advocates have done so already in conjunction with the current Assessment of Impediments to Fair Housing requirements. As early as the 2010 National Inclusionary Housing Conference, there was substantial discussion regarding "the desire to have inclusionary zoning recognized as a means of implementing the goal of

In conclusion, inclusionary zoning carries substantial upside potential for affordable housing and fair housing. However, increased use of inclusionary zoning also poses risks. Going forward, the challenge for inclusionary zoning proponents who care about both affordable housing and fair housing is: How can we maximize inclusionary zoning's complementary benefits and mitigate the risks of expanded use? We need to begin by exploring the risks more deeply.

II. Exploring the Risks

I will focus on inclusionary zoning ordinance design and implementation issue of offering developers alternative compliance options because it turns out that while this flexibility is a benefit, it also entails a significant risk of tradeoffs between affordable housing and fair housing goals.

A. Unacknowledged Tradeoffs: A Lost Opportunity for Affordable Housing and Integration

Some inclusionary zoning are designed as a “pure” land regulation—a developer can only comply by building the required affordable housing units on the same site as the market rate units.²² Other (probably most) inclusionary zoning ordinances include alternative compliance options: off-site development, land dedication and *in lieu* fees.²³

affirmatively furthering fair housing.” Miriam Axel-Lute, *Not Just Inclusionary Spot Zoning: Conference Portrays IZ As Essential to Civil Rights*, Shelterforce Magazine, Nov. 8, 2010.

²² See, e.g. the inclusionary zoning ordinances of the following cities in California: Sunnyvale, San Mateo, and Santa Cruz County. Some other California cities' inclusionary zoning ordinances including Napa County and Cupertino require on-site construction of the affordable units for projects of a certain size.

²³ California Inclusionary Housing Reader, *supra* note XX at 17 - 18.

When inclusionary zoning is understood as a response to historically widespread exclusionary zoning, its integration goals and its affordable housing goals are equally important. In practice, these goals generally do *not* conflict if affordable housing units are built *on-site* with market-rate units because for-profit developers subject to inclusionary zoning requirements typically select a relatively high-opportunity neighborhood for the development. But when ordinances offer developers alternative compliance options, each of these other options tends to favor affordable housing over fair housing.

If the developer builds the affordable housing units off-site, it's likely that land will not be located in the same neighborhood as the market-rate units, and all else being equal, the off-site affordable housing units are less likely to be located in predominately white, high opportunity neighborhoods. If the developer dedicates property instead of building on-site, it's likely that land will not be located in the same neighborhood as the market-rate units, and all else being equal, affordable housing units built on that dedicated land are less likely to be located in predominately white, high opportunity neighborhoods. If developer pays *in lieu* fees, a city may eventually generate more affordable housing units because affordable housing units funded by *in lieu* fees are likely to be located where land costs are lower and so, all else being equal, the same amount of funds will produce more affordable housing units.²⁴ But, again, these units are less likely to have an integrative effect.

²⁴ See, e.g. Still Possible?, *supra* note XX at 2 – 3 (“...[A]n alternative of collecting an *in lieu* fee that would be applied to subsidize affordable housing projects...should be a more efficient method, producing more affordable housing for the same investment. One reason is that a 100% affordable housing project can be built to a more economical standard.”); Jay A. Riffkin, Responsible Development? The Need for Revision to Seattle’s Inclusionary Housing Plan (hereafter “Responsible Development?”), 32 Seattle U. L. Rev. 443, 472 (2009)(“In addition, because the payment *in lieu* of development fund does not have enough cash to fund new projects on its own, the city is unlikely to do anything more than supplement the cost of affordable housing projects that are partly funded and built through other city programs.”)

Given the choice, developers will often select the *in lieu* fee or the off-site compliance option. Developers are likely to perceive the on-site building option as more difficult to implement compared to writing a check.²⁵ They may fear negative marketing and pricing consequences of co-locating market-rate and affordable housing units.²⁶ They may fear friction or even conflict between residents of market-rate and affordable housing units and resulting higher property management costs.²⁷ And, compared to building on-site, the off-site option may appear easier because the developer can collaborate with a nonprofit developer to build the off-site affordable units while focusing its own development capacity on the market-rate units. Therefore, when the other compliance options are included we may get more affordable housing units but risk increasing segregation or at least not promoting integration, thereby enabling a false sense of having addressed segregation.²⁸ This is the lost opportunity risk.

²⁵ Still Possible?, *supra* note XX at 3 (“...[M]any developers would prefer to simply pay a fee, which they can ascertain and include in project budgets without the further complications inherent in marketing and administering the affordable units.”)

²⁶ A Tale of Two Cities, *supra* note XX at 771 – 771 (“The off-site option is aimed at developers who are concerned about marketing effects of mixing poor and wealthier residents, . . . reducing development costs for low-income units, . . . [and] avoiding the design and administrative headaches of building affordable units in a market-rate development.”)

²⁷ Julie Satowaug, Affordable Housing in New York’s Luxury Buildings, New York Times, Aug. 29, 2014, available at: <http://www.nytimes.com/2014/08/31/realestate/affordable-housing-in-new-yorks-luxury-buildings.html> (last visited Mar. 13, 2015). (describing relationships between tenants of market-rate units and affordable units in inclusionary housing, “...there is occasional friction between the two groups. At the Westminster, for example, Mr. Amico [a real estate broker and a market-rate tenant] said he has heard some grumbling about the tenants [from affordable units] hanging out in the lobby, and notices have been posted reminding residents of proper lobby etiquette...”)

²⁸ M. Tanner Clagett, If It's Not Mixed-Income, It Won't Be Transit-Oriented: Ensuring Our Future Developments Are Equitable & Promote Transit, 41 Transp. L.J. 1, 20 (2014) (“The options available to developers in the face of inclusionary zoning ordinances seem to land the ordinances in safe territory. Typically, such options include fees allowing developers to place the mandated affordable units at a separate site. Such a bypass may be harmful to mixed-income [Transit Oriented Development]s' goals, though (in addition to possible constitutional issues). It could, however, lead to the construction of more low-income housing than the ordinance requires. If the development project is sited on expensive land in high demand with a moneyed demographic, and the proposed off-site low-income housing is on cheaper land, then--from a strictly mathematical standpoint--more low-income families could be housed for less money. Again, though, this approach does little for the purposes of mixed-income TOD and would still likely require low-income families to bear greater transportation costs.”); Breaking the Color Line, *supra* note XX at 706 (“Furthermore, inclusionary zoning laws are often most effective in increasing affordable housing in relatively racially diverse municipalities. This phenomenon could be because minorities are more comfortable moving into more diverse neighborhoods, or it could be because the more exclusive neighborhoods fight the hardest against the creation of affordable units.”)

In many pro-inclusionary zoning publications, inclusionary zoning is presented primarily or exclusively as a policy to increase the supply of affordable housing. The affordable housing goal is usually explicitly stressed, while the fair housing goal is ignored or only slightly mentioned.²⁹ There may be many reasons for this presentation, including pragmatic reasons (responding to the local politics to get the ordinance approved or strategically emphasizing affordable housing), whether the drafters prioritize affordable housing over equity, or a lack of interest or understanding about how inclusionary zoning can serve both goals.

Why do localities considering adopting an inclusionary zoning ordinance include alternative compliance options? Reasons include: (1) political (they make inclusionary zoning more palatable to the for-profit development community who *will* want to have these options); (2) practical (they make inclusionary zoning more flexible and flexibility is good, if not necessary); (3) legal: (an erroneous belief that these options are legally necessary);³⁰ (4) lack of awareness of inclusionary zoning's fair housing benefits and the tradeoffs entailed by including the options; and (5) values (they do not support the fair housing goal or prioritize affordable housing over it).

Pro-inclusionary zoning articles generally uncritically praise giving developers options for compliance.³¹ However, I think we need to focus more closely on this decision.³² Affordable

²⁹ See, e.g. Bay Area Inclusionary Initiative Toolkit, Non Profit Housing Association of Northern California (2003), available at: <http://nonprofithousing.org/wp-content/uploads/2014/Toolkits/Inclusionary/InclusionaryTool.pdf> (last visited Mar. 13, 2015). (describing inclusionary zoning only as “an affordable housing policy” without mention of its potential integration purposes). Affordable by Choice, *supra* note XX, at 26 (evaluating success of inclusionary zoning using only measures that consider affordability and not whether the affordable units fostered integration).

³⁰ See legal discussion, *infra* at XX - XX.

³¹ Accord Tale of Two Cities, *supra* note XX at 71 – 72 (“This “smorgasbord” of options, which includes building affordable units on-site, off-site, or paying a cash-in-lieu fee, affords developers substantial flexibility in complying with Boulder's mandatory inclusionary zoning ordinance. These options help to explain Boulder's success despite its

housing and fair housing advocates might agree the design decisions are a function of politics and local conditions, but may not come out on the same side of each issue because of their varied effects on the affordable housing and fair housing goals and their possibly conflicting evaluations of these effects.

Some may argue that the need for affordable housing is so great in some communities that we should not worry too much about the integration part invoking the adage “Don’t let the perfect be the enemy of the good.” Others may take the view that we should subordinate the integration goal to meeting affordable housing needs because an affordable housing unit located *anywhere* in most jurisdictions provide an chance at future integrative moves by the household. Often affordable housing developers feel beleaguered and might think: “We’re doing the best we can in a very difficult situation with limited funding, scarce sites available, and local opposition is particularly intense in so-called better neighborhoods. Don’t blame us for past segregation decisions. We can’t do everything at once.” Based upon my prior work assisting non-profit affordable housing developers to obtain local government approvals in the face of community opposition, I am somewhat sympathetic to these concerns. However, given the unique potential for inclusionary zoning and the importance of these design decisions, I urge more deliberate and careful consideration of the tradeoffs.

lack of direct developer incentives.”); Bay Area Inclusionary Housing Toolkit, p. 15 (“Component Two: Flexible Parameters: The flexibility component outlines possible ways that affordable housing parameters can be achieved by providing market-rate developers with a range of options to fulfill their [inclusionary housing] requirement.”)

³² See also Michael Floryan, *Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning Practices* (hereafter “Cracking the Foundation”), 37 Pepp. L. Rev. 1039, 1098 - 1103 (2010) (raising questions about offering developers the options of off-site construction, land dedications and paying *in lieu* fees); Tale of Two Cities, *supra* note XX at 775-77 (same).

Reaping the full benefits of inclusionary zoning requires sustained attention to the potential tradeoffs in light of the constant pragmatic pressures to compromise one goal for the other.

B. Engaging the Integration Debate

Sometimes we yearn for affordable housing and fair housing to be front-burner issues, but as the old saying goes, “Be careful what you wish for...” In my view, we are not a “post-racial society” in any meaningful sense. Race, income and integration are still difficult and volatile topics both among legislators, opinion leaders, and among the general public. Increased proposed use of inclusionary zoning is likely to incite a controversial public debate about “forced integration.” If we are not ready for this debate, it could hurt both affordable housing and fair housing in general as well as increase local opposition to inclusionary zoning ordinances. In particular, if the Affirmatively Furthering Fair Housing (AFFH) regulation is finalized, we should expect much more critical attention to integration. This is predictable based upon the public controversy over the Westchester County consent decree and the proposed AFFH regulation.³³

Why is this a problem for inclusionary zoning ordinances? Despite a great deal of agreement on the value of “integration” in the abstract within the affordable housing and fair housing community as the stated goal based upon the “truly integrated and balanced living patterns”

³³ See, e.g. Patrik Jonsson, 'Fair' housing or 'social engineering'? HUD proposal stirs controversy, Christian Science Monitor, Aug. 9, 2013, available at: <http://www.csmonitor.com/USA/2013/0809/Fair-housing-or-social-engineering-HUD-proposal-stirs-controversy> (last visited Mar. 13, 2015). (reporting fears that the proposed AFFH rule would “force communities to diversify in ways that may hurt local property values, their tax bases, and their overall economies”); Peter Applebome, Showdown for Westchester and U.S. Over Desegregation Agreement, New York Times, Apr. 23, 2013, available at: <http://www.nytimes.com/2013/04/24/nyregion/us-gives-westchester-deadline-to-comply-with-housing-pact.html> (last visited Mar. 13, 2015). (quoting Westchester County executive Robert Astorino “Washington bureaucrats, who you will never see or meet, want the power to determine who will live where and how each neighborhood will look”; “What’s at stake is the fundamental right of our cities, towns, and villages to plan and zone for themselves.”)

language in the legislative history of the federal Fair Housing Act,³⁴ there is insufficient agreement on what integration actually means. In fact, there are at least two competing conceptions that have very different implications for inclusionary zoning design: the *traditional integration model* and the *individual access to the opportunity structure model*.³⁵

First, there is what I call the *traditional integration model* that concerns the nature or quality of a community. It focuses on the complexion of a community as a geographical unit and the social relationships between members of different groups (races³⁶ or income) within it. This concept asks: Who lives there and how do they relate to each other? It usually begins with a statistical analysis of relative spatial location and concentration of Caucasians and people of color within a defined geographical unit.³⁷ However, this vision looks beyond simply improving the statistics. It seeks actual, authentic human interaction between people of different races and economic classes and overcoming “social distance.”³⁸

³⁴ Comments of Senator Mondale, 114 Cong. Rec. 3422.

³⁵ There are other less popular models of residential integration. *See, e.g.* Iris Marion Young, *INCLUSION AND DEMOCRACY* (2000), Excerpts from Chapter 6 Residential Segregation and Democracy (criticizing the traditional integrationist ideal and offering an alternative ideal of “Differentiated Solidarity”); Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 *Cornell L. Rev.* 729 (2001) (presenting a post-integrationist vision focusing on regionalism).

³⁶ In this article when I use the term “race” I recognize it as a social construct, but one with important actual effects. *See, e.g.* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 *Harvard Civil Rights-Civil Liberties Review* 1 (1994).

³⁷ *See, e.g.*, Douglas S. Massey, “The residential segregation of Blacks, Hispanics, and Asians, 1970 – 1990,” in Gerald David Jaynes, *IMMIGRATION AND RACE: NEW CHALLENGES FOR AMERICAN DEMOCRACY* 44 – 61 (2000) (describing various traditional statistical measures of residential segregation: dissimilarity and isolation (p. 46) and clustering, concentration and centralization on pp. 60 – 61).

³⁸ *See e.g.* Bogardus, E. S., “Measurement of Personal-Group Relations,” *Sociometry*, 10: 4: 306–311 (1947); Karakayali, Nedim, “Social Distance and Affective Orientations,” *Sociological Forum*, vol. 23, n.3, pp. 538–562 (2009). This model focuses on racial and ethnic integration without any reference to the “opportunity structure.” The concept is well-expressed in the following quote by Manhattan Borough President Gale Brewer, “I’m hoping that as time goes on, people will share play dates, and I hope they’ll do BBQs together.” Laura Kusisto, *A ‘Poor Door’ on a Planned New York Apartment Tower With Affordable Housing Gets a Makeover*, *Wall Street Journal*, Aug. 28, 2014, available at: <http://www.wsj.com/articles/a-poor-door-on-a-planned-new-york-apartment-tower-with-affordable-housing-gets-a-makeover-1409276266> (last visited Mar. 13, 2015).

The second model is the *individual access to the opportunity structure model*. This model focuses on how location of a household relates to the “opportunity structure” of a community, e.g. good schools, good jobs, decent shopping, healthy neighborhoods, etc.³⁹ It does not inquire into the relationships among the members of the households who live in affordable housing units and those in market-rate units. Its primary focus is economic integration.

Why are the two models significant for the design of inclusionary zoning ordinances, and the issue of alternative compliance options? The recent “poor door controversy” provides a vehicle to explore the two conceptions and their potential conflict.⁴⁰ A developer was using New York City’s voluntary inclusionary zoning ordinance to develop market-rate condos and affordable rental units. The proposal envisioned two separate entrances, one for residents of the market-rate condos and another for residents of the affordable rental units. A reporter’s story of the plan along with a graphic stirred a national furor.⁴¹ The controversy led to revision in the design.⁴²

³⁹ This model comes from the writings of John A. Powell and the work of the Kirwan Institute (<http://kirwaninstitute.osu.edu/>) and more recently the Haas Institute for a Fair and Inclusive Society at University of California at Berkeley <http://diversity.berkeley.edu/haas-institute> (last visited Mar. 13, 2015), as well as the “geography of opportunity” scholarship, e.g. *The Geography of Opportunity: Race and Housing Choice in Metropolitan America*, ed. Xavier de Souza Briggs (2005). The author used this model in an amicus brief supporting inclusionary zoning on behalf of the Leo T. McCarthy Center for Public Service and the Common Good and 44 Housing Scholars to California Supreme Court in *California Building Industry Association v. City of San Jose* (S212072).

⁴⁰ The news story and graphic that launched the controversy is Kate Briquette, *Upper West Side Condo Has Separate Entrances for Rich and Poor*, New York Post, Aug. 1, 2013; available at: <http://nypost.com/2013/08/18/upper-west-side-condo-has-separate-entrances-for-rich-and-poor/> (last visited Mar. 13, 2015). In this analysis, I am putting aside the issue of whether or not the poor door could be shown to violate the federal Fair Housing Act under a disparate impact theory. See Scott M. Badami, A “Poor Door”—And The Fair Housing Act Risks Involved (hereafter “Fair Housing Risks”), Fair Housing Defense blog, Aug. 3, 2014 (musing that “if the net impact of the ‘poor door’ is such that protected classes are somehow singled out—there will be an argument that a ‘poor door’ has a disparate impact on minorities and is therefore against the law.”)

⁴¹ The development was being built pursuant to New York City’s 421-A tax exemption inclusionary zoning program which had been revised in 2007 to require affordable units to be built on-site. See, e.g. Karrie Jacobs, *The Real Scandal in NYC Real Estate? Not Enough Poor Doors* (hereafter “Real Scandal”), available at: <http://www.fastcodesign.com/3034027/slicker-city/the-real-scandal-in-nyc-real-estate-not-enough-poor-doors> (last visited Mar. 13, 2015).

Later, the City of West Hollywood voted against another “poor door” proposal.⁴³ Others opined that poor doors were not the issue or even that poor doors are not a problem at all.⁴⁴

If we hold to the traditional integration model, the poor door is significant because it seems to reinforce separation of people based upon income (and possibly race) and is likely to lead to stigma and to the experience of affordable housing residents being perceived as “second class” citizens.⁴⁵ We would not allow separate entrances for race, gender or religion.⁴⁶ At the very least, it violates the “spirit” of the traditional model of integration.

In contrast, if we employ the individual access to the opportunity structure model, the poor door probably should not matter because living in that same great neighborhood provides the affordable housing residents essentially equal access to the opportunities for schools, jobs, health and safety, etc.⁴⁷

⁴² Scott M. Badami, Is the “Poor Door” Closed? Not Yet. But the Proposal is Changing. And Will Likely Change Some More, Fair Housing Defense blog, Sept. 3, 2014 (reporting “the developer and city have reworked the project”).

⁴³ Hailey Branson-Potts, West Hollywood commission votes against “poor door” housing development, Los Angeles Times, Aug. 9, 2014. The developer later revised the plan to make equal access for all residents. *Id.*

⁴⁴ Mireya Navarro, “Poor Door” in a New York Tower Opens a Fight Over Affordable Housing, N.Y. Times, Aug. 26, 2014 (“Even advocates of affordable housing are divided on the issue: some argue that developers who segregate apartments should not benefit from government incentives, while others say the focus should be on building more homes, rather than where to enter them. ‘There are trade-offs,’ said Lisa Sturtevant, vice president for research at the National Housing Conference, an affordable housing advocacy group in Washington. ‘It’s really important that there’s no discrimination, but there’s a balance between what we can do and should do.’”); Real Scandal, *supra* note XX (arguing that NYC’s inclusionary programs do not need to provide incentives for developers to build and that developers merely “play the game” they have available to them).

⁴⁵ Fair Housing Risks, *supra* note XX (“The concern, of course, is if the affordable residents are being treated as ‘second class citizens’ and those tenants are stigmatized in a matter which does not reflect how our fellow citizens should be treated under the fair housing laws.”)

⁴⁶ We do sometimes provide separate entrances to buildings for persons with physical disabilities as a reasonable modification under the Fair Housing Act.

⁴⁷ Fight Over Affordable Housing, *supra* note XX (“But the repugnance is not universal. Among the roughly 500 cities with inclusionary zoning programs, housing supporters have been mostly focused on having the affordable units built close to their market-rate counterparts so that low-income households share some of the benefits of wealthier neighborhoods, like good schools and public safety. ‘It’s so important to build as much affordable housing

Exploring the poor door controversy forces us to be more clear about our model of integration.

What do we mean by “integration”? What is the goal? How does it happen? What are the mechanisms? What *counts* as an “integrated community”? How do you operationalize it for purposes of city planning, individual siting of developments and evaluation? If we do not assume that after it is sufficiently established it will be self-replicating, how can it be maintained?

Location, location, location: Both integration and opportunity housing assume location of affordable housing is critical (if not determinative) and particular location in relationship to other land uses. But they differ in what location is important and how or why it matters. For the traditional model, it is location that will facilitate meaningful interactions between different groups. For the access to opportunity model, it is location that facilitates better or equal access to good schools, good jobs, etc.

This difference affects what locations for affordable housing will serve each model’s integration purpose. Is just being somewhere “within” the jurisdiction good enough? Generally, the location of the affordable housing units within the jurisdiction *will* matter if there are significant relevant differences among the neighborhoods within the jurisdiction as in many cities in America. For the traditional model: unless we assume a lily white city, the answer is “no” because siting the affordable housing units in the same neighborhood as existing low income housing is just another form of *de facto* segregation. For the access to opportunity model: it may be fine if all of

as possible, and you always have to compromise,’ said Carol Lamberg, co-chairwoman of the New York Housing Conference, an affordable housing coalition.”)

the neighborhoods within the jurisdiction are relatively “high opportunity neighborhoods” or if there are substantial transit options.

In the same way that statistics alone do not tell us if the traditional model’s goal has been met, neither does locating a person in a high opportunity mean that that model’s goal has been or will be met. Physical proximity alone—whether to a person from another community or to an element of the opportunity structure—is a necessary but not sufficient condition for achieving the goal. This means we need to get to the operational assumptions of the models.⁴⁸

It is possible that if we dig deeper into the assumptions and mechanisms of the two models that they are not so different and perhaps they even merge. Maybe the traditional model *also* seeks economic and social opportunity for the individuals in the households. If so, we need to be clear

⁴⁸ The traditional model must answer: What is the relevant geographical unit to measure degree of integration? The building, the block, the neighborhood, the census district, the planning district, the city, or the region? And, the traditional model must address the mechanism by which neighbors living in close geographic proximity are expected to form relationships across the social distance. One common suggestion was the “contact hypothesis” which suggests that if certain conditions are met interpersonal contact between members of groups with a prior history of conflict will reduce or eliminate prejudice, bias and stereotypes. This concept is often attributed to Gordon Allport in his book *THE NATURE OF PREJUDICE* (1954). For more contemporary discussions of the contact hypothesis, see Brown, R., & Hewstone, M. *An integrative theory of intergroup contact* in M. P. Zanna (ed.), *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY*, Vol. 37, 255–343 (2005); Wright, S. C. *Cross-group contact effects*, in S. Otten, T. Kessler & K. Sassenberg (eds.), *INTERGROUP RELATIONS: THE ROLE OF EMOTION AND MOTIVATION* 262–283 (2009).

The opportunity model must explain: How close do people need to be to elements of the opportunity structure to have realistic access? What are the necessary and sufficient conditions for access? It will vary based upon each element of opportunity. For example, regarding schools, if the jurisdiction has neighborhood-based schools, then location matters by neighborhood; if the jurisdiction has magnet schools or other system, the neighborhood may not matter for that element of opportunity. For employment, it will depend upon the mechanism by which residents are expected to access better job opportunities. Will address alone matter or one’s social contacts? Moreover, there may be both objective and subjective aspects of “opportunity.” In other words, being objectively aware of an opportunity is different from subjectively believing you have a reasonable chance at actually accessing it so that you are motivated to seek it. This issue will be the subject of my future scholarship.

There are several well-developed methodologies that operationalize the access to opportunity model using geospatial tools. One called “opportunity mapping” was pioneered by the Kirwan Institute, <http://kirwaninstitute.osu.edu/opportunity-communities/mapping/> (last visited Mar. 13, 2015). A similar but distinct model is incorporated into the “Assessment Tool” of HUD’s proposed AFFH regulation. This tool was still in draft form at the time the regulation was proposed. It is described in the Federal Register on pp. 57950 – 57954 at <http://www.huduser.org/portal/publications/pdf/2014-22956.pdf> (last visited Mar. 13, 2015). The author is not aware of a similar comprehensive methodology that operationalizes the traditional integration model.

how this additional result is likely to occur. Perhaps it assumes that economic and social opportunity will flow from the relationships via some version of the “contact hypothesis.” And, perhaps the opportunity model assumes that meaningful personal relationships across race and income will develop among the residents by virtue of the affordable housing residents taking up the newly available opportunities. If so, need to think through how this is likely to occur.⁴⁹

Constructive conversations among affordable housing and fair housing advocates about the integration models and how they may overlap and merge would be very useful.⁵⁰

What model of integration we support makes a difference for how inclusionary zoning ordinances ought to be designed, implemented and evaluated. If we promote the traditional integration model, then there should be a strong emphasis on on-site development of affordable housing units with market rate units. If we follow the individual access to the opportunity structure model, then we should put less emphasis on on-site development and we can be more open to other locations within a jurisdiction and their tradeoffs as long as they meet the model’s criteria.

Advocates need to decide on a good analysis and help decision-makers, opinion leaders (including the media) and the general public understand it so that they can talk about it with

⁴⁹ No matter which model of integration we promote, we need to include program features such as targeted advertising and counseling of potential residents to maximize the chance that the program will increase racial integration. These are some lessons from the experiences in Mount Laurel (New Jersey), the Gautreaux litigation and HUD’s Moving To Opportunity program. *See, e.g.* Breaking the Color Line, *supra* note XX at XX (“Racial segregation is an overlapping, but separate problem [to lack of equal opportunity] that deserves the attention of policy makers. Granted, policies that break down economic segregation might also help break down racial segregation. Minorities are disproportionately poor in this country, so any policy that benefits the poor should disproportionately benefit minorities. Because racial segregation is so severe and harmful in this country, however, policies designed to help the poor should include mechanisms to maximize the chance that poor minorities will benefit from the policy.”)

⁵⁰ For a hopeful view, see Philip Nyden, Michael Maly and John Lukehart, *The Emergence of Stable Racially and Ethnically Diverse Urban Communities: A Case Study of Nine U.S. Cities*, Housing Policy Debate, Vol. 8, Issue 2 (1997) Fannie Mae Foundation.

others. If we don't successfully engage this public debate, there will be more local opposition to adoption of inclusionary zoning, leading to fewer inclusionary zoning ordinances, weaker inclusionary zoning ordinances and more opposition to their implementation.⁵¹ Politically, individual access to the "opportunity structure" model appears to be the less controversial of the two models because it is somewhat less threatening to local leaders and the general public because it is based in the bi-partisan notion of America being a nation of "equal opportunity." But it would be naïve to assume that this model is widely accepted.

C. Legal Risks: A Framing Contest

The legal fight over inclusionary zoning is a framing contest.⁵² A local government makes the first move by its design and findings in enacting an ordinance. An opponent will use her pleadings, motions and evidence to try to reframe the ordinance to challenge the local governments' authority to enact it or to elicit stricter legal scrutiny. A court will decide which frame (and accompanying legal standard) it will apply to determine the legality of the inclusionary zoning ordinance. This recognition raises issues about the preparation and design of inclusionary zoning ordinances, specifically, whether, anticipating a legal challenge, cities

⁵¹ See *supra* note XX (citing political support as necessary for success).

⁵² For legal framing in general see Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 Yale L.J. 804 (2008); Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 Marq. L. Rev. 263 (2010). For legal framing in the inclusionary zoning context, see *In Defense of Inclusionary Zoning*, *supra* note XX at 1018 (identifying the issue of alternative compliance mechanism and its potential legal consequences as making "most inclusionary zoning ordinances are neither fish nor fowl"); *Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and its Potential to Meet Affordable Housing Needs* (hereafter "*Framing Inclusionary Zoning*"), ZONING AND PLANNING LAW REPORT, Vol. 36, No. 4 (April 2013) (applying the framing analysis to numerous cases in which inclusionary zoning has been challenged).

should include alternative compliance options⁵³ which render the ordinance vulnerable to reframing.⁵⁴

Developers exhibit a variety of responses to mandatory inclusionary zoning. Some developers are fine with inclusionary zoning, treating it as a cost of doing business. Others are ambivalent; their reaction depends upon how generous the subsidies are and how easy it is to make it work. But some property rights groups (e.g. the Pacific Legal Foundation) and developer organizations (e.g. California Building Industry Association) are implacably opposed to inclusionary zoning.⁵⁵

⁵³ It is important to distinguish a “waiver” provision from alternative compliance mechanisms. Any inclusionary zoning ordinance should include a hardship waiver or partial waiver provision to prevent an unintended regulatory taking along with because standards and procedures the local government would apply for reducing, waiving or mitigating inclusionary requirements if the developer can demonstrate the law would cause some constitutionally impermissible hardship and that the benefits afforded under the ordinance do not adequately mitigate the hardship. The inclusion of a waiver was critical to a California appellate court’s rejection of a facial taking attack on an inclusionary zoning ordinance in *Home Builders Ass’n of N. California v. City of Napa*, 90 Cal. App. 4th 188, 194, 108 Cal. Rptr. 2d 60, 64 (2001) (“Here, City’s inclusionary zoning ordinance imposes significant burdens on those who wish to develop their property. However the ordinance also provides significant benefits to those who comply with its terms. Developments that include affordable housing are eligible for expedited processing, fee deferrals, loans or grants, and density bonuses. More critically, the ordinance permits a developer to appeal for a reduction, adjustment, or *complete waiver* of the ordinance’s requirements. Since City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking.”) See also, *Action Apartment Ass’n v. City of Santa Monica*, 166 Cal.App.4th 456 (2d Dist. 2008) (same).

⁵⁴ The scope of this article is limited to considering the opportunities and risks for inclusionary zoning ordinances that are within local governments’ control through its design of the ordinance. There are many other policies that can promote inclusionary housing and protect it from legal attack, including federal and state incentive programs that encourage local jurisdictions to support mixed-income development in their communities, a mandatory statewide inclusionary housing ordinance (see Laura M. Padilla, *Reflections on Inclusionary Housing and A Renewed Look at Its Viability*, 23 Hofstra L. Rev. 539, 558 (1995)), a state enabling statute for inclusionary zoning, limiting the scope of state anti-rent control laws, affordable housing overlay zones (See Factsheet: Housing Overlay Zones, Public Advocates, available at: http://www.publicadvocates.org/sites/default/files/library/affordable_housing_overlay_zone_fact_sheet_7-27-10.pdf) (last visited Mar. 13, 2015) and development agreements (Pindell, Ngai, *Developing Las Vegas: Creating Inclusionary Affordable Housing Requirements in Development Agreements*, 42 Wake Forest L. Rev. 419 (2007)).

⁵⁵ Still Possible?, *supra* note XX at 2 (identifying the California Building Industry Association and the Pacific Legal Foundation as “major opponents” of inclusionary zoning); Their litany of complaints about inclusionary zoning is familiar: (1) It’s unnecessary, just free up market; (2) Even if they admit the value of the goals, they claim it is ineffective (even self-defeating) and/or inefficient; (3) It’s illegal (more below); (4) Even if all of these, it’s unfair to property owners and/or developers.

With increased use of inclusionary zoning, there will be more pressure to attack it and more available targets. It turns out the same ordinance design issue—the availability of alternative compliance options—that entails the risks discussed above is also central to the legal risks. And the interaction between ordinance design and legal issues similarly complicate the achievement of serving both affordable housing and fair housing goals.

Inclusionary zoning is a controversial land use regulation. The legal landscape is mixed. State statutes or citizen initiatives can bar or limit it.⁵⁶ It is under frequent and broad legal attack in some jurisdictions, e.g. California. There are some supportive legal decisions and some negative ones.⁵⁷ Successful legal challenges can shut it down in whole⁵⁸ or in part.⁵⁹ Given this, it is only reasonable to expect and to prepare for more legal challenges.

Opponents generally try to portray inclusionary zoning as a cheap way to fund affordable housing development, and that it unfairly passes on costs from taxpayers to developers, landowners or new homebuyers/tenants. Sometimes affordable housing advocates' presentations play into opponents' characterizations, e.g. by emphasizing that it does not require traditional

⁵⁶ See, e.g. Jennifer H. Logan, "Otherwise Unavailable": How Oregon Revised Statutes Section 197.309 Violates the Fair Housing Amendments Act, *J. Affordable Housing & Community Dev. L.*, Vol. 22, No. 2 (2014) (arguing that "because mandatory inclusionary zoning would make a fair distribution of affordable housing available to racial and ethnic minorities in the Metro Region, § 197.309 makes housing "otherwise ... unavailable" to protected groups in violation of the federal Fair Housing Act and should be repealed.")

⁵⁷ See *Framing Inclusionary Zoning*, *supra* note XX at 5 – 9.

⁵⁸ See, e.g. *Bd. of Sup'rs of Fairfax County v. DeGroff Enterprises, Inc.*, 214 Va. 235 (1973) (invalidating Fairfax County inclusionary zoning ordinance as unconstitutional because it pursued "socio-economic zoning," an illegitimate governmental objective). The State of Virginia later enacted a statute enabling local governments to enact inclusionary zoning ordinances, Va. Code Ann. Sect. 15.2-735.1.

⁵⁹ See, e.g. *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000) (invalidating rental inclusionary ordinance as conflicting with state rent control statute); *Palmer/Sixth St. Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396 (2009) (same); *Apt. Ass'n of So. Cent. Wisconsin, Inc. v. City of Madison*, 722 N.W.2d 614 (Wis. Ct. App. 2006) (same). A court could also limit the potential of an inclusionary zoning ordinance if it framed it as "exaction" and subjected it to 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).

governmental subsidies.⁶⁰ And, opponents typically ignore the fact that inclusionary zoning is a response to longstanding historical exclusionary zoning.⁶¹ Grounding inclusionary zoning in history as a response to exclusionary zoning is useful and gives courts a more complete picture and another reason to uphold it.⁶²

The legal conflict around inclusionary zoning is essentially a framing contest. Proponents usually frame inclusionary zoning as a form of traditional land use regulation.⁶³ This framing treats affordable housing as a particular “land use” like open space. If challenged as unconstitutional, such zoning is subject to traditionally deferential “rational basis” review.⁶⁴ The city begins with a presumption of constitutionality. The opponent bears the burden of proof to show either that the ordinance was adopted for an improper purpose or that there is no rational relationship between the city’s purpose (e.g. to increase affordable housing supply) and what law attempts to do or

⁶⁰ See, e.g., publications cited by Dave Lanferman, Inclusionary Zoning In California: Legal Questions And Issues, Blog post, Real Estate, Land Use and Environmental Law Blog, Sheppard Mullin, October 6, 2011, available at: http://www.realestatelanduseandenvironmentallaw.com/inclusionary-zoning-in-california-legal-questions-and-issues.html#_ftn5 (“Richard A. Judd & David Paul Rosen, Inclusionary Housing in California: Creating Affordability Without Public Subsidy, 2 A.B.A. J. OF AFFORDABLE HOUSING AND COMMUNITY. DEV. L. 4 (Fall 1992); Daniel R. Mandelker, The Effects of Inclusionary Zoning of Local Housing Markets: Lessons from the San Francisco, Washington D.C., and Suburban Boston Areas, A.L.I.-A.B.A. LAND USE INST., August 2008 (“Among supporters, IZ [“inclusionary zoning”] is heralded as an important evolution in affordable housing policy because it requires less direct public subsidy than traditional affordable housing programs”; Brian R. Lerman, Mandatory Inclusionary Zoning – The Answer to the Affordable Housing Problem, 33 B.C. ENVTL. AFF. L. REV. 383, 386 (2006) (“The advantage of an inclusionary system to a community is that it helps provide affordable housing without a major public financial commitment.”)

⁶¹ But see *Home Builders Ass'n of N. California v. City of Napa*, 108 Cal. Rptr. 2d 60, 64 (2001) (discussing plaintiffs’ argument that past city actions causing lack of affordable housing do not justify inclusionary ordinance to address problem).

⁶² See, e.g. *Maldini v Ambro*, 36 N.Y.2d 481 (1975) (holding that town’s zoning of a district for retirement housing was not *ultra vires* as an inclusionary effort “to correct social and historical patterns of housing deprivation.”); *Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp.*, 92 N.J. 158 (1983) (stating “It is nonsense to single out inclusionary zoning . . . and label it ‘socioeconomic’ if that is meant to imply that other aspects of zoning are not.”); *Home Builders Ass'n of No. California v. City of Napa*, 90 Cal.App.4th 188 (2001) (refusing to invalidate an ordinance promoting affordable housing because shortage may have been product of the city’s own prior restrictive land use policies).

⁶³ See, e.g. *Home Builders Ass'n of No. California v. City of Napa*, 90 Cal.App.4th 188 (2001); *California Building Industry Association v. City of San Jose*, 216 Cal.App.4th 1373 (2013), on appeal to California Supreme Court (S212072). Also see *Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp.*, 92 N.J. 158 (1983).

⁶⁴ See, e.g. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

that there is no rational way that the law will serve the stated objective. If a court accepts the traditional land use regulation frame, when opponents bring Substantive Due Process or Equal Protection challenges, they generally lose.⁶⁵

Similarly, if opponents bring Regulatory Taking challenges, inclusionary zoning framed as land use regulation will survive challenges under the three types of Regulatory Taking tests articulated in *Lingle v. Chevron*.⁶⁶ To date, no court has found that a mandatory set-aside ordinance amounts to a regulatory taking under either of the categorical takings tests, the “Permanent Physical Occupation” test derived from *Loretto v. Teleprompter Manhattan CATV Corp.*⁶⁷ and the “Total Taking” test (derived from *Lucas v. South Carolina Coastal Council*).⁶⁸ Liability under the Ad Hoc Balancing Test derived from *Pennsylvania Central Transportation Co. v. City of New York*⁶⁹ is also not likely.⁷⁰

⁶⁵ See cases cited *supra* in note 63. And see *But see Bd. of Sup'rs of Fairfax County v. DeGroff Enterprises, Inc.*, 214 Va. 235 (1973) and *Sintra, Inc. v. City of Seattle*, 119 Wash. 2d 1 (1992) (finding multi-part affordable housing mitigation ordinance was a proper exercise of the city's police power but a violation of the State's Substantive Due Process test as “unduly oppressive” to the landowner.”

⁶⁶ *Lingle v. Chevron*, 544 U.S. 528 (2005) (disapproving “substantially advances” as a regulatory taking test and setting out approved regulatory takings tests).

⁶⁷ 458 U.S. 419 (1982). See *Florida Home Builders Association, Inc. v. City of Tallahassee*, 2007 WL 5033524 (finding ordinance did not effect a physical taking because, on its face, “it does not allow the City or anyone else to encroach on a developer's land. The Ordinance only applies when a landowner voluntarily decides to develop property in a certain manner. A developer's decision to develop in a manner covered by the Ordinance is a voluntary act on the part of a developer.”)

⁶⁸ 505 U.S. 1003 (1992). *Travis v. County of Santa Cruz*, 2004 WL 2801083, (unpublished California court of appeal decision) (holding that county IZ ordinance was not an unlawful regulatory taking since the conditions... did not deprive the owner of all economically viable use of the property.)

⁶⁹ 438 U.S. 104 (1978).

⁷⁰ 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 *Penn Central*). And the impact on distinct reasonable investment-backed expectations would be limited. See *Guggenheim v. City of Goleta*, 582 F.3d 996 (9th Cir. 2009) opinion vacated on reh'g en banc, 638 F.3d 1111 (9th Cir. 2010) (vacating an opinion that found a mobile home rent control ordinance a facial regulatory taking on the ad hoc balancing test).

The opponents' legal strategy is relatively clear and consistent. Most of their legal theories revolve around rejecting inclusionary zoning as a "land use regulation" and trying to frame it as something else, usually as a form of rent control, a fee, a tax or an exaction.⁷¹ They seek this reframing because they want courts to apply more demanding legal tests that are required when local governments enact these other kinds of ordinances. And, presuming that the local government would not have prepared for these types of challenges when it enacted the ordinance, they argue it must fail because it does not meet the appropriate legal requirements.

The link between opponents' legal strategy and inclusionary ordinance design is also clear: When an inclusionary zoning ordinance gives developers alternative compliance options, opponents seize on these options, i.e. an *in lieu* fee, as evidence that the purported inclusionary zoning ordinance is *not* a traditional land use regulation, but rather something else. In other words, inclusion of alternative compliance options makes it plausible for opponents to frame an inclusionary zoning ordinance as something other than a traditional land use regulation and, thus harder for proponents to defend it as a traditional land use regulation.⁷² In addition, some inclusionary ordinances include ambiguous or contradictory language (e.g. in their findings) which also enables opponents' attempts to reframe.⁷³

⁷¹ See Framing Inclusionary Zoning, *supra* note XX.

⁷² Given that local governments often include alternative compliance options to accommodate developers' interests and this decision is used by opponents to attack inclusionary zoning, thus proving the adage "No good deed goes unpunished." While some courts might sever the *in lieu* fee from the set-aside building requirement, others will not. *See, e.g. Palmer/Sixth St. Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396, 1412 (2009) (finding *in lieu* fee "inextricably intertwined" with the ordinance's affordable housing requirement such that the fee provision was not severable).

⁷³ *See, e.g. the City of San Jose inclusionary zoning ordinance which is being challenged as an exaction in California Building Industry Association v. City of San Jose*, 216 Cal.App.4th 1373 (2013), on appeal to California Supreme Court (S212072). ("Although the ordinance contained recitals that the development of market rate housing created a need for affordable housing, the ordinance was not based upon a formal nexus study.") Still Possible?, *supra* note XX at 4). Unfortunately, sometimes inclusionary supporters are also not helpful in this regard. For example, Victoria Basolo and Nico Calavita, two supporters of inclusionary zoning, describe "[inclusionary housing] is a development fee." Victoria Basolo & Nico Calavita, Policy Claims with Weak Evidence: A Critique of

Legal attacks often include two steps. In the first step, the opponent challenges the local government's authority to enact the inclusionary zoning ordinance, claiming the city is acting "ultra vires" or beyond its authority.⁷⁴ In the second step, if the court finds that the local government does have the legal authority to enact the measure but accepts the opponents' reframing of it as something other than a traditional land use regulation, opponents will argue that the local government is violating the appropriate state test to enact that particular type of measure.

While local governments in all states usually have the authority to enact general "land use regulation," many or most states have different rules for localities enacting a tax, a fee, an exaction, or a form of rent control. Opponents use the alternative compliance options, especially *in lieu fees*, to claim that the inclusionary zoning ordinance is *not* a land use regulation but rather some other kind of regulation or measure that is subject to a stricter legal test.

Following are examples of opponents' attempts to reframe inclusionary zoning ordinances as rent control, as a tax or fee, or as an exaction. Some states have statutes pre-empting or limiting

the Reason Foundation Study on Inclusionary Housing Policy in the San Francisco Bay Area 11 (2004), http://www.nonprofithousing.org/actioncenter/campaigns/download/IH_countering_critics.pdf.

⁷⁴ See, e.g. *Middlesex & Boston St. Ry. Co. v. Bd. of Aldermen of Newton*, 371 Mass. 849 (1977); *Hochberg v. Zoning Comm'n of Town of Washington*, 24 Conn. App. 526 (1991). The vast majority of inclusionary zoning measures enacted in the last decades have been as a legislative act. And see Hollister, Timothy S., Allison M. McKeene, and Danielle G. McGrath, *National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances*. Washington, DC: National Association of Home Builders (2007) (identifying which states expressly authorize, not expressly authorize, or expressly prohibit local inclusionary zoning ordinances). Specific state authorization of inclusionary zoning as a "land use regulation" will generally deter a court from framing it as a tax, fee, exaction or form of rent control.

rent control ordinances. Opponents have enjoyed some success in attacking rental inclusionary zoning as a form of “rent control” in these jurisdictions.⁷⁵

Frequently opponents’ attacks initially focus on an *in lieu* fee option and frame it as an impact fee or a tax. If the local government lacked authority to enact such a measure, it is an *illegal* fee or tax. And, even if the locality had proper authority, it may have failed to abide by the required procedures or other substantive requirements to properly enact it, e.g. submitting it to a popular vote.⁷⁶

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.”⁷⁷ 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.⁷⁸

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

⁷⁵ See, e.g. *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000) (invalidating rental inclusionary ordinance as conflicting with state rent control statute); *Palmer/Sixth St. Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396 (2009) (same); *Apt. Ass’n of So. Cent. Wisconsin, Inc. v. City of Madison*, 722 N.W.2d 614 (Wis. Ct. App. 2006) (same).

⁷⁶ In this section I cite some local ordinances that are explicitly “mitigation” ordinances because in the framing contests courts sometimes compare these ordinances to regular inclusionary ordinances.

⁷⁷ 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.

⁷⁸ In *Kamaole Pointe Development LP v. County of Maui*, 2008 WL 5025004 (D. Haw. 2008), 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.” *Id.* at 13. In contrast, 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*, 25 A.3d 527 (R.I. 2011).

taxation authority is often more limited than its authority to impose fees, so this analysis can lead to a finding that the measure is an “illegal tax.”⁷⁹

Framing inclusionary zoning ordinances as “exactions” is a common attack.⁸⁰ Generally, an exaction is something that a local government requires a developer to provide because its proposed development causes certain negative impacts on a public policy or public interest. The exaction is intended to rectify the negative impact. Opponents’ attacks of this kind often try to convince courts to treat the *in lieu* fee as an impact fee which in most jurisdictions is a type of exaction.⁸¹ While the purpose and method of calculation of *in lieu* fees are different from impact fees, this distinction may be lost on some courts unfamiliar with land use law technicalities.⁸²

⁷⁹ See, e.g. *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal. App. 3d 892 (1st Dist. 1986) (upholding a residential hotel conversion ordinance was not invalid as a “special tax” under California’s Constitution). See also, *Holmdel Builders Ass’n v. Holmdel*, 121 N.J. (1990) (holding *in lieu* fees were not “taxes”). But see *Bonan v. City of Boston*,⁷⁹ *Bonan v. General Hosp. Corp.*, Civ. No. 76348 (Mass.Super.Ct. March 31, 1986), *rev. on other grounds*, *Bonan v. City of Boston*, 398 Mass. 315 (1986) (reversing the trial court’s finding that Boston’s “Development Impact Project Exaction” was invalid for lack of authority because it so closely resembled a tax as premature but without reaching the merits of the trial court’s holding). And see *San Telmo Associates v. City of Seattle*, 108 Wash. 2d 20 (1987) (invalidating the housing replacement provisions in Seattle’s Housing Preservation Ordinance as an illegal tax as opposed to a regulation on development).

⁸⁰ For an article encouraging such attacks, see Burling and Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 Stan. Envtl. L. J. 397 (2009). Cracking the Foundation, *supra* note XX at 1062 (arguing that among all of the possible characterizations, exaction is the best).

⁸¹ In *Holmdel Builders Ass’n v. Township of Holmdel*, 583 A.2d 277 (N.J. 1990), the New Jersey Supreme Court entertained plaintiff’s framing the *in lieu* fees of a mandatory set-aside ordinance as an “exaction” *Id.* at 288. However, the court upheld it applying a test that the exaction must be “founded on [an] actual, albeit indirect and general, impact,” and rejecting application of the strict “but-for” type relationship between development and the harm caused that state law applied to certain exactions. See, e.g. *Bldg. Indus. Ass’n of Cent. California v. City of Patterson*, 171 Cal. App. 4th 886 (2009) (invalidating an *in lieu* fee that was part of a development agreement in an analysis that assumed it was a generally applicable impact fee); 2006 WL 1666822, *Building Industry Association of San Diego County, Inc. v. City of San Diego, et al.*, Respondents/Defendants. No. GIC817064. May 24, 2006 (assuming without analysis that inclusionary zoning requirement was an exaction). In accepting review of the City of San Jose case, *supra* note XX, the California Supreme Court may be deciding whether the affordable housing requirement of the inclusionary zoning ordinance itself should be treated as an exaction under California’s statute regulating local government’s enactment of exactions. Still Possible?, *supra* note XX at 6 – 7.

⁸² 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. See chapter 12 “Inclusionary Zoning: Using the Market to Create Affordable Housing,” in Alan Mallach, *A Decent Home: Planning, Building and Preserving Affordable Housing* (American Planning Association 2009). 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.

Many states have statutes limiting local governments' adoption of "exactions."⁸³ Because most local governments have some authority to enact and apply exactions, these attacks often argue that the locality has not laid the proper foundation for enacting a new exaction. Usually, for a local government to validly enact an exaction it must conduct an "impact" or "nexus" study demonstrating two necessary relationships, first between the development and the negative impact on the public policy, and second between the negative impact and the exaction required of the developer.⁸⁴ Opponents argue that the local government must demonstrate that the proposed market rate developments creates a need for affordable housing in the jurisdiction, thus negatively impacting the jurisdiction's housing policies.⁸⁵ After conducting such a study, the local government must then base the specifics of their inclusionary zoning ordinance (e.g. what is required of the developer) on the results of these studies.⁸⁶

⁸³ See, e.g. California's Mitigation Fee Act, Cal. Govt. Code Sect. 66001 et seq.

⁸⁴ Such impact fee studies for commercial impact fees are now common. See, e.g. the ordinance at issue in *Commercial Builders of No. California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991).

⁸⁵ "Of course, virtually all inclusionary zoning ordinances incorporate both mandatory set-asides and fees-in-lieu thereof. Therefore, the authors submit that inclusionary zoning ordinances properly fall within the development exactions category and are subject to the *Nollan/Dolan* analysis.... Local governments should take heed of the analysis set forth in *Nollan* and *Dolan* and duly consider how or whether new development actually affects the supply of affordable housing. It is one thing to assert that new development gives rise to housing needs because it generates employment opportunities. It also may be easy to accept that these new jobs offer low to median wages. It is another thing altogether, however, to maintain that new development actually makes the housing needed by those employees to be prohibitively expensive. Thus, even if a local government performs the rigorous analysis of linking the construction of new residential, commercial, or industrial space to an increased demand for housing for low-to median-wage workers, a mandatory program that does not justly compensate new development will likely fail to meet the threshold nexus requirement described by the U.S. Supreme Court in *Nollan* for one very important reason: it is virtually impossible to demonstrate that new residential or nonresidential development in and of itself *causes housing to be unaffordable*." J. Michael Marshall & Mark A. Rothenberg, *An Analysis of Affordable/work-Force Housing Initiatives and Their Legality in the State of Florida*, Part I, Fla. B.J. 79, 81 – 83 (June 2008).

⁸⁶ While this linkage may at first appear unlikely in the context of inclusionary zoning, numerous impact studies have been conducted to demonstrate this connection. See, e.g. the impact fee analysis described in *Still Possible?*, *supra* note XX at 9 – 10. The author has on file two such studies: *Nexus Study & Fee Analysis for the City of San Carlos*, Rosenow Spevacek Group, Inc. (Feb. 2, 2010) and *Napa County Affordable Housing Ordinance Revisions Update and Economic Analysis: Residential Component*, Keyser Marston Associates (Nov. 2009).

In addition, each State has a judicial test to determine if exactions are constitutionally valid.⁸⁷

Opponents have also argued that under the “Unconstitutional Conditions Doctrine” of the federal Constitution the more exacting Nollan/Dolan test applies to inclusionary zoning ordinances if they are framed as exactions.⁸⁸ Nollan requires a rational nexus between the development’s negative effect on some city policy or interest. Dolan requires that the exaction be “roughly proportional” in size and nature to the impact, with the government bearing the burden of proof for this. Currently, the scope of Nollan/Dolan’s application is unsettled under federal law. While some advocates argue that the United States Supreme Court’s recent opinion in *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013) at least implies that Nollan/Dolan applies to exactions legislatively adopted by local governments, including inclusionary zoning ordinances, other legal analysts argue that *Koontz* left this issue undecided.⁸⁹

While a successful attack requiring inclusionary zoning ordinances to meet the requirements of the Nollan/Dolan test would not eliminate inclusionary policies, it would render many current ordinances invalid until they conduct the studies, appropriately revise the ordinance and reenact

⁸⁷ See, e.g. in *California, San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643 (2002) (articulating that a legislatively enacted fee “must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development” and upholding a residential hotel conversion ordinance).

⁸⁸ See, e.g. Burling and Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 *Stan. Envtl. L. J.* 397 (2009).

⁸⁹ *Compare Still Possible?*, *supra* note XX at 12 – 13 (arguing that *Koontz* left the issue undecided) with David L. Callies, *Land Development Conditions After Koontz v. St. Johns River Water Management District: Sic Semper Nexus and Proportionality*, Presentation at ABA Section of State and Local Government Law 2013 Annual Meeting, pp. 9 – 10,

http://www.americanbar.org/content/dam/aba/events/state_local_government/2013/08/Planning_materials.authcheckdam.pdf (last visited Mar. 13, 2015). (“But what of the linkage of affordable/workforce housing fees or minimum set-asides of such housing increasingly often attached to land development permits of all kinds? Surely the 10 provision of such housing is a public good and hardly any court in the country considers it anything but a governmental public use or purpose also covered by a state or federal constitutional welfare clause. Nevertheless, because such fees are a form of exaction, they are subject to the “essential nexus” takings test under *Nollan*. *Nollan*, 483 U.S. at 837.”)

it as an exaction requiring the payment of an impact fee. And, the result would be funds available for affordable housing, but not requirement for the construction of actual units.

As this section demonstrates, the design choice of including alternative compliance options can render an inclusionary zoning ordinance vulnerable to reframing by opponents. Fulfilling inclusionary zoning's promise to serve both affordable housing and fair housing goals requires particular attention to this decision.

III. Proposals for Moving Forward

This article argues that the decision to offer alternative compliance options to developers can have significant effects for what goals are served, what model of integration is fostered and the legal strength of an inclusionary zoning ordinance. In light of these analyses, this section offers some proposals for moving forward.

First, we should do our best to advance both the affordable housing and fair housing goals of inclusionary zoning, or at least be aware of and be deliberate about potential tradeoffs between these goals going forward to ensure that inclusionary zoning serves both goals as much as possible. This requires a clear and strongly-defensible concept of "integration." National leaders in the affordable housing and fair housing movements⁹⁰ should use their influence in how inclusionary zoning ordinances are designed to maximize the degree to which they serve both

⁹⁰ I would include at least the following national organizations as national leaders: National Low Income Housing Coalition (<http://nlihc.org/>), National Housing Conference (<http://www.nhc.org/>), Innovative Housing Institute (<http://www.inhousing.org/>), Inclusive Communities Project (<http://www.inclusivecommunities.net/>), Cornerstone Partnership (<http://www.affordableownership.org/>) and the National Fair Housing Alliance (<http://www.nationalfairhousing.org/>).

affordable housing and fair housing goals and to mitigate the risks described in this article. Each of these tasks requires more research.

All else being equal, it appears that an inclusionary zoning ordinance that only offers on-site development of affordable units will generally serve both affordable housing and integration goals (on either model of integration) while also being legally defensible. However, to be clear, this article is not suggesting that there be a single or uniform inclusionary zoning ordinance because there are often significant political limits on inclusionary zoning design and other important factors to consider. Rather, this article is suggesting that we be clear and deliberate about the tradeoffs of different design options.⁹¹

Following is a preliminary decision tree and some pros and cons for local governments considering adopting an inclusionary housing ordinance who are concerned about these tradeoffs and risks.

The first decision is whether to adopt an inclusionary zoning ordinance or an affordable housing impact fee.⁹² Many jurisdictions in California revised their inclusionary zoning ordinances as affordable housing impact fees after the *Palmer* case.⁹³ If the jurisdiction conducts a professional

⁹¹ I am rejecting two other options: (1) pure focus on affordable housing and indifference to the integration effect; and (2) recognizing that potential conflicts, but not revising the ordinance design to deal with them.

⁹² This goes to what documents are needed to prepare for adoption. If a local government plans to enact an inclusionary ordinance as land use regulation, it will need some facts and analysis rationally linking the purpose of the ordinance to a legitimate governmental objective and findings that rationally demonstrate that the ordinance will address the stated objective(s). If a local government plans to enact an affordable housing impact fee (or to cover risk that a court may frame inclusionary zoning as an exaction, then it will need to conduct an impact study to justify as impact fee as an exaction under the relevant state statute and state constitutional judicial test and, possibly, the Nollan/Dolan test.

⁹³ See Cities and Counties Need to Amend Local Inclusionary Ordinances to Address *Palmer v. City of Los Angeles*, Law Alert, Goldfarb and Lipman, Mar. 1, 2010, available at: <http://goldfarblipman.com/wp->

impact study, dedicates the funds to affordable housing development, and follows all of the appropriate procedures, it can feel confident that the program will be legally defensible. Another attraction is that with the scarcity of affordable housing subsidy and the flexibility of funding, jurisdictions could have control over what kinds of affordable housing at what levels of affordability would be built with the funds as well as when and where they would be built. Impact fees might be more efficient than requiring developers to build units. Certainly, local non-profit affordable developers might favor this option.

However, some possible downsides of this option should be considered. While a jurisdiction might want to act conservatively from a legal standpoint, this strategy is not legally required. And, the flexibility and control over local affordable housing funds may not be as productive as hoped.⁹⁴ Depending upon how high the impact fee is set⁹⁵ and the jurisdiction's interest in leveraging its local funding, affordable housing developments may need other sources of funding which rely on uncertain federal and state subsidies. This imports uncertainty and may take away control over timing over the affordable housing development.⁹⁶ Given the arguable bias of some

content/uploads/2010/03/800473_1-Law-Alert-Oak.pdf (last visited Mar. 13, 2015). (noting some cities have adopted affordable housing impact fee ordinances after conducting nexus studies as an option).

⁹⁴ See Inclusionary Housing: Fees vs. Units (hereafter "Fees vs. Units"), Webinar, Feb. 12, 2015 Cornerstone Partnership (explaining that a housing impact fee program has the potential to be more efficient and create more leveraging for other funds, but such efficiency is not automatic) (powerpoint slides on file with author). Cracking the Foundation, *supra* note XX at 1099-1100 (criticizing localities' uses of *in lieu* fees for purposes that do not further inclusionary zoning goals). An earlier study reported that cities' tracking of inclusionary lieu fees was "weak" and that 26 of 63 cities collecting *in lieu* fees had not yet spent them. Affordable by Choice, *supra* note XX at 14.

⁹⁵ There are disputes over how much in impact fees the nexus studies can justify. See Inclusionary Zoning After Palmer and Patterson—Alive and Well in California 29 - 31, The California Affordable Housing Law Project of the Public Interest Law Project (May 2010), available at: <http://www.pilpca.org/wp-content/uploads/2010/10/Inclusionary-Zoning-After-Palmer-Patterson-7-11-10.pdf> (last visited Mar. 13, 2015) (distinguishing "A Fee Based on the Cost of Developing the Community Inclusionary Percentage in Proportion to the Size of the Development" from a "Limited Fee Related Only to the Impact of New Rental Development on the Future Housing Need Determined By a "Nexus" Study"); Fees vs. Units, *supra* note XX (distinguishing setting fee by "affordability gap" vs "production cost").

⁹⁶ See, e.g. report on Seattle (Washington) finding that "Between 2000 – 2013 it took the Office of Housing an average of 47 months (3.9 years) to spend fee revenue," Fees vs. Units, *supra* note XX. Identifying five "Key

federal and state affordable housing subsidies towards 100% affordable developments, there may be a loss of the integration value of mixed income developments. The jurisdiction's own zoning, lower land costs in disenfranchised neighborhoods, and local opposition to proposed affordable housing developments—especially 100% affordable developments—may lead to siting in neighborhoods that do not serve either model of integration.

In the past, affordable housing impact fees have only provided for payment of the fee to an affordable housing fund, but recently some jurisdictions have considered what might be called a “flipped inclusionary zoning ordinance” in which the developer may develop affordable housing units on-site *in lieu* of paying the impact fee.⁹⁷ If the build option is only for on-site development, and the developer selects this compliance option, this program operates like a traditional inclusionary zoning ordinance with an on-site development requirement. However, the specifics of the on-site development option will determine both whether developers are likely to select it and whether this option will serve both affordable housing and fair housing goals. Given the initial requirement to pay an impact fee, it seems unlikely that a developer would choose the build option unless it was structured to be more attractive than paying the fee. But this attractiveness would probably mean either a reduced number of affordable housing units or more lenient requirements regarding where the affordable housing units would be built. These ordinances are too new for any fair evaluation, but it will be important to monitor their actual effects.

Ingredients” for spending *in lieu* fees efficiently: Leverage, Time to spend fees, Access to land/projects, Local capacity and Community support.” Id.

⁹⁷ See, e.g. Policy Options for Refining Seattle’s Incentive Zoning Program, 6 - 7 Cornerstone Partnership (July 2014); available at: http://clerk.seattle.gov/~public/meetingrecords/2014/plus20140721_1d.pdf (“Offer a Performance Option: Even if the program is designed as a Linkage Fee, the city can offer developers the option of providing units onsite *in lieu* of paying the fees”)

If the jurisdiction decides to enact an inclusionary zoning ordinance, the threshold decision is whether to require on-site development of the affordable units or to provide any alternative compliance options? Following are some pros and cons of offering alternative compliance options. Some not-for-profit affordable housing developers support offering alternative compliance options because they may be invited to partner with a for-profit to build the off-site inclusionary zoning units. They also like the possibility of tapping into the *in lieu* fees contributed to a local affordable housing trust fund to subsidize their own development proposals. Typically only fair housing advocates have a clear preference for on-site units because this is the most certain way to ensure that both affordable housing and fair housing goals are met. From a political perspective, offering alternative compliance options makes elected officials, for profit developers and sometimes courts more comfortable with the ordinance because they seem less demanding. However, from a legal perspective, inclusionary zoning opponents have somewhat successfully turned this welcoming gesture on its head to attack the ordinance as not a legitimate land use regulation and therefore subject to stricter judicial scrutiny. If a jurisdiction requires on-site development of affordable units, an alternative way to reduce developer resistance is to provide for a relatively generous density bonus and other regulatory relief attractive to developers, e.g. fast-tracking.

If a jurisdiction will offer compliance options, the following issues arise: (1) Which options to offer (e.g. exclude *in lieu* fees since this option is the most likely to draw a lawsuit); (2) Structure the ordinance to incorporate preferences or limitations on the use of alternative compliance options, e.g. to promote or prioritize on-site construction and deal proactively with the tradeoffs;

(3) And, if so, how? An ordinance could prioritize or incorporate a preference for the on-site construction option by making off-site development a disfavored option.⁹⁸ Or it could limit the potential differences between on-site and off-site development, e.g. by requiring that off-site development be within a prescribed distance of the market-rate units.⁹⁹ Certainly, there are many more possibilities. Finally, (4) if the structure of preferences or limitations allows some discretion in selecting among compliance options, the ordinance can influence the likely results by determining who decides (the local government or the developer?) and how. The ordinance could provide specific criteria or a prescribed analysis to guide the exercise of discretion.¹⁰⁰

Ideally, we need a complete analysis to frame and analyze tradeoffs in the form of a practical manual for housing advocates, local government officials and city attorneys. This analysis would need to consider several different types of communities because the challenges and opportunities facing affordable housing and fair housing can vary widely depending on the region—urban, suburban and rural settings—and because location of affordable housing within each of these

⁹⁸ “Carlsbad’s ordinance emphasizes the importance of requiring construction instead of allowing in-lieu fees indiscriminately. The offsite alternative is typically not allowed.” *Affordable by Choice*, *supra*, note XX at 18. California’s Coastal Zone Inclusionary requirement requires on-site construction of the affordable units unless it would “infeasible”, California Inclusionary Housing Reader, *supra* note XX at 103. Jay Riffkin offers additional suggestions in *Responsible Development?*, *supra* note XX at 471 - 474 (“offer developers a marginal reduction in the number of inclusionary units needed to be built if those units are built on-site... The marginal reduction in units would make off-site development or payment of the in-lieu fee comparatively more expensive than building on-site... [or by] setting variable affordability time requirements for on-site units... Reducing the control period will induce development of on-site units as developers are better able to plan, price, and market the units to buyers.”)

⁹⁹ For example, New York City’s former (voluntary) inclusionary ordinance required off-site development to be “within the same community district or, if in another district, no farther than a half mile away.” Mireya Navarro, “Poor Door” in a New York Tower Opens a Fight Over Affordable Housing, *N.Y. Times*, Aug. 26, 2014. Boulder, Colorado’s inclusionary zoning ordinance requires that at least half of the required affordable units be built on-site. *Tale of Two Cities*, *supra* note XX at 776.

¹⁰⁰ See, e.g. *Home Builders Ass’n of N. California v. City of Napa*, 90 Cal. App. 4th 188, 192 (2001) (describing City Council’s “sole discretion” under the ordinance to determine if an “alternative equivalent proposal” offered by the developer to develop affordable units is acceptable and as to complying with the ordinance by paying in-lieu fees, developers of single-family units may choose this option by right, while developers of multi-family units are permitted this option if the City Council, in its sole discretion, approves). An ordinance could require that a specific tradeoff analysis (criteria and analysis) be applied, not just a stated goal, e.g. require a fair housing analysis regarding an off-site development proposal or property dedication by the developer.

likely to have different consequences for the selected integration model.¹⁰¹ To the degree possible, this analysis should be based on empirical studies.¹⁰²

What is currently available? Cornerstone Partnership has produced a partial analysis of the tradeoffs.¹⁰³ A document created by PolicyLink recognizes some of the tradeoffs, but doesn't offer a complete analysis or solution.¹⁰⁴ Under the proposed Affirmatively Furthering Fair Housing regulation, HUD would provide data and analysis to jurisdictions subject to the regulation that may be useful for this analysis.¹⁰⁵ Boston's Metropolitan Area Planning Council has produced a thorough and sophisticated report entitled Fair Housing and Equity Assessment for Metropolitan Boston.¹⁰⁶ The Kirwan Institute and the Haas Institute for A Fair and Inclusive Society at University of California at Berkeley are continuing to develop their opportunity analyses.¹⁰⁷

¹⁰¹ One version of the types of markets to be analyzed is "high-cost submarkets, suburban/healthy urban submarkets, blighted urban submarkets, and rural submarkets" from the subjects of Mixed Income Housing's Greatest Challenge: Strengthening America's Neighborhoods While Reaching Our Lowest Income Families, Neighborworks, Neighborhood Reinvestment Corporation (2002).

¹⁰² For example, one issue that needs research is, in any given community, to what degree the location of an affordable housing unit within the jurisdiction matters to the integration goal (however defined). If it matters, then careful attention must be paid to the location of affordable housing units; otherwise inclusionary zoning can unintentionally lead to de facto exclusionary zoning within the jurisdiction.

¹⁰³ Fees vs. Units, *supra* note XX. Based upon personal conversations, the author believes that Cornerstone Partnership is continuing to work on this project.

¹⁰⁴ Equitable Development Toolkit: Inclusionary Zoning, 8, Policylink (June 2003), available at: <http://www.policylink.org/sites/default/files/inclusionary-zoning.pdf> (last visited Mar. 13, 2015).

¹⁰⁵ See AFFH Assessment Tool at Federal Register on pp. 57950 – 57954 at <http://www.huduser.org/portal/publications/pdf/2014-22956.pdf> (last visited Mar. 13, 2015). A strong AFFH regulation should also help support other policies (e.g. rezoning to increase land zoned for multifamily development and reasonable densities) that can serve both affordable housing and fair housing, and so mitigate our conflicts between affordable housing and fair housing. Analysis required for HUD's Sustainable Community Grant applications may also be relevant.

¹⁰⁶ The report is available at: http://www.chapa.org/sites/default/files/Full_Fair%20Housing%20and%20Equity%20Assessment%20for%20Metro%20Boston_0.pdf (last visited Mar. 13, 2015).

¹⁰⁷ Kirwan Institute, <http://kirwaninstitute.osu.edu/> (last visited Mar. 13, 2015).; The Haas Institute for A Fair and Inclusive Society at University of California at Berkeley, <http://diversity.berkeley.edu/haas-institute> (last visited Mar. 13, 2015).

Conclusion

To maximize the potential for inclusionary zoning to serve both affordable housing and fair housing goals, we must first sort out what integration model we want to advance. Then, given this integration model, we must design the ordinance with the tradeoffs between the goals in mind while ensuring that the ordinance will be legally defensible. This article is merely a call to focus advocates' attention to this important issue; it hopes to start a conversation. There are many open issues and need for data.