

**INCLUSIONARY ZONING AFTER  
*PALMER & PATTERSON*—**

**ALIVE & WELL IN CALIFORNIA**

The California Affordable Housing Law Project  
of the Public Interest Law Project

May 2010



For more information, contact:

Mike Rawson  
**CALIFORNIA AFFORDABLE HOUSING LAW PROJECT**  
**OF THE PUBLIC INTEREST LAW PROJECT**  
449 15<sup>th</sup> Street, Suite 301  
Oakland, CA 94612  
(510) 891-9794 (ext. 145)  
mrawson@pilpca.org

<http://www.pilpca.org>

---

---

## TABLE OF CONTENTS

### INCLUSIONARY HOUSING UNDER ATTACK—THE SECOND GENERATION....1

#### I. SUMMARY: THE DECISIONS, RESPONSES & ACTIONS NEEDED.....2

##### A. PALMER & PATTERSON.....2

###### 1. *Palmer*.....2

###### 2. *Patterson*.....2

##### B. LOCAL RESPONSES .....4

##### C. WHAT COMMUNITIES AND ADVOCATES NEED TO DO (AND NOT DO) .....5

###### PALMER

###### 1. EXISTING ORDINANCES .....5

###### 2. EXISTING RENTAL BUILDINGS WITH INCLUSIONARY UNITS.....5

###### 3. NEW ORDINANCES .....6

###### 4. ALTERNATIVES THAT WILL ENSURE DEVELOPMENT OF AFFORDABLE RENTAL HOUSING .....6

###### PATTERSON

###### 1. BASE IN-LIEU FEES ON THE FINANCING SUBSIDY (GAP) REQUIRED TO DEVELOP THE FOREGONE INCLUSIONARY UNITS.....8

###### 2. ON-SITE REQUIREMENTS MAY BE BASED ON BOARD PURPOSES, NOT LIMITED TO THE IMPACT OF NEW HOUSING DEVELOPMENT ON THE NEED FOR AFFORDABLE HOUSING .....8

###### 3. MITIGATION FEE ACT NEXUS STUDY IS NOT NECESSARY .....8

#### II. THE LEGAL ISSUES PRESENTED BY INCLUSIONARY ZONING.....9

##### A. THE LEGAL NATURE OF INCLUSIONARY ZONEING – LEGITIMATE EXERCISE OF POLICE POWER .....9

###### 1. The Police Power – Regulation for the General Welfare .....10

###### 2. Inclusionary Zoning is Reasonably Related to Legitimate Governmental Purposes .....11

---

|  |               |
|--|---------------|
| <b>B. TAKINGS, DUE PROCESS AND EQUAL PROTECTION ISSUES.....</b>  | <b>12</b>     |
| 1. Takings.....  | 12            |
| 2. Substantive Due Process.....  | 14            |
| 3. Equal Protection.....   | 15            |
| <b>C. THE MITIGATION FEE ACT.....</b>  | <b>16</b>     |
| <b>D. IN-LIEU FEES, DEVELOPMENT FEES GENERALLY &amp; <i>PATTERSON</i> ...</b>  | <b>18</b>     |
| 1. In Lieu Fees—What Kind of Fees Are They? .....  | 19            |
| 2. Development Fees, In-Lieu Fees and the Courts.....  | 20            |
| ➤ <i>Associated Home Builders of the Greater East Bay, Inc.</i><br><i>v. City of Walnut Creek</i> .....                                  | 20            |
| ➤ <i>Erlich v. City of Culver City</i> .....   | 21            |
| ➤ <i>San Remo Hotel L.P. v. City and County of</i><br><i>San Francisco</i> .....   | 23            |
| ➤ <i>Lingle v. Chevron U.S.A.</i> .....  | 25            |
| ➤ <i>Building Industry Assoc. of Central Calif. v.</i><br><i>City of Patterson</i> .....   | 26            |
| 3. The Mitigation Fee Act and In-Lieu Fees .....   | 27            |
| 4. Recap—Legal Requirements for In-Lieu Fees.....  | 27            |
| <b>E. ALTERNATIVES FOR RENTAL HOUSING AFTER <i>PALMER</i>.....</b>   | <b>28</b>     |
| 1. Adopt an Affordable Housing Development Fee .....   | 29            |
| a) A Fee Based on the Cost of Developing the<br>Community Inclusionary Percentage in<br>Proportion to the Size of the Development.....   | 29            |
| b) Limited Fee Related Only to the Impact of New<br>Rental Development on the Future Housing<br>Need Determined By a “Nexus” Study ..... | 30            |
| 2. Adopt an Inclusionary Zoning Overlay or Incentive<br>Program.....   | 31            |
| <b>F. CONCLUDING THOUGHTS.....</b>   | <b>32</b>     |
| <b>APPENDICES .....</b>  | <b>34, 35</b> |

---

---

---

# INCLUSIONARY ZONING AFTER *PALMER & PATTERSON*—

## ALIVE & WELL IN CALIFORNIA

### INCLUSIONARY HOUSING UNDER ATTACK—THE SECOND GENERATION

Two recent California Court of Appeals decisions present communities and advocates with new questions regarding the legal parameters of inclusionary zoning and related in-lieu fees—*Palmer/Sixth Street Properties L.P. v. City of Los Angeles*, 175 Cal. App. 4<sup>th</sup> 1396 (2009) and *Building Industry Assn of Central California v. City of Patterson*, 171 Cal. App. 4<sup>th</sup> 886 (2009).<sup>1</sup> This memorandum attempts to sort these out and considers a variety of options for continued implementation of local inclusionary laws.

In most cases, revisions to existing ordinances should not be immediately necessary, as the legal issues raised by these decisions can be addressed adequately in the development approval process. Indeed, jurisdictions may risk triggering new statutes of limitations to challenge an ordinance based on the adoption of the amendment. But, in light of *Palmer* it is probably necessary to consider alternative means of ensuring affordable rental housing is developed. And, although the in-lieu fee formula examined in *Patterson* was unlike any other in California, in view of the attempts of some developers to bootstrap the result in *Patterson* into attacks on conventional inclusionary and in-lieu fee requirements, clear responses are needed and are considered below.

In the first part of this memorandum, we provide a brief summary of *Palmer* and *Patterson* and the major issues presented by each, and then we outline the local government responses that are needed—and those that are not. The second part turns to a more in depth assessment of the current state of the law as related to inclusionary housing programs, beginning with a consideration of the general nature of inclusionary zoning and where it sits in the realm of land use regulation, then addressing in-lieu fees, and alternatives to on-site rent restrictions foreclosed by *Palmer*.

---

<sup>1</sup> In 2002 PILP and WCLP published a comprehensive memorandum on legal issues raised by local Inclusionary Zoning Laws—*Inclusionary Zoning—Legal Issues*. ([http://www.pilpca.org/www/docs/IZLEGAL\\_12.02.pdf](http://www.pilpca.org/www/docs/IZLEGAL_12.02.pdf).) It focused principally on the first California appellate court case to consider the legality of inclusionary zoning in the face of takings, due process and Mitigation Fee Act challenges, upholding Napa's ordinance—*Homebuilders of Ass'n of Northern California v. City of Napa*, 90 Cal.App.4th 188 (2001). Since 2002, in addition to *Palmer* and *Patterson*, the U.S. Supreme Court in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) altered the legal standard under the takings clause of the Constitution, and another California appellate court has considered constitutional and statutory attacks on inclusionary housing programs, upholding Santa Monica's law (*Action Apts. Ass'n v. City of Santa Monica*, 166 Cal.App.4th 456 (2008)). These and other relevant cases are considered in the second part of this memorandum.

---

---

## I. SUMMARY: THE DECISIONS, RESPONSES & ACTIONS NEEDED

### A. PALMER & PATTERSON

#### 1. Palmer

*Palmer* held that provisions of a specific plan requiring developers of new rental housing to rent a portion of the units at restricted rents conflict with the Costa Hawkins Act (Civ. Code §1954.50 *et seq.*), enacted to permit developers to set initial rents on newly constructed and voluntarily vacated units in jurisdictions with rent control. The court also found that the alternative of paying an *in-lieu* fee did not save the inclusionary requirement because payment of the fee was “inextricably intertwined” with the mandate to impose rent restrictions. Finally, it noted that the exception in the Act<sup>2</sup>, which allows rent restrictions on units developed pursuant to a contract with local government to provide incentives and concessions similar to those in the state Density Bonus Law (Gov. C. §65915), does not apply when the developer is mandated by local law to enter into a contract to provide the affordable units.

The court deemed the language of the Costa-Hawkins Act unambiguous and therefore found it unnecessary to review the legislative history of the Act. If it had it would have discovered substantial indication that the Act was only intended to apply to strict rent control ordinances—those which limited rents on all rental units in a community regardless of the income of the tenants or whether the unit had been voluntarily vacated. Indeed, given the number of jurisdictions with inclusionary zoning laws even in 1995 when Costa Hawkins was adopted, it seems apparent that the exception to the Act for units with restricted rents pursuant to contracts with local government was intended to cover inclusionary units.

Although all trial courts in the state are bound by the decision, a case brought in a part of the state covered by a different appellate district could come out differently on appeal. Clarifying amendments by the state Legislature are needed, but probably unlikely until next year. Until another court or the Legislature acts, jurisdictions will not be able to mandate rent restrictions on inclusionary units in new rental housing developments. Existing inclusionary units are likely safe because they are covered by recorded agreements and statutes of limitations have run.

#### 2. Patterson

Patterson transformed its traditional 10% on site inclusionary requirement to a “development impact fee,” and that’s where its problems began. Departing from the standard methodology of basing an inclusionary in-lieu fee on a portion of the actual cost of developing the forgone inclusionary units, Patterson derived a development impact fee

---

<sup>2</sup> Civ. Code §1954.52(b)

---

ostensibly tied to the impact of new residential development on the need for affordable housing. The *Patterson* court found that the City’s unique formula for determining these fees did not yield a fee that is reasonably related to that stated purpose and therefore constituted a regulatory taking. Local governments can distinguish their in-lieu fees by basing their fees on a formula related to the cost of developing the inclusionary units and clearly indicating that the purpose of their inclusionary obligation and in-lieu fee alternative is to address far more than just a need for housing created by new housing.

The court’s analysis is not relevant to most inclusionary in-lieu fees for at least two reasons. First, the purpose of most inclusionary in-lieu fees is very different than the purpose of Patterson’s fee. Almost all are intended to provide a source of funds sufficient to facilitate production of the affordable units the developer otherwise would provide. Patterson’s fee, on the other hand, is intended to offset the impact of residential development on the need for affordable housing. Therefore, whereas the *Patterson* court was faced with determining whether there was a reasonable relationship between the amount of the fee and the need for affordable housing created by residential development, courts addressing standard in-lieu fees would need only to assess whether the amount of the fee was related to the cost of developing the inclusionary units.

Patterson based its fee on an intricate analysis of the cost of affordable housing development, the City’s share of the regional need for housing and the amount of remaining developable residential land. The court found that the City failed to establish a reasonable relationship between the City’s regional housing need and the need for affordable housing associated with new market rate development of remaining land. Significantly, the court did not say the City *could* not establish such a relationship—it simply found that the City had not done so.

The second reason the opinion has limited effect is that it fails to adequately take into account the U.S. Supreme Court’s recent *Lingle v. Chevron U.S.A., Inc.*<sup>3</sup> decision, which changed the legal standard for determining whether application of a local law constitutes a taking. In *Lingle* the Supreme Court dispensed with the “substantially advances”/means-end test for determining whether a local law works a taking and is the basis of the “reasonable relationship” test of development fees. No longer is a local law measured by the extent to which it actually advances the stated purpose of the ordinance. Instead, a court asks whether the ordinance is sufficiently related to its purpose (under due process and equal protection analysis). *Lingle* explained that from now on, whether a local ordinance causes an unconstitutional taking is analyzed under standards of *Penn Central Transp. Co. v. New York City*.<sup>4</sup> The court examines the extent of the economic impacts of the development in relation to the investment backed expectations and the “character” of the requirement and determines whether it goes so far as to be

---

<sup>3</sup> 544 U.S. 528, 564 (2005)

<sup>4</sup> 438 U.S. 104 (1978)

---

confiscatory. The fact specific nature of this standard will limit takings challenges to application of inclusionary legislation to particular developments.

The reach of the *Patterson* opinion thus should be limited to its narrow and distinctive facts and by its failure to adequately incorporate the *Lingle* analysis. Nevertheless, at least three communities—San Jose, Palo Alto and Sunnyvale (dismissed on statute of limitations grounds)—face court challenges attacking their inclusionary ordinances and in-lieu fees based in part on extremely expansive reading and questionable extrapolation of its out-dated legal analysis and the peculiar facts.

***B. LOCAL RESPONSES***

*Palmer*. Although there is an effort to seek an amendment to the Costa-Hawkins Act to overturn *Palmer*, the likelihood of that occurring, especially this year, is uncertain. In the meantime, to address *Palmer* local governments must at least implement their inclusionary housing requirements so that developers of rental housing are allowed to determine the initial rents of all units on site. But they must also find a legally viable alternative to ensure that new development in the aggregate will include sufficient affordable housing to accommodate existing and future needs.

*Patterson*. A few localities, apparently hoping to avoid litigation based on theories expressed in *Patterson*, are planning to revise their in-lieu fee (and some their on-site inclusionary requirements) after undertaking nexus studies unnecessarily limited to determining the extent to which new housing development generates a need for new housing. But as this memorandum will explain, to pass constitutional muster, inclusionary requirements and the attendant in-lieu fees need only to be related to their undeniably legitimate and important legislative purpose—to ensure that housing affordable to all economic segments of the community and surrounding region is included in future development. Amendment, therefore, may be unnecessary, and may even render these communities vulnerable to legal attacks based on the premise of the studies.

Communities and advocates must confront head-on the misplaced view advanced by some after *Patterson*—that inclusionary housing obligations and in-lieu fees are a type of exaction required to be strictly related to the projected need for new affordable housing created by new housing development *rather* than land use regulations related to the community’s legitimate desire to accommodate its critical existing and projected needs for affordable housing, to provide opportunities for households of all income levels and to affirmatively further integration and other fair housing goals.

---

---

## C. WHAT COMMUNITIES AND ADVOCATES NEED TO DO (AND NOT DO)<sup>5</sup>

### PALMER

#### 1. EXISTING ORDINANCES.

- **Inclusionary Requirements on For-Sale (Single/Multi) Housing Still Valid.** Ordinances may need amendment to require that affordable units be offered for sale within a defined period of time as a condition for approval of a tentative subdivision map. The tentative map could contain an agreement to provide for-sale affordable units onsite or pay an affordable housing fee. Additionally, the ordinance should reference that developers are allowed to elect to provide affordable rental units under Gov. Code §65589.8. If this option is elected, ordinances should probably provide concessions or incentives to come within the Costa-Hawkins exception.
- **Adequate Procedures Included to Address Palmer?** Determine whether the ordinance and regulations contain adequate procedures and discretion to permit approval of rental housing developments in conformance with *Palmer's* interpretation of the Costa-Hawkins Act. For example, the ordinance should have a waiver provision or some other provision that permits the city to dispense with the requirement mandating rental restrictions. When a state law preempts a local law, as *Palmer* held Costa-Hawkins did, local governments are obligated to interpret them in a manner consistent with the decision. As long as the existing ordinance provides adequate procedures and discretion, ordinances should not require amendment, at least not immediately—it would be appropriate to wait until the housing element or other general plan element is amended to address the issue.
- **Condominium Conversion Protections.** Make sure there are restrictions on conversion of rental housing to condominiums that require the converted complex to contain at least the same percentage of inclusionary units as a new for-sale development (or pay an in-lieu fee).

#### 2. EXISTING RENTAL BUILDINGS WITH INCLUSIONARY UNITS.

- **Most Restrictions Will Not Require Adjustment.** These units will generally be subject to regulatory agreements and deed restrictions that were put in place sometime ago. Almost all will not only restrict rental rates, but also limit occupancy to lower or moderate income occupants. Owners will have a difficult time challenging these because:

---

<sup>5</sup> Appendix A provides this information in a chart format.

- 
- a) Developers signed agreements that provided them with substantial incentives, concessions or even financial assistance, bringing them within the Costa-Hawkins exception;
  - b) The restrictions on the income of occupants are not prohibited by Costa-Hawkins (and indeed are expressly permitted by Government Code §65008);
  - c) In many cases the statute of limitations will have run.

### 3. NEW ORDINANCES.

- **Draft with Palmer in Mind.** New local laws should acknowledge that new rental housing may not be *required* to include units with rent restrictions, but should maintain requirements on single family and multifamily subdivisions developed for sale. New local laws should also provide alternatives to the requirement to provide affordable for-sale housing, including fees and land donation options. Rental alternatives should comply with Costa-Hawkins through a voluntary agreement that provides regulatory incentives.
- **Include an Inclusionary Housing Policy in a General Plan Element.** An ordinance implementing a valid general plan will be presumed to be reasonably related to a legitimate governmental purpose. This also comports with Gov. Code §65589.8, which allows developers to have the option of building affordable rental units where there is an inclusionary requirement, if that requirement is in the housing element.

### 4. ALTERNATIVES THAT WILL ENSURE DEVELOPMENT OF AFFORDABLE RENTAL HOUSING.

- **Generally Applicable Affordable Housing Fee on Rental Housing Development.** A community can adopt a policy providing that, for many reasons, a proportion of all future development in the community must be affordable. (Many communities base existing inclusionary programs on such policies, usually contained in a general plan element.) The fee must be related to legitimate governmental purposes, but nothing prohibits those purposes from including purposes such as the following: the existing need for affordable housing, the need provide housing affordable to local job holders and to reduce vehicle trips, the need to address segregation and other effects of exclusionary land use practices, and to otherwise further fair housing.
  - a) A fee on rental housing based on the cost of developing the proportion of affordable units called for in the policy is reasonably related to a legitimate public purpose—the cost of developing the percentage of units the community has determined is needed from future

- 
- b) development to meet its affordable housing needs. *Palmer* found in-lieu fees on rental housing inextricably linked to on site rental requirements, but a stand-alone affordable housing fee only would not be in-lieu of on-site rental units.
- c) “Nexus” Study Probably Not Required. The Mitigation Fee Act would not apply because the fee would not be imposed to cover the cost of “public facilities.” The fee also would satisfy the language in some cases requiring development fees to be related to the “deleterious impact of the development” because the impact of the development would be its failure to further the community’s aggregate inclusionary purpose.
- d) “Nexus” Study Pros and Cons.
- Provides quantified basis clearly establishing the requisite relationship, but limits the fee to the connection to the particular impact studied, e.g. the impact of new market-rate housing on the need for affordable housing.
  - Limiting the fee on rental development solely to the impact on the need for new affordable housing ignores critical existing housing needs and other social, environmental and economic consequences of failing to develop affordable housing.
  - Other impacts are harder to quantify, but the quantification of impact requirements of the *Nollan/Dolan* cases do not apply to legislation establishing generally applicable development fees. The nexus studies evolved to meet the *Nollan/Dolan* requirements for ad hoc fees, not the lesser standard for generally applicable fees.
- **Rental Housing Zoning Overlay or “Super” Density Bonus Ordinance.** A zoning overlay ordinance that offers rental housing development substantial incentives and regulatory concessions in exchange for inclusion of on-site affordable rental housing at greater proportions than would be required by state Density Bonus law would not violate Costa Hawkins. Indeed these developments would fit within the Costa-Hawkins exception. For example, the overlay could require a greater percentage in affordability than the Density Bonus statute in exchange for greater density bonuses, additional regulatory concessions or provision of financial subsidies.

---

---

**PATTERSON**

**1. BASE IN-LIEU FEES ON THE FINANCING SUBSIDY (GAP) REQUIRED TO DEVELOP THE FOREGONE INCLUSIONARY UNITS.**

- Patterson’s mistake was styling its fee as an “impact fee” and basing the fee on an unsound analysis of the cost of developing the city’s five year affordable housing need and the remaining residential capacity. It could have easily and soundly based its in-lieu fee on the cost of producing the inclusionary units. A community that characterizes its in-lieu fee as a fee related to the impact of new development on the need for affordable housing risks the same attack that Patterson got and unnecessarily limits the amount of the fee.

**2. ON-SITE REQUIREMENTS MAY BE BASED ON BROAD PURPOSES, NOT LIMITED TO THE IMPACT OF NEW HOUSING DEVELOPMENT ON THE NEED FOR AFFORDABLE HOUSING.**

- Legislatively enacted inclusionary housing requirements must be reasonably related to their purpose—to address the community’s need for affordable housing and the social, economic and environmental consequences of not doing so. Likewise, in-lieu fees related to replacing the affordable units forgone by the developer will necessarily be sufficiently related to the underlying purposes of the inclusionary requirement.

**3. MITIGATION FEE ACT NEXUS STUDY IS NOT NECESSARY.**

- The Act does not apply to in-lieu fees—their purpose is not to finance “public facilities” required by the development.

---

---

## II. THE LEGAL ISSUES PRESENTED BY INCLUSIONARY ZONING

### A. THE LEGAL NATURE OF INCLUSIONARY ZONING— LEGITIMATE EXERCISE OF POLICE POWER

Inclusionary zoning regulates residential land use by establishing development standards requiring a portion of new housing development to include units with occupancy and price restrictions for a period of time. It reflects the community's decision under its police powers to ensure that future residential development will accommodate a mix of lower, moderate and above moderate income households. In this sense it is not intrinsically different from local land use ordinances that regulate use or change of use (e.g. from rental to condominium, from residential hotel to tourist hotel), and it shares some aspects of price control ordinances such as rent control (although the price controls are not indefinite).

The distinctiveness of inclusionary zoning has led to divergent legal attacks. Some were wholly unsuccessful facial takings attacks (now probably untenable after *Lingle v. Chevron U.S.A., Inc.*<sup>6</sup>). And, some are as-applied attacks contending that inclusionary requirements (and attendant in-lieu fees) are “exactions” that allegedly must be directly related to the need for new housing created by the development of new housing.

A consideration of the legal basis for local regulation of land use leads to the understanding that inclusionary zoning passes constitutional muster because it is clearly related to its legitimate purpose—to accommodate the community's existing and projected needs for affordable housing, to address the effects of exclusionary zoning practices of the past, to provide equal opportunity for households of all income levels, to provide housing for workforce of new commercial development, to address the dwindling supply of land and to affirmatively further integration and other fair housing goals. The premise that the *only* legitimate purpose of inclusionary zoning can be to accommodate the housing need derived by some causal mechanism from the impact new development is false. Whether viewed a species of land use regulation or a variation of development exactions as some opponents contend, the validity of the obligation ultimately turns on the sufficiency of the relationship between the obligation and its effectuation *all* legitimate purposes.

This memorandum accordingly examines inclusionary zoning against the backdrop of the police power authority of local governments and the requirements of the takings, due process and equal protection clauses, as well as the Mitigation Fee Act. First we address the legitimacy of particular purposes. Next we review the sufficiency of the relationship between the inclusionary obligation and its legitimate purposes. We will

---

<sup>6</sup> 544 U.S. 528 (2005)

---

---

then look at inclusionary in-lieu fees. Finally, we consider alternatives to the on-site rental inclusionary programs rendered uncertain by *Palmer /Sixth Street Properties L.P. v. City of Los Angeles*<sup>7</sup> court’s interpretation of the Costa Hawkins Act.

### 1. The Police Power—Regulation for the General Welfare

Any analysis of local regulation must begin with a consideration of the “police power.” The authority for local government to regulate within its jurisdiction—including land use, pricing, health and safety, commercial and industrial activity, transportation and the public peace—stems from the police power delegated to local government by Article XI, section 7 of the Californian Constitution. The police power itself emanates from the Tenth Amendment to the United States Constitution, which reserved to the states their inherent powers. Article XI, section 7 of the California Constitution authorizes a city or county to “make and enforce within its limits all local, police, sanitary, and other ordinances or regulations not in conflict with the general laws.”

Under long standing U.S. Supreme Court precedent, the police power entitles communities to take actions and adopt laws and policies the protect the public’s health, safety and welfare. *See Euclid v. Amber Realty Company*, 272 U.S. 365 (1926). Even before *Euclid*, the California Supreme Court held that local governments could legitimately employ their police powers to protect the general welfare through enactment of zoning ordinances creating residential zones reserved for single family housing. *Miller v. Board of Public Works*, 195 Cal. 477 (1925).

A local regulation is a legitimate exercise of the police power unless it is “clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals, or general welfare.” *Euclid* at 395; *see Miller* at 490. Since *Euclid* and *Miller*, federal and California courts have that a wide variety of local concerns legitimately fall within the general welfare, including maintaining socio-economic balance (*Village of Belle Terre v. Boraas*, 416 U.S. 1, 4-6 (1974)), limiting exorbitant rents (*Birkenfeld v. City of Berkeley*, 17 Cal.3d 129 (1976)) managing growth when serving the regional welfare (*Associated Homebuilders, Inc. v. City of Livermore*, 18 Cal. 3d 582 (1976)), and more recently, serving aesthetic objectives (*Erlich v. City of Culver City*, 12 Cal.4<sup>th</sup> 854, 886 (1996)), creating and preserving affordable housing for lower income households (*Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4<sup>th</sup> 952, 970 (1999); *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal.4<sup>th</sup> 643, 677 (2002)), and regulating economic competition to protect a downtown business district (*Hernandez v. City of Hanford*, 41 Cal.4<sup>th</sup> 279, 296-298 (2007)).

The first question when assessing the constitutionality of local inclusionary zoning legislation, then, is whether its purposes are legitimate governmental interests under the police power. If the purposes are legitimate, the question becomes whether

---

<sup>7</sup> 175 Cal. App. 4<sup>th</sup> 1396 (2009)

---

there is a sufficient relationship between the purpose and the requirement. This basic analysis is essential whether measuring the legislation against the takings, due process or equal protection clauses. (After *Lingle*,<sup>8</sup> the question of the effectiveness of legislation at achieving the objective is not germane in takings cases). California courts considering inclusionary zoning have answered both questions affirmatively either explicitly (*Home Builders Association of Northern California v. City of Napa*, 90 Cal.App.4<sup>th</sup> 188, 195 (2001)) or by implication (*Action Apartments Assn. v. City of Santa Monica*, 166 Cal. App. 4<sup>th</sup> 456 (2008)).<sup>9</sup>

## **2. Inclusionary Zoning Is Reasonably Related To Legitimate Governmental Purposes**

Inclusionary housing ordinances have been based on a constellation of governmental purposes, but the primary goal is to ensure that as a community grows or redevelops it provides affordable housing opportunities for lower income households to avoid and alleviate a host of negative consequences. This purpose falls squarely within the purview of the police power. As the *Home Builders* court stated: “We have no doubt that creating affordable housing for low and moderate income families is a legitimate state interest,” citing *Santa Monica Beach, Ltd., supra*, at 970 and the “repeated pronouncements” of the state Legislature to the same effect. 90 Cal.App.4<sup>th</sup> at 195. Fundamentally, the Housing Element Law requires all communities “to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.” Government Code § 65580(d) (*emphasis added*).

Therefore, once a community determines that there is a local/regional need for affordable housing, provision of affordable housing for families in need is a legitimate governmental purpose within the police power. An inclusionary housing requirement certainly is related to the accomplishment of this legitimate objective. It is, however, the causes and consequences of the need as articulated by the local government that become the touchstone for determining whether there is a sufficient relationship between the ordinance adopted and the affordable housing purpose. In this regard, as discussed above, the reasons for mandating inclusion of affordable housing can and should range

---

<sup>8</sup> 544 U.S. 528, 542 and 544.

<sup>9</sup> Under takings jurisprudence, a tighter relationship is required for requirements imposed in ad hoc, discretionary manner as an individualized condition of approval of a specific development than for requirements imposed by local legislation establishing a generally applicable mandate such as inclusionary zoning ordinances. This is known as the *Nollan/Dolan* test. In *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 837 (1987) the Supreme Court required that ad hoc individualized development conditions have an “essential nexus” to the stated purpose of the requirement. And in *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) the Court held that such requirements must be “roughly proportional” to the impact of the development based on an “individualized determination” and some “quantification.” Both *Home Builders* and *Action Apartments* found the *Nollan/Dolan* test inapplicable to local inclusionary zoning legislation because the ordinances were generally applicable to all developments. *Home Builders, supra* at 196-197; *Action Apartments, supra* at 470-471

---

broadly—the immediate lack of housing affordable to local residents and workforce, the environmental, social and economic consequences of long workforce commutes, the increasing scarcity of developable land, the effect on community composition of past exclusionary land use practices and the future need for affordable housing from projected commercial and economic growth, to name some. The soundest ordinances from a legal standpoint will be those ground their inclusionary requirements on the full gamut of possible bases.

Examples of communities finding widespread causes and consequences of the lack of affordable housing to justify inclusionary housing legislation upheld by the courts include Napa, Maui County and Cotati. Napa based its ordinance on findings that a shortage of affordable housing had negative consequences for all the city’s residents, but was most severe for lower income persons. Manual laborers were forced to live in overcrowded and substandard conditions, the homeless population was increasing and workers in lower income households were forced to live greater distances from their jobs, causing traffic congestion and pollution. *See Home Builders* at 191. Similarly, the purpose of Maui’s inclusionary ordinance is to provide housing affordable to workforce households “in order to alleviate the shortage of workers and resulting downward pull on Maui’s economy.” *Kamaole Pointe Development LP v. County of Maui*, 573 F.Supp.2d 3154, 1383 (D. Haw. 2008). Cotati’s inclusionary housing ordinance states an even broader purpose to:

“Encourage the development and availability of housing affordable to a broad range of households with varying income levels within the City”; to “[o]ffset the demand on housing created by new development, and mitigate environmental and other impacts that accompany new development by protecting the economic diversity of the City’s housing stock, reducing traffic, transit and related air quality impacts, promoting jobs/housing balance and reducing demands placed on transportation infrastructure in the region”; and to “[i]mplement the policies of the Housing Element of the General Plan.”

*Mead v. City of Cotati*, 2008 U.S. Dist. LEXIS 94238, 29-30, quoting the ordinance.

All of these laws articulate broad and legitimate concerns substantially related to the public health, safety and general welfare. Communities articulating similar wide-ranging bases for inclusionary legislation will have legally sound ordinances.

## **B. TAKINGS, DUE PROCESS AND EQUAL PROTECTION ISSUES**

### **1. Takings**

The takings clauses of the Fifth Amendment of the U.S. Constitution and Article I of the California Constitution provide that private property may not be taken for public use without just compensation. While, as discussed above, the first attacks on

---

inclusionary zoning laws were brought under these provisions, they were unsuccessful. Generally, they attempted to employ the *Nollan/Dolan* essential nexus and “rough proportionality” tests—applicable only when ad hoc exactions are imposed as a condition of approval of individual developments—as the legal test for measuring the legal validity of generally applicable local legislation like inclusionary zoning.<sup>10</sup> Developers argued that the inclusionary obligation must be roughly proportional to the need for housing created by the proposed development. Both *Home Builders* and *Action Apartments*, however, found the *Nollan/Dolan* test inapplicable to local inclusionary zoning legislation because the ordinances were generally applicable to all developments. *Home Builders*, *supra* 90 Cal.App.4<sup>th</sup> at 196-197; *Action Apartments*, *supra*, 166 Cal. App. 4<sup>th</sup> at 470-471.

And since *Lingle v. Chevron U.S.A. Inc.*<sup>11</sup>, facial attacks under the takings clause are virtually untenable. The Court dispensed with the previous “means-ends” test requiring a law to “substantially advance” a legitimate state interest to survive a takings challenge because the test “can be read to demand heightened scrutiny of virtually any regulation of private property.” *Id.* at 544. The Court deemed the “substantially advance” test more akin to the rational relationship test used in facial challenges under the due process clause and inappropriate to determining whether a regulation actually effectuated a taking of private property. *Id.* at 540-544. Now, in the Ninth Circuit, unless a regulation completely deprives a property owner of all economically beneficial use of property, a generally applicable development condition (as opposed to an exaction imposed on an individual development and, therefore, subject to *Nollan/Dolan* heightened scrutiny) must be addressed under the standards of *Penn Central Transp. Co. v. New York City*.<sup>12</sup> *McClung v. City of Sumner*, 548 F.3d 1219, 1225, 1226 (9<sup>th</sup> Cir. 2008).

Under *Penn Central* the court must look at the economic impact of the regulation on the claimant, including the extent of any interference with distinct “investment-backed expectations” and the “character” of the governmental regulation and then determine whether the impact of the regulation on the development is so drastic that it should be deemed confiscatory. 438 U.S. 104 at 124. This type of analysis generally precludes a facial challenge because it is predicated on a review of the particular facts of a specific development proposal. Moreover, such a takings challenge is unripe until the plaintiff has made a claim for compensation to the local government. *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186-87, 194 (1985).

And keep in mind that in *Penn Central* the Court upheld New York City’s landmark preservation law, explaining that land use controls that have diminished

---

<sup>10</sup> See footnote 5, *supra*; *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

<sup>11</sup> 544 U.S. 528 (2005)

<sup>12</sup> 438 U.S. 104 (1978)

---

property values by up to 87.5% have been found permissible. *Penn Central* at 131. As the *Home Builders* court said of Napa’s ordinance:

If New York can enact a landmark preservation law to remedy a shortage of historic buildings created by its prior policies, [the] City can enact an inclusionary zoning ordinance even if its prior policies contributed to the scarcity of available land and a shortage of affordable housing.

90 Cal.App.4<sup>th</sup> at 197-198.

In some situations, a developer may claim that an inclusionary ordinance would impose substantial economic burdens on the project. Accordingly, an inclusionary zoning ordinance with a procedure for seeking a reduction of the inclusionary obligation based on demonstration of specific economic hardships should be well protected from a facial or as-applied takings attack.

## 2. Substantive Due Process

The 14<sup>th</sup> Amendment to the U. S. Constitution provides that no state shall “deprive any person of life, liberty, or property without due process of law.” Article I, section 7 of the California Constitution contains similar due process language. This guarantee has been interpreted to prevent governments from “enacting legislation that is ‘arbitrary’ or ‘discriminatory’ or lacks “a *reasonable relation* to a proper legislative purpose.” *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4<sup>th</sup> 761, 771 (1997) (citing *Nebbia v. New York*, 291 U.S. 502, 537 (1934)). Therefore, as with a takings challenge, a generally applicable government regulation like inclusionary zoning will not be held to any heightened scrutiny. It must only be rationally related to any legitimate governmental purpose. *Lingle*, 544 U.S. at 542, 545; *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9<sup>th</sup> Cir. 2007).

As discussed, there is no question that the several interrelated purposes that have been identified as bases for inclusionary zoning are legitimate government objectives. See *Home Builders*, *supra*, 90 Cal.App.4<sup>th</sup> at 191 and *Kamaole Pointe Development*, *supra*, 573 F.Supp.2d 3154, 1383. And, as a means employed to achieve the objective, inclusionary housing programs are hardly arbitrary or irrational, expressly requiring the provision of affordable housing through on-site inclusion, land dedication or payment of in-lieu fees related to the inclusionary requirement. The “judiciary does not sit as a superlegislature to weigh the wisdom of legislation.” *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978).

In *Home Builders* the court turned back plaintiff’s due process attack on the price restriction aspects of Napa’s inclusionary zoning ordinance. Plaintiffs contended the law was arbitrary because it did not insure owners a fair return on investment. The court noted that it is unlikely a developer is *entitled* to a fair return, but more important was the

---

ordinance’s clause that allowed the City “to reduce, modify, or waive the requirements contained in the ordinance.” *Home Builders* at 199. Similarly, the *Kamaole* court found that Maui’s inclusionary ordinance served a clearly legitimate objective and bore a rational relationship to its purpose. *Kamaole* at 1384.

As with a takings challenge, an inclusionary zoning requirement with a procedure for seeking a hardship reduction or alternative performance for economic hardship based on evidence submitted on a specific development proposal will be protected from a facial due process challenge because it contains the means of avoiding an arbitrary application prohibited by due process.

### 3. Equal Protection

The equal protection clauses of the state and federal constitutions prohibit state and local governments from depriving persons of equal protection of the laws. U.S. Const., 14<sup>th</sup> Amendment, Cal. Const., Article 1, §7. While the nature of land use and zoning laws is to treat parcels of property differently based on the applicable zoning category and development standards, they do not violate equal protection if they bear a rational relationship to their express purpose and the purpose serves a legitimate governmental interest. *Construction Industry of Sonoma County v. City of Petaluma*, 522 F.2d 897, 906 (9<sup>th</sup> Cir. 1975), *cert. denied*, 424 U.S. 934. Inclusionary zoning laws are measured by the same standard. *Kamaole* at 1383, citing *Hodel v. Indiana*, 452 U.S. 314, 331. “Moreover, such legislation carries with it presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.” *Ibid.*, citing *Hodel* at 332.

Social and economic legislation is valid unless “the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature’s actions were irrational.” *Vance v. Bradley*, 440 U.S. 93, 97 (1979)

*Ibid.*

As such, the *Kamaole* court found nothing on the face of Maui’s inclusionary ordinance indicating arbitrariness or irrationality. *Id.* Indeed, but for some exceptions based on legitimate concerns, the ordinance treated all developers equally. “Disparate government treatment will survive rational basis scrutiny ‘as long as it bears a rational relationship to a legitimate state interest.’” *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9<sup>th</sup> Cir. 2004) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

Some developers bringing equal protection attacks on inclusionary zoning have advanced the view that “developers are being forced to subsidize housing for low- and

---

moderate-income individuals, whereas other taxpayers are not.” *Mead v. City of Cotati*, *supra*, 2008 U.S. Dist. LEXIS 94238, 32.

But individuals pursuing development projects are not situated similarly to other taxpayers, in that they are in a unique position to create affordable housing. And as explained above, requiring this group to set aside twenty percent of new housing for low- and moderate-income individuals is rationally related to the City’s interest in increasing the amount of affordable housing within its limits.

*Ibid.*

Like the takings and due process challenges, the inclusionary zoning laws are rationally and reasonably related to the effectuation of the legitimate cluster of purposes for which they are adopted. They, therefore, do not run afoul of the equal protection clauses.

### C. THE MITIGATION FEE ACT

The Mitigation Fee Act (Gov’t. C. §§66000-66025) almost certainly does not apply to the underlying inclusionary obligation—to include affordable units within new development or off site. The Act provides that when a local agency imposes *fees* as a condition of approval of a development project, the local agency must determine how there is a reasonable relationship:

- Between the fee’s use and the type of development project
- Between the need for the public facility and the type of development project
- Between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development project

§66001 subd. (a) and subd. (b).

The Act was adopted “in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects.” *Ehrlich v. City of Culver City*, *supra*, 12 Cal. 4th 854, 864. In *Ehrlich*, the Court decided that the “reasonable relationship” language imposed requirements akin to the takings clause (as they existed prior to *Lingle*). *Id.* at 867. Adopted in between the Supreme Court’s *Nollan* and *Dolan* decisions [Stats.1987, ch 927, effective January 1, 1989], it applies a “reasonable relationship” test to certain fees of either general applicability or those imposed on a discretionary basis on individual projects. §66000(b).

The initial question, however, is whether the Mitigation Fee Act applies to the primary requirement of inclusionary zoning to include affordable units in new residential developments. A fee is defined as a “*monetary exaction*” that is:

---

charged in connection with approval of a development project for the purpose of defraying all or a portion of the cost of *public facilities* related to the development project.

§66000(b). The inclusionary on-site affordability requirement, however, is neither monetary nor imposed to defray the cost of public facilities. The developer's option to elect to pay an in-lieu fee instead of providing the affordable units does not make the requirement to provide units a fee, rather, it requires the developer "use [its] land in a particular way." *Mead v. City of Cotati*, *supra*, 2008 U.S. Dist. LEXIS 94238, 36, citing *Centex Real Estate Corp. v. City of Vallejo*, 19 Cal. App. 4<sup>th</sup> 1358, 1364 (1993) (excise tax on property development was not a fee covered by the Act because it was "imposed to raise revenue for the City's general fund and not for the limited purpose of funding public facilities or services related to a new development"); *Williams Commc'ns, LLC v. city of Riverside*, 114 Cal. App. 4<sup>th</sup> 642, 658 (2004) ("We agree with the trial court's conclusion that the \$750,103 was not a fee within the meaning of this definition because it was not assessed for the purpose of defraying the cost of William's project.")

The Act does set out a *procedure* for challenging fees *and exactions* (§66020 & §66021), but the reference to exactions probably is no broader than the definitional "monetary exactions." The *Erhlich* court construed these provisions to apply to challenges related to fees. 12 Cal. 4th at 866. And, even if an inclusionary obligation is construed as a kind of non-monetary exaction within the meaning of those sections, the effect of the Act is simply to prescribe the procedures that a challenger must use. Furthermore, §66005(a) presents additional indication that the Act's mention of exactions is intended only to encompass conditions that extract a form of payment related to services of facilities:

When a local agency imposes any fee or exaction as a condition of approval of a proposed development . . . or development project, those fees or exactions shall not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed.

This indicates two things: 1) the only "exactions" covered by the Act are monetary exactions and 2) in any case, the Act's restrictions only apply to exactions imposed to cover the costs of services or facilities. The basic on-site inclusionary housing requirement is not imposed to cover the cost of a service or facility. As the court found in *Fogarty v. City of Chico*, 148 Cal. App. 4<sup>th</sup> 537 (2007), "exactions" are not "land use restrictions, which are not any form of payment." They include conditions like those listed in §66020 that "involve divesting a developer of either money or a possessory interest in the subject property." *Id.* at 543-544.

To summarize, the Mitigation Fee Act applies to fees or monetary exactions and not to obligations to include affordable housing on-site or off-site. The Act's incorporation the term "exactions" in the section prescribing the *procedures* for

---

---

challenging local development fees may indicate that these procedures be utilized in any legal attacks on non-monetary requirements of inclusionary zoning. But, more likely the use of “exactions” merely signifies that the Act’s procedural scheme is to be used for challenging conditions other than impact fees that require a form of payment to cover services and facilities.

Next addressed are the application of constitutional requirements and the corollary requirements of the Act to the “in-lieu” fees most ordinances allow a developer to elect as an alternative to the inclusionary obligation to provide affordable units on-site or off-site.

#### **D. IN-LIEU FEES, DEVELOPMENT FEES GENERALLY & PATTERSON**

It is first necessary to review the case law addressing development fees as it has evolved from the pre-*Nolan/Dolan/Lingle* eras to the present. Although the path is not always well marked and constitutional standards have evolved, migrated and changed, the basic test for the validity of fees has remained constant. Fees must be based on a legitimate governmental purpose, and they must be related by varying degrees to the effectuation of that purpose, depending on whether they are fees of general application or required on an ad hoc basis for a particular development. Because in-lieu fees are by definition intended to provide an alternative to performance of a particular land use condition, they must be related to the effectuation of that condition. And because the fees do not fund public facilities or services they are not subject to the Mitigation Fee Act. However, as discussed above an attack on in-lieu fees probably should be brought according to the procedures provided in the Act).

The most confusing aspect of inclusionary zoning programs from a legal analysis standpoint is the in-lieu fee alternative incorporated in most local ordinances. The confusion is due in no small part to the imprecise categorization and inconsistent consideration by the courts of local fees related to development, exacerbated most recently by the opinion in *Building Industry Assn of Central California v. City of Patterson, supra*, 171 Cal. App. 4<sup>th</sup> 886. The decision was engendered by the one-of-its-kind “development impact fee” (described previously) adopted by the City of Patterson in-lieu of an on-site inclusionary production requirement. Instead of basing the fee simply on the cost of developing the affordable units that would otherwise be included in a development, the City based the fee on a complex assessment the impact of new development on the City’s ability to meet its housing needs. The court concluded that there was an insufficient relationship between the impact of the development on housing need and methodology for calculating the fee.

The *Patterson* decision has led some to question essential nature of in lieu fees and to ask whether the fee is an impact fee, some other kind of development fee or

---

something else. Consequently, we begin by considering the categories of fees that are levied on development because the class of fee has bearing on the question of the legality of the fee. In-lieu fees appear clearly to be development fees.

### 1. In Lieu Fees—What Kind of Fees Are They?

The most recent case to consider the types of fees applied to new development identified three categories—special assessments, development fees and regulatory fees distinguishable from special taxes. *California Building Industry Assn. v. San Joaquin Valley Air Pollution Control Dist.*, 178 Cal. App. 4<sup>th</sup> 120, 130 (2009), citing the seminal decision *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4<sup>th</sup> 866, 874 (1997). The court concluded that the fees at issue in the case—fees based on the cost of regulating developments that are “indirect sources” of pollution—were regulatory fees because they

were based on the cost of the regulatory activities. Being regulatory fees, they must be related to the cost of regulating the pollution attracted by new development, and the court found that they were. *San Joaquin Valley*. at 131. A fee becomes a tax if it is not reasonably related to the burden and benefits conferred on development. *Id.* at 132.

A development fee, on the other hand is “imposed for building permits or other governmental privileges so long as the amount of the fee bears a reasonable relation to the development’s probable costs to the community and benefits to the developer.” *Id.* at 130. Approval of a development must be conditioned on the payment of the fee. *Id.* at 131. Note that under *Sinclair Paint* the legality of the fees is determined by the sufficiency of the relationship to both the “costs” to the community as a whole and the benefit to the developer of receiving the privilege to develop.<sup>13</sup> Development fees are imposed for the privilege of receiving approval to develop, which may be granted or withheld by the governmental body depending on decisions it is empowered to make to further the general welfare of the community pursuant to its police powers.

Development fees generally fall into three subcategories—impact fees, in-lieu fees and mitigation fees.<sup>14</sup> Inclusionary in-lieu fees—either available as an alternative or as the initial requirement to facilitate production of the designated percentage of inclusionary units—fit most appropriately in the category of development fees because they must be paid as a condition of approval of a residential development and they are

related to the cost of developing a percentage of affordable units related to the size of the development. *See* the discussion below.

---

<sup>13</sup> This broad “costs to the community” standard bears strong resemblance to the “deleterious public impact” standard set out in *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4<sup>th</sup> 643 (2002) and discussed below.

<sup>14</sup> *Abbot, et. al., Exactions and Impact Fees in California* (Solano Press, 1991) at 20-21.

---

## 2. Development Fees, In-Lieu Fees and the Courts

### *Associated Home Builders of the Greater East Bay., Inc. v. City of Walnut Creek*

Analysis of the legal bases for any type of development related fee begins with Justice Mosk’s opinion in *Associated Home Builders of the Greater East Bay., Inc. v. City of Walnut Creek*, 4 Cal. 3d 633 (1971). The Court upheld against a takings attack the constitutionality of Business & Professions Code §11546, which authorized local governments to require dedications of land or in-lieu fees, or a combination, for park or recreational purposes as a condition to approve a subdivision. The Court also upheld the City’s ordinance setting the in-lieu fee. *Id.* at 635. It had no doubt that the requirement is “justified on the basis of a general public need for recreational facilities caused by present and future subdivisions.” *Id.* at 638.<sup>15</sup>

We see no persuasive reason in the face of these urgent needs caused by present and future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities to such an extent that additional land for such facilities will be required.

*Id.* at 640. See *Remmenga v. California Coastal Commission*, 163 Cal. App. 3d 623, 628 (1985)

The Court then turned to the issue of the amount of the in-lieu fee, which under the statute must be reasonably related to the use of the park by future subdivision inhabitants. It found that an in-lieu fee based on a percentage of the value of the land that the developer must otherwise dedicate had a reasonable relationship to the use of recreational facilities by residents. *Ibid.*

The opinion is important to inclusionary in-lieu fees because it articulated for the first time the connection that must exist between in-lieu fees on development and the underlying land use condition—in *Associated Home Builders* the dedication of park land.

The Court found that an in-lieu fee reasonably related to the underlying obligation is valid. This basic analysis has not since been materially altered.

---

<sup>15</sup> “The elimination of open space in California is a melancholy aspect of the unprecedented population increase which has characterized our state in the last few decades. Manifestly governmental entities have a responsibility to provide park and recreation land to accommodate this human expansion despite the inexorable decrease in of open space available to fulfill such need.” *Id.* One could easily substitute “affordable housing” for park and recreation land and the statement would be equally true, if not more so.

---

However, with *Lingle's* dispatch of the “substantially advances” means-ends takings analysis, continued vitality of the reasonable relationship test is uncertain. The standard as articulated in *Associated Home Builders* derived from older takings cases (as well as from the statute at issue in the case). As will be seen, its survival through the years depended heavily on the requirements of the pre-*Lingle* takings cases, not due process or equal protection requirements. Whether future cases will sustain it or turn to a similar rational/reasonable relationship due process test remains to be seen. After *Lingle*, except for ad hoc development fees on individual projects measured by the *Nollan/Dolan* “rough proportionality” means-ends test, generally applicable development fees are tested for takings under *Penn Central's*<sup>16</sup> imprecise assessment of whether the economic impact of the fee on the developer, considering the character of the fee, is confiscatory.

Until future courts weigh in, though, an inclusionary in-lieu fee that is reasonably related to the cost of providing the affordable units forgone by the developer’s election to pay the fee is sound. It strongly resembles the park dedication in-lieu fee in *Associated*

*Home Builders*, which was based on a percentage of the value of the forgone land dedication. It is similarly consistent with the determination in *Remmenga* that the “requirement to pay an in-lieu fee...presents essentially the same constitutional issue... presented by the requirement that the owner...dedicate a public right of way in order to obtain a development permit.” *Remmenga* at 628 (relying on *Associated Home Builders*).

### ***Erlich v. City of Culver City***

The California Supreme Court confirmed this standard in the post *Nollan/Dolan* era in *Erlich v. City of Culver City*, *supra*, 12 Cal. 4th 854. In *Erlich*, Justice Mosk in his concurrence picked up where he left off in *Associated Home Builders*. Looking at the nature of development fees in the context of *Erlich's* pre-*Lingle* takings challenge, he reviewed the constitutionality of taxes, assessments and various fees (*id.* 892-899) and explains where development fees fit in this mix:

They are perhaps best characterized as a special assessment placed on developing property, calculated according to preestablished legislative formulae based on square footage or per unit of development. [Citations] Courts have granted considerable discretion to local government to impose such fees, and have upheld them against takings and related challenges. [Citations]

*Id.* at 896.

Reconciling this with the takings challenges brought by *Erlich* against development fees in the post-*Nollan/Dolan* but pre-*Lingle* time, he concludes:

---

<sup>16</sup> 438 U.S. 104 (1978)

---

In sum, it does not appear that *Nollan* or *Dolan* alter the restricted judicial review applicable to general government fees—a restriction rooted in the separation of powers doctrine—merely because a property owner can recast his challenge to a fee as a takings claim, asserting that he was being asked to pay for a disproportionate share of public improvements or services in exchange for a development permit. On the contrary, the cases show that the constitutionality of such fees will be judged under a standard of scrutiny closer to the rational basis review of the equal protection clause than the heightened scrutiny of *Nollan* and *Dolan*.

*Id.* at 897.

Thus even under the means-end “substantially advances” takings test that existed at the time, local governments were not required to establish that generally applicable development fees were mathematically proportionate to any public improvements or services for which they were assessed as they would be if they were ad hoc and *Nollan/Dolan* applied.

Justice Mosk then indicates how this lower scrutiny would apply to different sorts of generally applicable monetary exactions, stating that the inquiry will vary depending on the nature of the state interests purporting to justify the exaction. For example, “[i]f the fee is imposed to mitigate the impacts of the development, then it will be upheld if there is a reasonable relationship between the fee and the development impact.” (Citing *Associated Home Builders, supra*, 4 Cal. 3d at 633.) *Ibid.* So it follows, as in *Associated Home Builders*, that a fee must be related to the purpose for which the fee is imposed.

As the plurality in *Erhlich* explained (though in the context of the *Nolan/Dolan* heightened scrutiny):

Its effect, at least as to those conditions that fail to exhibit the constitutionally required nexus, is to rule out the imposition of a certain species of regulatory conditions: *those which are either logically unrelated to legitimate regulatory objectives or fail to exhibit the constitutionally required "fit" between conditional means and legitimate governmental ends.*

*Id.* at 868 (*emphasis added*). The point is that, within the framework of development fees, the “fit” required is between the fee and the purpose of the fee. Fees imposed on an ad hoc basis on individual developments must have a *Nollan/Dolan* closer fit than generally applicable development fees. But for fees imposed by formula across the board, like the *art fee* in *Erhlich*, a simple relationship is all that is required. Not unlike the park dedication in-lieu fee in *Associated Home Builders*, the art fee paid in-lieu of

providing art on site was proportional to the valuation of the building (one percent). *Id.* at 885. (The court deemed the art requirement a legitimate exercise of the police power

---

---

because it was akin to traditional land use requirements, in this case aesthetic requirements. *Id.* at 886).

After *Nollan/Dolan/Erhlich* then, a generally applicable inclusionary in-lieu fee will need to be rationally related (the due process and equal protection requirement) and possibly “reasonably” related (to the extent that test survives *Lingle* in the takings context and to the extent it’s any different from rationally related) to its purpose—to provide funds needed to develop elsewhere the units the developer chooses to forgo. This is not a requirement to establish mathematical proportionality as there would be for an ad hoc fee subject to *Nollan/Dolan*.

Some have assumed that an in-lieu fee must be related, not to the purpose of the fee—to provide equivalent alternative performance to the underlying inclusionary requirement—but to the purpose of the underlying inclusionary requirement. The assumption is based on language in cases such as the next discussed *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4<sup>th</sup> 643 (2002). The distinction, however, is not material—an in-lieu fee sufficiently related to the on-site inclusionary percentage necessarily will be related to the underlying purpose of the on-site obligation. It even will be mathematically proportionate, although that proportionality is not required.

What’s more, focusing on the relationship of the in-lieu fee to the inclusionary percentage obligation is much easier analytically—it does not require a study that treats the in-lieu fee as if it were something it’s not: an obligation of the developer that is independent of the primary inclusionary obligation.

### *San Remo Hotel L. P. v. City and County of San Francisco*

*San Remo Hotel* considered a pre-*Lingle* takings challenge of the housing replacement fees a developer converting residential hotels to tourist use can elect to pay in-lieu of providing replacement residential hotel units under San Francisco’s Residential Hotel Housing and Conversion Ordinance (HCO). The California Supreme Court resolved that under its precedents generally applicable fees like the HCO’s in-lieu fee “are not subject to *Nollan/Dolan/Erhlich*.” 27 Cal. 4<sup>th</sup> 643, 670 (2002).<sup>17</sup>

---

<sup>17</sup> Even where heightened scrutiny under *Nollan* applied, for example, a court in requiring a nexus between the development and the problem that the fee seeks to address, has **rejected the proposition** that such fees will be upheld “only where it can be shown that the development is directly responsible for the social ill in question.” *Commercial Builders of Northern California v. Sacramento*, 941 F.2d 872 at 875 (9<sup>th</sup> Cir. 1991).

---

---

The Court nonetheless held that in the context of then existing takings jurisprudence, legislatively imposed development fees like the HCO in-lieu fee are subject to some level of a means-end review:

As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development.... While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees...the arbitrary and extortionate use of purported mitigation fees...will not pass muster.

*Id.* at 671, citing the Mitigation Fee Act, *Ehrlich* and *Associated Home Builders*. As the concurrence/dissent pointed out, this “reasonable relationship” standard falls somewhere between the *Nollan/Dolan* heightened “roughly proportional” standard and the rational basis standard of due process and equal protection cases. Just where is not completely clear. *Id.* at 686-687 (conc op. of Baxter, J., Chin, J. conc.). The concurrence reminds that the standard evolved from the takings analysis requiring a development exaction to substantially advance a legitimate state interest. *Ibid.* Presumably *Lingle’s* abrogation of this test someday will lead the Court to reconsider whether this in-between standard survives.

The best indication of the meaning of the reasonable relationship standard is found in the *San Remo Hotel* court’s application of the standard to the HCO “in-lieu” fee. The purpose of the HCO was to “benefit the general public by minimizing the adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion or demolition. *Id.* at 650. The HCO carried out this purpose by requiring developers to replace 100% of converted or demolished units, or pay an in-lieu fee. The in-lieu fee in turn was based on the cost of replacement of the units, determined by a formula based on independent appraisals. *Id.* at 651. The City set the fee at 80% of the replacement cost. *Id.* at 673. Therefore, the Court found that the fees “bear a reasonable relationship to the loss of housing” because they are based on “the number of rooms being converted from residential to tourist designation....” *Id.* at 672-673.

Thus, the “deleterious public impact of the development” is the extent to which development hinders effectuation of the social purpose identified in the local ordinance.<sup>18</sup> In *San Remo Hotel*, the hotel conversions removed affordable residential hotel units from the housing stock. The HCO in-lieu fees were reasonably related in intended *use* because

---

<sup>18</sup> Although not mentioned by the Court, this broad standard is not dissimilar to the standard for measuring development fees expressed by the Court much earlier in *Sinclair Paint*, *supra*, 15 Cal. 4<sup>th</sup> 866. As discussed above at the outset of this discussion of fees, in *Sinclair Paint* the Court held that a development fee must bear a reasonable relationship to the development’s likely costs to the community and benefits to the developer. *Id.* at 875; *California Building Industry Assn v. San Joaquin Valley Air Pollution Control Dist.*, *supra*, 178 Cal. App. 4<sup>th</sup> 120, 131.

---

---

they were employed to replace the lost housing. And the in-lieu fees, when elected, were reasonably related in *amount* because they were related to the cost of replacement.

Inclusionary in-lieu fees are analogous. The deleterious public impact of market rate development is its failure to include affordable housing needed by the community and the region for the many reasons that have been articulated in the ordinances, e.g. existing housing need, land scarcity, environmental concerns, and integration. The public impact is certainly *not* limited solely to the need for housing created by new housing development (although this is certainly one deleterious public impact). The standard inclusionary in-lieu fee, then, is reasonably related in intended *use* because it is earmarked for development of the affordable units foregone by the developer's election not to include them in the development. Such a fee is reasonably related in *amount* because it is related to the cost of developing the units elsewhere. And as long as there is evidence in the record to establish this reasonable relationship in both use and amount (e.g. how the fee was calculated to address the consequence of non-compliance with the primary obligation), thereby establishing that the fee is not arbitrary or extortionate, the fee should be upheld.

***Lingle v. Chevron U.S.A.***

As explained, *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005) declared invalid what had long been the first step of determining whether a governmental action caused a Fifth Amendment takings—assessing whether the action “substantially advances” a

legitimate state interest. The Court found that the “means-ends” analysis of the effectiveness of a regulation of private property “has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.” *Id.* at 542. But the Court found that the test is not appropriate for determining whether property has been taken, because “the ‘substantially advances’ inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights.” *Ibid.* (*emphasis in original*).

*Lingle*, therefore, calls into question the viability and meaning of the reasonable relationship test because it eliminated the “substantially advances” test on which it has been based. As Justice Kennard demonstrated in her concurrence in *Santa Monica Beach*, the origins of the “substantially advances” takings test can be traced back to Supreme Court *due process* analyses rather than takings. 19 Cal. 4th 952, 978-979. The most prominent iteration in the land use context was in *Euclid's* statement that land use regulation is valid under due process unless “clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals, or general welfare.” *Ibid.*, quoting *Euclid*, 272 U.S. at 395.

---

---

Given the long history of the reasonable relationship standard though, and its close relation to the rational basis/relationship tests utilized in due process and equal protection analyses, its elimination from takings analyses may have little practical effect. While a means-end test is no longer appropriate in evaluating a takings challenge, it remains a part of due process analysis, but it is an extremely deferential test.

Consequently, establishing some rational/reasonable connection between a development fee in general or an in-lieu fee in particular and the effectuation of the purpose of a land use condition will remain essential to the validity of the fee.

***Building Industry Assoc. of Central Calif. v. City of Patterson***

*Patterson* did not change the basic legal analysis for in-lieu fees set forth in *San Remo Hotel*. See 171 Cal. App. 4<sup>th</sup> 885 at 898. But the unique methodology used by the City did not yield a fee that was reasonably related to its purpose—to address the impact of new development on the need for affordable housing.

*Patterson* replaced its rather ordinary inclusionary zoning program (and a very small in-lieu fee (\$734/unit)) with a fee based on a Development Impact Fee Justification Study. *Id.* at 891. Here it diverged from the standard “affordability gap” formula akin to that use in *San Remo* and in most inclusionary programs. The study began by assessing the additional “gap” subsidy needed to make units affordable. *Id.* at 892. But then, rather than simply basing the in-lieu fee on the cost of providing an inclusionary percentage of units as had in the past—a method the court implicitly endorsed (*ibid*)—it veered away from that methodology. Instead, the study calculated the cost of meeting

the City’s Regional Housing Needs Assessment (RHNA) by multiplying the lower income RHNA (642 units) by the per-unit gap subsidy amount and arriving at a total subsidy of \$73.5 million. Then the study divided that figure by the remaining unentitled units in the city indicated by the existing general plan, for a per unit fee of \$20,946. *Ibid.*

The court pointed out the illogic of this calculation, noting that if the 214 units proposed by the developer had been the only unentitled units left in the city, the methodology would have resulted in a fee of \$343,458 per unit. *Id.*, footnote 8. Accordingly, the formula did not result in a fee that was related to the stated purpose of the fee—to address the impact of market rate development on the need for affordable housing. *Id.* at 899.

No connection is shown, by the Fee Justification Study or by anything else in the record, between this 642-unit figure and the need for affordable housing associated with new market rate development.

*Ibid.* Had the City stuck with its previous methodology—relating the fee to the cost of developing the inclusionary units not provided by the development, the fee almost

---

---

certainly would have been held valid. As with in-lieu fees in most jurisdictions it would have been related to the amount of affordable housing the development would have otherwise provided. After determining the affordable housing subsidy gap, the City should have simply derived the fee from an inclusionary percentage.

### 3. The Mitigation Fee Act and In-Lieu Fees

The Mitigation Fee Act (Government Code §66000, *et seq.*, *supra*), as discussed in the preceding analysis of the basic on-site inclusionary requirement, only applies to monetary exactions imposed “for the purpose of defraying all or a portion of the cost of public facilities related to the development.” Gov’t C. §66001. In-lieu fees, if chosen by the developer, are not imposed to cover all or some of the costs of public facilities relating to the development. Accordingly, they should not be subject to the Act. *See Centex Real Estate Corp. v. City of Vallejo, supra*, 19 Cal. App. 4<sup>th</sup> 1358, 1364; *Williams Commc’ns, LLC v. City of Riverside, supra*, 114 Cal. App. 4<sup>th</sup> 642, 658. (“We agree with the trial court’s conclusion that the \$750,103 was not a fee within the meaning of this definition because it was not assessed for the purpose of defraying the cost of William’s project.”)<sup>19</sup>

Although *adoption* of inclusionary in-lieu fees most likely are not subject to the substantive and procedural requirements of the Act, *challenges* to in-lieu fees may need

to be brought pursuant to the procedures set out in §§ 66020--60025. These sections provide procedures for a developer to protest and then bring litigation to attack not only a mitigation fee, but also “dedications, reservations, or *other exactions....*” §66020(a) (*emphasis added*).

### 4. Recap—Legal Requirements for In-Lieu Fees

The preceding review of the law relating to development fees generally and in-lieu fees specifically suggests the basic parameters for a legally sound in-lieu fee in the framework of an inclusionary zoning program.

- The fee must have a rational/reasonable relationship in its intended *use* to the “deleterious public impact” of new development. The impact of market rate development is its failure to provide the affordable inclusionary units. Therefore the fee must be intended to produce those forgone units elsewhere. Most in-lieu fee provisions have this purpose.

---

<sup>19</sup> In a footnote, the *Patterson* court said: “We note that [section 66001](#) expressly applies to fees imposed to mitigate the effects of development on “public facilit[ies].” We express no opinion on the question whether [section 66001](#), or the Mitigation Fee Act in general (see [Gov. Code, § 66000.5](#)), applies to affordable housing in-lieu fees.” 171 Cal. App. 4<sup>th</sup> at 897

- 
- The fee must have a rational/reasonable relationship in its *amount* to the failure of the market rate development to provide inclusionary units. Therefore the amount of the fee must be related to the *cost* of providing the affordable units the developer elects to forgo. The common inclusionary in-lieu fee formula—a per unit fee based on all or a portion of the subsidy or “gap” financing necessary to produce the affordable units—meets this standard.
  - Establishing the basis for the fee should include an analysis of the funding necessary to produce units affordable to the income classes targeted for the inclusionary units. The formula for the fee should then be derived from this analysis, based on the percentage inclusionary requirement. The Mitigation Fee Act does not apply, so a mitigation fee nexus study should not be required.

## **E. ALTERNATIVES FOR RENTAL HOUSING AFTER PALMER**

So what’s a local government to do?

First, local officials must keep in mind that communities are vested with the police power, which is as broad and elastic as they need it to be to serve the general welfare of the community within the broad bounds of the state and federal constitutions. Second, failing to adopt any program requiring the developers of rental housing to participate in meeting the goals of inclusionary zoning programs will undermine the basis of the inclusionary program and the ability of the community to address its affordable housing needs. It will also open the community to charges that it is unfairly placing the inclusionary “burden” solely on for-sale housing developers.

Finally, don’t lose site of the limited nature of the *Palmer* holding. Beyond finding that the Costa Hawkins Act preempted the power of local government to require new rental housing to contain rent restricted units, the decision did not say that inclusionary zoning or related in-lieu fees were otherwise unconstitutional. *It did not restrict the authority of local governments to continue to require income restrictions on occupants of a portion of units in a complex.* It only found the in-lieu fee in conflict because it was “inextricably intertwined” with the on-site rental set-aside requirement. *Palmer*, 175 Cal. App. 4<sup>th</sup> at 1411. And it implicitly held that an affordable housing development fee without a corollary on-site affordable housing requirement would not violate Costa Hawkins. *Id.*, fn 14 (“[The City] contends the ordinance would not violate the *Costa-Hawkins Act* if the set-aside provision were an in-lieu option for the fee. We are not persuaded. The only way the builder could avoid the fee would be to permit itself to be bound by the set-aside provision that is illegal under the *Act*...”) It is the set-aside and fee in combination that violated Costa Hawkins, not the fee itself.

Addressed below are legally viable alternatives to on-site inclusionary requirements in rental housing developments: A stand-alone affordable housing fee and

---

---

an affordable housing zoning overlay/incentive ordinance consistent with the exception to Costa Hawkins.

### **1. Adopt an Affordable Housing Development Fee**

Adopting a fee on rental housing development to produce affordable housing needed by the community will at least provide a source of funds to subsidize affordable rental housing off-site. The question is how to go about it. An affordable housing fee on rental housing development will effectuate the same purposes of a community-wide inclusionary housing program and thus is clearly within a community's police powers. From the review of the laws related to development fees discussed earlier, the fee passes constitutional muster if it is reasonably related to a legitimate governmental purpose. It is beyond legal question at this point that the many purposes of such a fee are legitimate government interests. The question then becomes, what is necessary to establish a reasonable relationship to those interests?

Recall that the legal standard for the validity of a generally applicable development fee at this juncture (with the caveat that in light of *Lingle* future courts may adjust it) is that the fee be reasonably related in intended *use* and in *amount* to the "deleterious public impact" of the development. *San Remo Hotel, supra.*, 27 Cal. 4<sup>th</sup> 643, 671. Public impact is an extremely broad standard and is not limited to any one impact. Some impacts are harder to quantify than others, but the "rough proportionality" quantification of impact requirement of the *Nollan/Dolan* cases does not apply to generally applicable development fees. They need only be *reasonably* related, a standard

more akin to the rational relationship standard used in equal protection analysis. *Erlich, supra.*, 12 Cal. 4<sup>th</sup> 854 at 897.

#### **a) A Fee Based on the Cost of Developing the Community Inclusionary Percentage in Proportion to the Size of the Development.**

The community would adopt a general, aggregate inclusionary policy providing that, for many significant reasons, a minimum proportion of all future development in the community must be affordable. (Many communities base existing inclusionary programs on such policies, usually contained in general plan, particularly the housing element.) To implement this policy with respect to rental housing, the policy would provide that as to new rental housing the community is placing an affordable housing development fee on new rental housing development to assist with the development of affordable rental housing based on the inclusionary percentage. The fee, of course, must be related to legitimate governmental purposes, but those purposes may range broadly and include things such as meeting the existing need for affordable housing, making appropriate use of dwindling land, reducing vehicle trips and furthers fair housing opportunities and integration.

---

---

A stand-alone fee on rental housing based on the gap financing cost of developing the same percentage of affordable units identified in the overarching inclusionary policy is reasonably related in intended *use* and in *amount* to the “deleterious public impact” of market rate rental housing development—the use of scarce residential land for market rate housing despite the stated need for affordable housing. It is related in use because it would be earmarked for affordable housing development. It is related in amount because it would be based on the cost of developing the percentage of affordable units attributable to the development based on the community-wide inclusionary percentage.

Just as on-site inclusionary production requirements provide developers with incentives and regulatory concessions such as increased density bonuses, developers of rental housing should probably be offered similar incentives and concessions conditioned on payment of the fee. A fee levied to effectuate the community-wide inclusionary policy should carry the same or equivalent benefits to those developers who elect to include affordable units in for-sale housing developments.

The Mitigation Fee Act would not apply because the fee would not be imposed to cover the cost of “public facilities.” *See* the discussion previously.

**b) Limited Fee Related Only to the Impact of New Rental Development on the Future Housing Need Determined By a “Nexus” Study**

Some jurisdictions, out of an over-abundance of caution it seems, are embarking on Mitigation Fee Act-type nexus studies, limiting the analysis to discerning the impact

of market-rate rental housing development on the need for affordable housing. But as explained, the so-called deleterious public impact of market rate rental housing is not so

limited. Market rate development impacts the ability of the community to meet its existing housing needs, achieve a jobs-housing fit, reduce environmental consequences of the lack of affordable housing, combat lingering segregation related to past exclusionary zoning patterns and otherwise further fair housing goals.

The nexus studies and the Mitigation Fee Act itself came about to meet the *Nollan/Dolan* requirement for ad hoc fees imposed on individual developments be roughly proportional mathematically to the impact of the development on the need for public facilities and services. *Ehrlich* at 864. But generally applicable development fees are not held to that heightened standard.

The quantification provided by a formal nexus study certainly establishes the requisite reasonable relationship, and therefore provides some legal comfort. But it has potentially significant drawbacks.

First, by limiting the study to discerning the degree of connection between new housing and the need for affordable housing, the approach will necessarily limit the

---

---

---

---

amount of the fee. Second, a study limiting the impact studied for an affordable housing fee could be shoehorned by opponents to mount an attack on the for-sale inclusionary obligation. And this could lead to the slippery slope of jurisdictions turning to unnecessarily narrow impact studies to determine the appropriate inclusionary percentage.

A limited impact study also ignores other critical impacts such as the loss of developable land and other social and environmental consequences. And it does not address existing needs and social ills created by land use practices of the past, including segregation and sprawl, that will only be exacerbated if residential development continues to avoid affordability.

These other impacts likely do not lend themselves to narrow and precise quantitative analysis. But they are nonetheless legitimate and critical purposes to address. And they legally can be addressed by public programs that are rationally or reasonably related if not capable of precise quantification because that is all that is legally required. Justice Mosk's statement of almost 40 years ago in *Associated Home Builders* when examining an in-lieu fee for a park dedication requirement, bears repeating:

We see no persuasive reason in the face of these urgent needs caused by present and future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision increase the need for recreational facilities to such an extent that additional land for such facilities will be required.

4 Cal. 3d at 633.

The needs of the past can only be addressed by the future. The opportunity to develop in the future is founded on the substantial effort and benefits provided by those who came before—the infrastructure, the schools, the jobs, the recreational activities,.... the community—the very *location* that provides the developer with the impetus for development.<sup>20</sup> Though fulfilling the opportunity may take substantial effort especially as land becomes scarcer, the effort is not an unconstitutional burden and offers substantial benefits.

## **2. Adopt an Inclusionary Zoning Overlay or Incentive Program.**

The basic concept is to adopt a voluntary inclusionary option with sufficient incentives to entice performance and to satisfy the exception to Cost Hawkins—Government Code §1954.53(a)(2). The subdivision provides that the owner is not free to set the rent on a new unit if:

---

<sup>20</sup> See *Commercial Builders, supra*, note 14 (941 F.2d 872, 875)

---

The owner has otherwise agreed by contract with a public entity in consideration for a direct financial contribution or any other forms of assistance specified in Chapter 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Cal. Government Code.

§65915 *et. seq.* is California's Density Bonus Law, which provides that developments are entitled to certain density bonuses and other regulatory concessions and incentives if the developer agrees to provide a certain percentage of affordable housing units in the development.

A community using that mechanism would offer a developer of rental housing significant financial incentives or other regulatory concessions in exchange for the developer voluntarily agreeing to include affordable rental units on site. As is the requirement under the Density Bonus Law, the developer must agree to provide the affordable units for a period of years (30) and to rent the units to tenants with lower and moderate incomes for that period. This is usually accomplished with a written regulatory agreement or similar instrument that is recorded against the property.

Any financial assistance or concessions or incentives should probably exceed those available to the developer pursuant to the Density Bonus Law to differentiate the requirement from the law and to be sufficiently advantageous to encourage participation. The Density Bonus Law itself intends that incentives and concessions "contribute significantly to the economic feasibility of lower income housing." §65917.

Such an inclusionary program could be implemented through the adoption of a zoning overlay for sites zoned for multifamily housing, or through enactment of a "super" density bonus ordinance.<sup>21</sup>

## **F. CONCLUDING THOUGHTS**

Inclusionary zoning truly remains alive and well in California. Generally applicable inclusionary obligations on for-sale developments and related in-lieu fees are not affected by *Palmer*, and there are viable alternatives for purely rental housing. Recorded restrictions on existing units remain valid. Although some minor amendments of existing ordinances may be warranted to improve their defensibility, localities can construe and implement ordinances consistent with the case.

---

<sup>21</sup> *Caution: CEQA Analysis Likely Required.* This method, however, with its attendant increase in density and relaxation of development standards, could trigger analysis under the California Environmental Quality Act. Pubic Resources Code § 21000 *et seq.* The legislative body's adoption of the overlay or expanded density bonus/incentives/concessions law would be a discretionary act that might possibly have a significant effect on the environment. *See, e.g.,* Public Res. C. § 21065 and § 21068. In facilitating affordable housing development, however, it would also contribute to reduced commuting and vehicle emissions by providing housing affordable to the local workforce, which would mitigate any negative environmental effects.

---

*Patterson* is an anomaly because of the unique in-lieu/impact fee adopted by the City. Although some developers have sought to shoehorn the decision's standard analysis of developer fees into to new theory of attack on inclusionary zoning itself, the extrapolation is flatly inconsistent with long established decisional law. Local land use measures must be sufficiently related to legitimate public purposes, which extend well beyond addressing the need for housing created by housing. *Nollan/Dolan's* quantification of the proportionality of the obligation to a specific development's impacts is not required. While basing inclusionary requirements on nexus studies measuring new housing impact may provide some legal covers, they are not necessary and could be unnecessarily limiting.

## APPENDIX

### RESPONSES TO *PALMER & PATTERSON--PALMER*

| Inclusionary Ord. Provisions                        | Amendment Required?  | Helpful Amendments   | Other Issues/Possibilities  |
|---|--|--|---|
| <u>For-Sale Units</u>                               | NO   | <ul style="list-style-type: none"> <li>• <u>Must offer units for sale by certain date</u> (to avoid renting of affordable condos at market rents)</li> <li>• <u>Reference Gov't Code 65589.8</u> (developers may voluntarily agree to develop rent restricted rentals)</li> </ul>                  | <ul style="list-style-type: none"> <li>• <u>Offer Costa-Hawkins Act Exception Incentives to Encourage Rentals</u> (Civil Code 1954.52(b))</li> </ul>  |
| <u>Rental Units</u>                                 | <u>YES, If Ord. does not contain sufficient procedures or discretion to enable community to waive</u>  | <ul style="list-style-type: none"> <li>• <u>Express Exemption</u></li> </ul>   | <ul style="list-style-type: none"> <li>• <u>Condo Conversion Restrictions</u> (require converted units to include affordable units)</li> </ul>  |
| <b>Rental Housing Alternatives</b>                  |  |  |   |
|   | Local Law  | Purpose  | Bases & Implementation  |
| 1. <u>Affordable Housing Fee on Rental Projects</u> | <u>General Plan Policy &amp; Program</u> <ul style="list-style-type: none"> <li>• Establish % of affordable housing needed in future development.</li> </ul> <u>Local Ordinance Establishing Fee</u> | <u>Address broad Social, Economic and Environmental Needs &amp; Objectives</u> <ul style="list-style-type: none"> <li>• <i>E.G.</i>, existing and future low &amp; mod need, workforce need, GHG reduction, reduction of segregation, remedy past exclusionary zoning, scarcity of land</li> </ul> | <ul style="list-style-type: none"> <li>• <u>Base Fee on “Gap” Analysis:</u> <ul style="list-style-type: none"> <li>- Cost of Financing affordable units</li> </ul> </li> <li>• <u>Mitigation Fee Act/ Nollan/Dolan test not applicable:</u> <ul style="list-style-type: none"> <li>- Not a public facilities impact fee</li> <li>- Fee applies to all housing development</li> </ul> </li> <li>• <u>“Nexus” Study of Impact of New Housing Dev. on Housing Need?</u> <ul style="list-style-type: none"> <li>- Provides quantified basis for fee</li> <li>- <b><i>BUT</i></b> Unnecessary &amp; Unduly Restrictive</li> <li>- Ignores existing needs</li> <li>- Ignores other legitimate purposes</li> </ul> </li> </ul> |
| 2. <u>Zoning Overlay/ Super Density Bonus</u>       | <u>General Plan &amp; Zoning Ordinance Amendments—</u> <ul style="list-style-type: none"> <li>• Incentives and regulatory concessions for % on-site affordable rental housing.</li> </ul>            | <u>Provide Affordable Rental Housing after Palmer.</u>   | <u>Comply with the Costa-Hawkins Exception.</u> (CC 1954.52(b)) <ul style="list-style-type: none"> <li>• Provide greater density bonus than Density Bonus Law (Gov't C 65915)</li> <li>• Provide greater regulatory concessions than DB Law or financial subsidies.</li> </ul>  |

## APPENDIX

### RESPONSES TO *PALMER & PATTERSON-- PATTERSON*

|   | <b>Amendment Required?</b>   | <b>Revisions</b>   | <b>Other Alternatives Considered</b>   |
|---|--|--|--|
| <b>In-Lieu Fees</b>                         | <p><u>NO</u>,</p> <p><u>Unless</u> fee is similar to Patterson’s:</p> <ul style="list-style-type: none"> <li>• Defined as an “Impact Fee”</li> <li>• Based on impact of housing development on need for affordable housing</li> <li>• Inadequate relationship between identified need &amp; new development</li> </ul> | <p><u>Base Fee on “Gap” Analysis:</u></p> <ul style="list-style-type: none"> <li>• Cost of replacing the forgone affordable inclusionary units (akin to the in-lieu fee considered in <i>San Remo</i>)</li> </ul>  | <p><u>Basing Fee on Particular Impacts:</u></p> <ul style="list-style-type: none"> <li>• Impact of Forgoing On-site Affordable Housing—the most direct impact               <ul style="list-style-type: none"> <li>- Same as Gap Analysis</li> </ul> <p style="text-align: center;"><i>OR</i></p> </li> <li>• Impact of Housing Development on Need for Affordable Housing:               <ul style="list-style-type: none"> <li>- Not a true in-lieu fee—</li> <li style="padding-left: 20px;">Not based on IZ ordinance</li> <li>- Could lead to attacks on the Fee</li> <li>- Could lead to attacks on IZ</li> </ul> <p><i>BUT:</i></p> <ul style="list-style-type: none"> <li>- Provides quantified basis for fee</li> </ul> </li> </ul> |
| <b>Inclusionary Policies and Ordinances</b> | <p><u>NO</u>,</p> <p><u>Unless:</u></p> <ul style="list-style-type: none"> <li>• Purpose not clear or broadly defined to address identified existing and future social, economic and environmental needs &amp; objectives</li> </ul>   | <p><u>Address Existing and Future Social, Economic and Environmental Needs &amp; Objectives</u></p> <ul style="list-style-type: none"> <li>• <i>E.G.</i>, existing and future low &amp; mod need, workforce need, GHG reduction, reduction of segregation, remedy past exclusionary zoning, scarcity of land</li> <li>• <i>Identified In:</i> Housing Element, ConPlan, Analysis of Impediments (AI), SB 375 Sustainable Communities Strategy (SCS), etc.</li> </ul> | <p><u>Basing IZ on Impacts:</u></p> <ul style="list-style-type: none"> <li>• Impacts of Not Including Affordable Housing in New Development               <ul style="list-style-type: none"> <li>- exacerbating existing &amp; future needs</li> <li>- jobs-housing imbalance</li> <li>- segregation</li> <li>- increase in GHG emissions</li> </ul> <p style="text-align: center;"><i>OR</i></p> </li> <li>• Impact of Housing Development on Need for Affordable Housing:               <ul style="list-style-type: none"> <li>- Provides quantified basis for fee</li> <li>- BUT Unduly Restrictive</li> <li>- Ignores existing needs</li> <li>- Ignores other legitimate purposes</li> </ul> </li> </ul>                                 |

