Fair Housing, Discrimination, and Inclusionary Zoning in the United States

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Introduction

The United States has struggled with discrimination in housing and the providing of affordable, workforce or low-income housing for decades. This paper summarizes and analyzes the problems and opportunities created in large measure by federal and state courts, together with guidance provided by the U.S. Department of Housing and Urban Development to address these issues and problems. First, the paper addresses the problem of discrimination in housing and remedies broadly provided by the U.S. Supreme Court under the U.S. Fair Housing Act (FHA) in the recent case of Inclusive Communities v. Texas Department of Community Affairs. Then follows a discussion of recent HUD guidance by way of administrative rule, together with a summary of how federal courts address discrimination in housing following the Inclusive Communities decision. Second, this paper addresses the concept of inclusionary zoning as a potential remedy for the construction of new affordable or workforce housing by placing the burden on the land development community as a condition or conditions for land development approval. The paper concludes that while discrimination in housing has been well-addressed by the courts, providing a remedy even when government does not intentionally discriminate against potential poor residents on the basis of race, religion, handicapped, or family status, the use of inclusionary zoning presents clear problems under the U.S. Constitution despite the occasional support of such inclusionary zoning by a few state courts.

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I. The Problem: Discrimination in the United States

A. Government-Sponsored Segregation: Discriminatory Ordinances

Following the Great Migration of African Americans from rural counties to cities at the turn of the 20th century, and fearing their increasing purchasing power, concerned white homeowners turned to their local governments to prevent integration of their neighborhoods.1 Many local governments responded by enacting residential segregation ordinances.2 Typically, these ordinances either: “(1) prohibited whites from moving to all-Negro blocks and Negroes from moving to all-white blocks; (2) divided the city into segregated districts and designated a district for each race; or (3) restricted new residences in mixed blocks to the racial group which had established most of the residences on the block.”3

In 1910, the City of Baltimore became the first municipality to enact such an ordinance, preventing African Americans from moving onto blocks with a white majority and vice versa.4 The stated purpose of the ordinance was “preserving peace, preventing conflict and ill feeling between the white and colored races in Baltimore, and promoting the general welfare of the city by providing, so far as practicable, for the use of separate blocks by white and colored people for residences, churches and schools.”5 By 1912, Mooresville and Winston-Salem, North Carolina had passed similar ordinances.6 By 1913, Asheville, North Carolina; Richmond, Norfolk, and Roanoke, Virginia; Atlanta, Georgia; Madisonville, Kentucky; and Greenville, South Carolina had followed suit.7 By 1916, the popularity of segregation ordinances had also reached Birmingham, Alabama; Louisville, Kentucky; St. Louis, Missouri; and New Orleans, Louisiana.8 The prevalence of these ordinances persisted

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3. Bernstein, supra note 1, at 835.
7. See id.
8. See id.
until 1917, when the Supreme Court decided *Buchanan v. Worley* and invalidated this thinly veiled form of state-sponsored discrimination.10

B. Segregation by Contract: Restrictive Covenants

From 1917, when *Buchanan* was decided, until 1948, racially restrictive covenants became the primary legal means for perpetuating segregation.11 Typically, under these covenants, property owners would warrant not to sell or lease real property to “any person not of the Caucasian race.”12 Racially restrictive covenants were exceptionally effective during this time because “Lochner-era13 courts consistently enforced them, contributing to the dramatic increase in residential segregation during the first half of the 20th century.”14

This form of discrimination was not wholly private. As one commentator explains, “[i]t is virtually impossible to overstate the significance of [the federal government’s] involvement in creating, sponsoring, and perpetuating the racially segregated dual housing markets that divide America.”15 For example, the Federal Housing Administration actively promoted the use of racially restrictive covenants, frequently refusing to provide its mortgage insurance or guarantees unless the covenants were attached to the deeds.16 The widespread acceptability of racially restrictive covenants was substantially abdicated in 1948, when the Supreme Court handed down its landmark decision in *Shelley v. Kramer*,17 holding that judicial enforcement of the covenants violated the Fourteenth Amendment.18

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9. 245 U.S. 60 (1917).
10. See id at 74–75.
11. See CLARK & PERLMAN, supra note 4, at 11.
13. Named after *Lochner v. New York*, 198 U.S. 45 (1905), the “Lochner-era” refers to the period of time between 1897 to 1937 during which the Supreme Court utilized a broad interpretation of due process that protected economic rights, tended to strike down economic regulations of working conditions, wages, or hours in favor of laissez-faire economic policy.
16. See id. at 1509–10 (outlining how the discriminatory policies of the Federal Housing Administration and VA significantly transformed the nation’s patterns of homeownership along racial lines).
17. 334 U.S 1 (1948).
18. See id. at 20.
C. The Battles of Today

As the preceding discussion indicates, by 1948 both discriminatory ordinances and racially restrictive covenants had been outlawed by the Supreme Court. The discriminatory intent behind these mechanisms is patently obvious. Present-day housing segregation, however, is perpetuated by more subtle means. Indeed, since the FHA’s enactment in 1968, courts have accepted disparate impact claims challenging a wide range of practices, including zoning ordinances, administration of section vouchers, lending practices, mortgage insurance policies, landlord and housing provider reference policies, occupation restrictions, and the demolition of subsidized housing.

II. Fair Housing and Discrimination in Housing

A. Discriminatory Impact and Disparate Impact

1. THE FEDERAL FAIR HOUSING ACT: A SUMMARY

In 1968, Congress enacted the FHA “following the urban unrest of the mid-1960s and the chaotic aftermath of the assassination of the Rev. Dr. Martin Luther King, Jr.” The FHA’s goal: to provide, “within constitutional limitations, fair housing throughout the United States.” Congress believed the FHA’s proscription of discriminatory housing practices would “remove the walls of discrimination which enclose minority groups” and “replace ghettos with truly integrated and balanced living patterns.”

The thrust of the FHA is found within its two primary substantive provisions. First, 42 U.S.C. § 3604(a), makes it unlawful “to refuse to sell or rent after the making of a bona fide offer, or refuse to negotiate for the sale or rental of, or otherwise make available or deny, a

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dwelling to any person because of race, color, religion, sex, familial status or natural origin.”

Second, 42 U.S.C. § 3606(b), makes it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in the connection therewith.”

2. THE FEDERAL FAIR HOUSING ACT IN DETAIL

The FHA protects the following classes, and no others (in particular, there is no protection for economic status per se):

a. race
b. color
c. religion
d. sex (but not sexual orientation)
e. Family status. This class protects primarily parents with children under 18 from discrimination. This includes foster families and recipients of aid to families with dependent children. Licensed, age-restricted elderly living communities are exempt from compliance with this provision. It does not ban housing in favor of households with children. 42 U.S.C. §§ 3602(k) and 3607(b)
f. national origin
g. handicapped status. A physical or mental impairment that substantially limits one or more of such persons major life activities, a record of such impairment, or being regarded as having such an impairment. It does not include current, illegal use of or addiction to a controlled substance, but it does include past drug or alcohol addictions and HIV infections. This class protects not only persons with disabilities, but also persons associated with disabled persons. 42 U.S.C. § 3602(h). Handicapped conditions not considered disabilities under the FHA include emotional disturbance, homelessness, history of abuse, post-incarceration in halfway houses, or juvenile delinquency. The FHA prohibits a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to

afford such person full enjoyment of the premises. (42 U.S.C. § 3604(f)(3)(a)). Such modifications include installation of ramps, railings, and so forth, at the expense of the disabled person, though the landlord may require restoration of the alterations to the condition that existed prior to the making of the alterations. The FHA also prohibits refusing to make reasonable accommodations in rules, policies, and practices or services when such accommodation may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling. (42 U.S.C. § 3604(f)(3)(b)). Since this applies to both private and public rules, it applies to homeowners association rules, condominium association rules, apartment policies, zoning, building and housing codes.

A “dwelling” under the FHA is any building, structure, or portion thereof which is occupied as a residence by one or more families and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof. It is illegal under the FHA to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make available or deny, a dwelling. (42 U.S.C. § 3604(f)(3)(b)). Such modifications include installation of ramps, railings, and so forth, at the expense of the disabled person, though the landlord may require restoration of the alterations to the condition that existed prior to the making of the alterations. The FHA also prohibits refusing to make reasonable accommodations in rules, policies, and practices or services when such accommodation may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling. (42 U.S.C. § 3604(f)(3)(b)). Since this applies to both private and public rules, it applies to homeowners association rules, condominium association rules, apartment policies, zoning, building and housing codes.

B. Discriminatory Intent

The U.S. Supreme Court decided in 1976 in Arlington Heights v. Metropolitan Housing Development Corporation that the U.S. Constitution’s equal protection clause provided relief in cases involving discrimination in housing if, but only if, the plaintiff alleging discrimination can demonstrate that the defendant local or state government intends to discriminate against the plaintiff. Disproportionate impact alone would be insufficient.

In 1971, the Metropolitan Housing Development Corporation (MHDC) sought rezoning of a 15-acre parcel of land in the village of Arlington Heights, Illinois from a single-family to a multiple-family zoning classification. With the aid of federal financial subsidies provided under Section 236 of the National Housing Act, MHDC planned to construct 190 townhouse units in 20 two-story townhouse buildings: 100 single-bedroom units for senior citizens and 90 two, three, and
four-bedroom units for families with low or moderate incomes. The development was to be called Lincoln Green.

Following a recommendation of the Arlington Heights Plan Commission, the village board of trustees denied the zoning request. MHDC and other named plaintiffs sued in the U.S. District Court alleging that the denial was racially discriminatory, violating the 14th Amendment as well as the Fair Housing Act of 1968.

The district court upheld the decision of the board of trustees but was reversed by the Seventh Circuit in June 1975, which was, in turn, reversed by the U.S. Supreme Court.

The Village of Arlington Heights is a suburb of Chicago, located approximately 26 miles northwest of downtown. It is primarily a bedroom suburb, zoned largely for single-family detached houses. According to the 1970 census, the village population was 64,000, only 27 of whom were black. The 15 acres in question, part of an 80-acre parcel just east of the center of the village, are owned by the Clerics of St. Viator. While part of the site is occupied by St. Viator’s High School and a three-story novitiate building, much of the site is vacant. The entire site and all of the surrounding area was, and is, zoned R-3, single-family detached. Single-family homes abut the property on two sides; on the other two sides is the vacant St. Viator property. The proposed 15-acre development would have maintained much of the open space, with shrubs and trees screening the homes directly abutting the property, but would have required rezoning to the R-5 multiple-family classification to permit townhouses at the density proposed.

During the spring of 1971, the village plan commission considered the proposal at three public meetings. At the hearings, MHDC submitted studies demonstrating the need for housing of the type proposed. Evidence offered at trial indicated many of those attending the plan commission were vocal and demonstrative in opposition to Lincoln Green, while others testified in its favor. Some of the comments from both opponents and supporters of the rezoning petition addressed the “social issue” of introducing low and moderate-income housing that would probably be racially integrated into Arlington Heights. But the Supreme Court found that most of the opponents focused on the zoning aspects of the petition, stressing the single-family character of the neighborhood, the reliance by neighboring citizens upon that character, and, perhaps most important, Arlington Heights’ policy concerning multiple-family zoning. Adopted by the village board in 1962 and amended in 1970, the policy was that R-5 zoning should constitute a buffer between single-family and commercial, industrial, or other
high intensity land uses. Lincoln Green did not meet this requirement, since the property is completely surrounded by single-family zoned property.

Relying primarily on its decision in *Washington v. Davis*, 426 U.S. 229 (1976), decided after the Court of Appeals decision but before oral argument in this case, the Court reiterated that official action would not be held unconstitutional solely because it resulted in a racially disproportionate impact. In as plain words as can be imagined, the Court held: “Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” Absent that showing, the Court said, the Court of Appeals’ finding of a “discriminatory ‘ultimate effect’ is without independent constitutional significance.”

If, then, secretive motive rather than discernible effect is the critical factor, how is that motive to be shown? The Court offers five possible approaches:

First, the Court suggests that while racial impact is not the ultimate test, proof of racial impact may in some cases be helpful in proving the required racial motive: “Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.” However, it is clear that the pattern must be “stark” and that “impact alone is not determinative.”

Second, the Court suggests that motive might be demonstrated by an historical background that “reveals a series of official actions taken for invidious purposes.” Apparently, however, the type of historic pattern of inaction and indifference to segregation found by the Seventh Circuit was unpersuasive to the Supreme Court.

Third, the Court says the specific sequence of events leading to the challenged decision may be persuasive of racial motive if it betrays a departure either from normal procedures or from substantive standards usually considered important.

Fourth, if contemporaneous statements of the decision-makers reveal racial motive, that would be relevant. Statements of citizens addressing the decision-makers seem, however, if relevant at all, to carry much less weight.

Finally, the Court said: “In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.”
Against the backdrop of nine circuit courts of appeals having already found claims of disparate impact cognizable, Congress revisited the FHA in 1988, adding several significant amendments. First, Congress granted HUD authority to adjudicate housing discrimination claims and to promulgate regulations necessary to effectuate the FHA’s goals. Second, Congress created three exceptions to liability, clarifying that the FHA does not prohibit: (1) “conduct against a person because such person has been convicted . . . of the illegal manufacture or distribution of a controlled substance;” (2) “reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling;” or (3) “a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.” These amendments have been widely interpreted as presupposing the existence of disparate impact liability.

2. THE INCLUSIVE COMMUNITIES DECISION

On June 25, 2015, the U.S. Supreme Court decided Texas Department of Housing and Community Affairs v. Inclusive Communities. That it upheld the use of disparate impact as the test for discriminatory impact is no particular surprise since nine of the eleven federal circuit courts of appeals had adopted that test, and the test is consistent with other federal and U.S. Supreme Court cases brought under ADEA and FHA Title VII cases. The use of the test permits a plaintiff alleging discrimination to prove discrimination under the Fair Housing Act under a three-prong analysis:

- First, the plaintiff must show that a policy or practice of government has a disparate impact on a protected class of persons pro-

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34. See 42 U.S.C. § 3614(a).
38. See, e.g., Transcript of Oral Argument at 9–12, Texas Department of Housing and Community Affairs v. Inclusive Communities Project, 135 S. Ct. 46 (2014) (No. 13-1371) (where Justice Scalia asked the Solicitor General of Texas, Scott Keller, why the amendments don’t “kill” TDHCA’s case, Solicitor Keller did not appear to provide Scalia with a satisfying answer).
protected under the FHA: race, religion, national origin, family status, handicapped status.

• Second, the defendant local government must be given an opportunity to rebut the charge of discrimination by demonstrating that the practice or policy is not for discriminatory purposes, but for a benign and neutral public goal or purpose or policy, such as protection of the health, safety, and welfare of the community;

• Third, the plaintiff alleging discrimination may still succeed if the plaintiff can show there are other, less burdensome methods to accomplish the benign and neutral goals the defendant government claims for the purposes of the challenged public policy.

Justice Kennedy concentrated his Supreme Court opinion primarily on the first prong. First, he stated that there would be no liability for government if the challenge and allegation of disparate impact are based solely on a showing of statistical disparity. Second, that statistical disparity must also fail if plaintiffs cannot point to a policy of the offending government, rather than a simple instance of an action which has such a statistical disparate impact. The Court said that “racial imbalance alone does not without more establish a prima facie case of disparate impact” and “fiscal disparity must fail if plaintiff cannot point a defendant’s policy causing disparity.” The Court characterized this as a “robust causality requirement.” The Court distinguished between “artificial, arbitrary and unnecessary barriers,” which should be struck down under disparate impact analysis, and “displacement of valid governmental policies,” which should not.

In considering the second and third prongs, the Court said that it would be “paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalization of dilapidated housing merely because some other priority might seem preferable.”

According to Justice Kennedy’s opinion in ICP, “disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity.” 39 Further, “[d]isparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers,’ not the displacement of valid governmental policies.” 40 Accordingly,

40. Id. at 2522.
“[t]he FHA is not an instrument to force housing authorities to reorder their priorities, [but rather] aims to decision may not be a policy at all.”41 Similarly, “[i]t may also be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units . . .”42

3. ICP ON REMAND

The district court’s treatment of ICP on remand from the Supreme Court best illustrates how lower courts are construing ICP as elevating the burden for plaintiffs, particularly at the prima facie stage. Prior to the Fifth Circuit’s and Supreme Court’s decisions in ICP, the district court had granted plaintiff Inclusive Communities Project (ICP) partial summary judgment, finding it had sufficiently established a prima facie case of disparate impact.43 On remand from the Supreme Court, however, the district court found it necessary to reconsider whether ICP had established a prima facie case, noting that it had previously done so “without the benefit of the Supreme Court’s opinion.”44

Relying upon Justice Kennedy’s cautionary language, the district court concluded that it had not previously “give[n] the prima facie requirement the same emphasis the Supreme Court had given it.”45 The court noted that, while it had not relied solely evidence of statistical evidence alone, the other sources ICP cited also largely relied upon statistical evidence, and thus the court arguably had “not analyze[d] ICP’s evidence through the prism of the ‘robust causality requirement’ envisioned by the Supreme Court.”46

The court further emphasized that the Texas Department of Housing & Community Affairs (TDHCA) also did not have the benefit of the Supreme Court’s decision.47 Noting that TDHCA “essentially [did] not contest ICP’s prima facie case,” the court concluded that “TDHCA should be permitted to challenge ICP’s prima facie showing based on

41. Id.
42. Id. at 2523–24.
45. Id. at *3; see also id. (in its order granting partial summary judgment, the district court had previously stated that “ICP’s prima facie burden is not a heavy one,” explaining that “ICP need only provide evidence that raises an inference of discrimination” because “we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.” (citation omitted)).
46. Id.
47. Id. at *4.
a clearer understanding of the requirements and consequences of ICP’s establishing a prima facie case."48 Consequently, “the interests of justice and fundamental fairness require[d] not only that ICP’s disparate impact claim be decided anew under the burden-shifting regimen adopted by HUD and the Fifth Circuit, but that the court state with whether ICP has established a prima facie case.”49

4. OTHER CASES FOCUSING ON ICP’S CAUTIONARY LANGUAGE

Other lower courts have similarly stressed Justice Kennedy’s cautionary language. For example, in Azam v. City of Columbia Heights,50 the plaintiff alleged that the city’s enforcement of its health and safety codes with respect to his rental properties “ha[d] the effect of making affordable rental dwellings unavailable . . . [resulting in] a disparate impact [on] persons intended to be protected by the [FHA].”51 In granting the defendant’s motion for summary judgment, the court found that the plaintiff failed to establish a prima facie case of disparate impact, particularly the “robust causality requirement” and, in any event, failed to submit an alternative practice with a lesser impact.52

Similarly, in City of Los Angeles v. Wells Fargo & Co.,53 the city alleged that some of Wells Fargo’s lending practices were having a disparate impact on racial minorities.54 Relying upon the Supreme Court’s guidance in ICP, the court found that the city’s insufficient “statistical disparity evidence”55 and failure to identify a “policy” causing the purported disparate impact entitled the defendant to summary judgment.56

Additionally, in Ellis v. City of Minneapolis,57 the district court focused on what ICP requires from plaintiffs in pleading a claim of disparate impact under the FHA.58 There, the plaintiff brought a number of claims relating to the city’s allegedly “unlawful housing policies

48. Id.
49. Id.
51. Id. at *10 (some alterations in original).
52. Id. at *11. The court also noted that the city had a legitimate justification in ensuring compliance with its health and safety codes and the plaintiff had failed to provide a viable alternative, as required under the burden-shifting standard. Id.
54. Id.
55. Id. at *8 (the city had argued that 12 of the 4,260 loans to minority borrowers—or 0.28 percent of all loans issued to minorities—demonstrated a disparate impact claim under the FHA).
56. Id. *7–8.
58. Id. at *8–12.
and heightened enforcement of those policies against inner-city land­lords in a discriminatory manner.”59 After reiterating Justice Kennedy’s “cautionary language,” including the “robust causality requirement,” the court concluded that the plaintiffs failed to adequately plead a prima facie case of disparate impact.60 Specifically, the court found that, even assuming arguendo that the plaintiff’s alleged statistics demonstrated a disparate impact, the plaintiff had failed to plead any facts demonstrating a causal link between the challenged policies and the disparity.61

Finally, the only plaintiff-friendly decision came in Rhode Island Commission for Human Rights v. Graul.62 There, the Rhode Island Commission for Human Rights brought an action against a landlord, asserting claims under the FHA, based on allegations that the landlord denied housing to family based on familial status.63 Specifically, the Commission alleged that the landlord misinterpreted Rhode Island’s residential occupancy code’s square footage requirement to assert a “two heads per bedroom” policy based, which in turn prohibited families of three from occupying one bedroom units in the apartment complex.64 In granting the plaintiffs’ motion for summary judgment as to liability only, the court concluded that the plaintiff satisfied all three steps of the burden-shifting framework.65 Interestingly, the court did not cite directly to ICP or HUD’s regulations for its burden-shifting

59. Id. at *1 (plaintiff’s claims allege that (1) the city has failed to conduct and implement reports analyzing impediment to fair housing as required by its receipt of federal funds; and (2) the city’s dwelling licensing scheme has displaced hundreds of protected-class families from their rental homes).

60. Id. at *10.

61. Id. The court further found that the defendant had satisfied its burden of demonstrating a legitimate interests being furthered by its policies and that the plaintiff had failed to allege any viable alternative for the city to accomplish its legitimate objectives.


63. Id. at *1 (the Commission brought the action on behalf of a family of three whose defendant-landlord was attempting to evict from their one bedroom apartment).

64. Id. The occupancy code provided that “[e]very bedroom occupied by one person shall contain at least 70 square feet (6.5 m²) of floor area, and every bedroom occupied by more than one person shall contain at least 50 square feet (4.6 m²) of floor area for each occupant thereof.” Id. Apparently relying upon advice from a building inspector, the landlord interpreted this provision as requiring 70 square feet for the first occupant and an additional 50 square feet for every additional occupant thereafter—i.e., 170 square feet for a room occupied by three people. Id. at *11. As the court pointed out, however, a proper interpretation requires only 50 square feet per person when more than one person is occupying the room—i.e., 150 square feet. Id. Thus, under a proper interpretation, the plaintiffs only needed 150 square feet—precisely the size of their bedroom—not 170 square feet as the landlord had been attempting to require.

65. Id. at *9–13.
standard, but rather relied upon its prior case law, which espoused a similar three-step analysis.66


Crossroads apartment complex recently completed a major renovation. The complex sent notice to the current tenants notifying them that their leases would terminate at the end of their current lease terms. The tenants had the option to reapply to renew the lease, but they would be subject to new rental criteria, including a 625 or higher credit score, income three times the rent, Social Security numbers, and positive rental history. The majority of the tenants who reside in the complex are low-income, with a significant number of ethnic minorities or disabled. The plaintiffs argued that the new policies have a disparate impact on protected classes under the Fair Housing Act. The court agreed, finding that the plaintiffs were successful at establishing a prima facie case, even under the "robust causality requirement" discussed in _Inclusive Communities_. "Plaintiffs' causation argument is straightforward: Defendants' policies are the reason they are unable to remain at the complex."


Waples Mobile Home Park enacted a new policy, which requires, as a condition of entering into or renewing a lease at the Park that all adults living or seeking to live in the Park present either an original Social Security card, or an original passport, U.S. visa, and original arrival/departure Form I-94 or I-94W. The policy was only applicable to leaseholders previously; however, in mid-2015 the Mobile Home Park began applying the policy to all residents over the age of eighteen. Now, if any adult resident cannot satisfy the policy's documentation requirement, the tenant has twenty-one days to cure the deficiency; tenants who cannot do so are then given thirty days to vacate the Park. The plaintiffs argue that the enforcement of the new policy violates the Fair Housing Act, because most of the residents in the Park are undocumented immigrants of Latino descent, and the policy causes a statistical disparity adverse to protected minorities that is sufficient to make out a prima facie case of discrimination "because of" a plaintiff's protected national origin. The court rejects the plaintiffs' arguments under disparate impact

66. See, e.g., id. *8–9 (citing Langlois v. Abington Housing Auth., 207 F.3d 43, 51 (1st Cir. 2000)).
stating, “Plaintiffs’ use of the disparate impact theory in this case is not consistent with a robust causality requirement; it operates instead to eliminate the statute’s explicit requirement that the bar to housing be “because of” race or national origin. Indeed, to permit plaintiffs to use disparate impact in this case to establish causation results in essentially writing out of the FHA its robust causation requirement altogether.” The court clarifies that the policy does not discriminate against the Latinos due to their national origin, but rather because they had not yet received citizenship. “The disparate impact theory can hardly meet the FHA’s requirement to show discrimination “because of” race or national origin when a housing policy lawfully targets illegal aliens (the vast majority of whom, incidentally, are Latinos).” However, the court continues to state that while the plaintiffs may not solely rely on disparate impact in their argument, their allegations are sufficient to state a claim under the FHA. The implementation of the policy may be pretext for discrimination against Latinos; the plaintiffs use any evidence of discrimination, including evidence of disparate impact, to show that the policy is in fact a pretext for intentional racial of national origin discrimination.

The history and purpose of disparate impact theory, and the application of that theory in the decided cases, make clear that it would be inappropriate to permit plaintiffs to use disparate impact theory alone to satisfy the FHA’s “because of” requirement. Disparate impact theory, applied in this case, would be insufficient by itself to satisfy the FHA’s causation requirement. This is not to say that landlords have free reign to discriminate against illegal aliens as Latinos, nor that Latinos or illegal aliens are categorically precluded from the benefits of the FHA, including the disparate impact theory. To the contrary, an illegal alien who can prove discrimination on the basis of his or her race or national origin is undoubtedly a “person” entitled to the benefit of the FHA’s protection. See 42 U.S.C. § 3604(a) (protecting “any person”). Also, there may well be cases in which the adversity Latinos face in obtaining housing stems from the same sources of historical, state-sanctioned intentional discrimination faced by, for example, African-Americans. In those cases, disparate impact theory may be sufficient, by itself, to carry the burden of satisfying the FHA’s causation requirement. But in this case, the analysis here makes clear that plaintiffs cannot rely solely on disparate impact to satisfy the FHA’s causation requirement; plaintiffs must still show that the Policy was instituted “because of” race or national origin. In doing so, plaintiffs may use evidence of disparate impact, in addition to other proof, to meet their burden of demonstrating causation.

City of Joliet, Illinois v. New West, L.P., 825 F.3d 827 (7th Cir. June 17, 2016)

The City of Joliet commenced condemnation proceedings against an apartment complex. New West argued that Evergreen Terrace was not dilapidated and that the city’s suit should have been rejected on that ground, and on the further ground that razing the buildings would have a disparate impact on its predominantly black tenants,
in violation of the Fair Housing Act. New West relies more heavily on its disparate-impact theory than on its disparate-treatment theory. About 95% of Evergreen Terrace’s residents are black, and New West contends that this means that its closure must have a disparate impact. Since § 804(a) of the Fair Housing Act, 42 U.S.C. § 3604(a), forbids actions with unjustified disparate impact, New West maintains that closure necessarily violates the Act.

The court states that, although Inclusive Communities Project held that unjustified disparate impact from housing policies violates § 804(a), it stressed the importance of considering both whether a policy exists and whether it is justified. Disparate-impact analysis looks at the effects of policies, not one-off decisions, which are analyzed for disparate treatment. The Supreme Court added that “governmental entities . . . must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes.” The district court’s findings show that the condemnation of Evergreen Terrace is a specific decision, not part of a policy to close minority housing in Joliet. The judge also found that Joliet set out to achieve goals that the Supreme Court approves, and the analysis of Inclusive Communities Project therefore favors the city rather than New West.

The plaintiff is a disabled Native American, who lives in the defendant’s apartment complex, with the assistance of Section 8 vouchers. The plaintiff moved in to the apartment in 2007 and did not have any issues until new property managers were hired in 2011. The property managers made discriminatory comments to the plaintiff and did not make certain repairs to his unit that were made in other units. The plaintiff was continually given notice to vacate for no apparent reason. The plaintiff argues the defendant violated the Fair Housing Act under the disparate treatment theory. The court stated that when plaintiffs have provided direct and circumstantial evidence of discriminatory intent, they have established a prima facie case of disparate treatment and may be able to survive a motion for summary judgment on that evidence alone. The court found that the plaintiff had enough evidence to establish a prima facie case against the defendant.

Plaintiffs allege that Bank of America has engaged in mortgage lending discrimination directed at minority borrowers within the counties’
borders for the past 15 years. The court finds that the plaintiffs’ claims do not satisfy the test set forth in *Inclusive Communities* and therefore their claim fails. The plaintiffs alleged the discrimination was intentional, rather than a facially neutral policy. Therefore the plaintiffs cannot meet the third prong of the test, i.e., the policy is artificial, arbitrary, and unnecessary. Finally, the court found that the plaintiffs did not establish causality, because the plaintiffs must demonstrate how the defendant’s policy caused racial imbalance, rather than simply alleging that more minority borrowers were receiving undesirable loans. The court granted the defendant’s motion to dismiss, but allowed the plaintiffs to amend their complaint.


The State of Texas passed a bill requiring voters to present specific forms of identification at the polls; the change in the requirements disproportionately affected minority groups. Plaintiffs argued that the bill violated the Fourteenth and Fifteenth Amendments, and Section 2 of the Voting Rights Act, because the bill has a discriminatory effect. The court analyzed the discriminatory effect under the *Gingles* factors and a two-part framework. The majority opinion finds that the bill was racially discriminatory under the Voting Rights Act. The dissent argues that the majority opinion misconstrues the law. Under their analysis, the plaintiffs would have failed to meet the robust causality requirement set forth in *Inclusive Communities*, as the majority relied solely on some statistical disparity between minorities and whites, without any evidence that the bill caused the disparity, therefore not satisfying the causality requirement set forth by the Supreme Court.


The plaintiffs are three African Americans living in New York City. They allege that the city is racially segregated by its districts and that the city further perpetuates that segregation through its “Community Preference Policy.” The policy requires that developers of low-income housing hold a lottery for those interested in residing in the units, and that the developer reserve 50% of the housing opportunities for those already living in the community. In the disparate impact analysis, the court recognized the a disparate impact claim is available under FHA, and that plaintiffs who fail to allege facts at the pleading stage or produce statistical information demonstrating a causal connection cannot make out a prima facie case of disparate impact. The
court finds that a prima facie case is an evidentiary standard, not a pleading requirement, and therefore the plaintiffs have established their burden of giving rise to a plausible inference that the challenged policy causes a disparate impact.

*Avenue 6E Investments, LLC v. City of Yuma, Arizona,* 818 F.3d 493 (9th Cir. 2016)

Real estate developers brought action against the City of Yuma, claiming that the city’s refusal to rezone their 42-acre property to permit higher-density development violated the Fair Housing Act. The city conducted two analyses, which showed that Hispanics were generally located in concentrated regions around the city, and that substantially all of the available low-to-moderate-income housing was available in those areas. The analysis also showed that whites concentrated in separate areas and comprised of 75% of the population. The land owned by plaintiff was within the white-majority areas. With the collapse of the housing market, the plaintiffs realized there was no longer a demand for 8,000 square foot lots, but there was a need for more affordable housing. The plaintiffs requested the rezoning, and the city’s staff and in-house planning experts both recommended approval of the zoning request. The City Council held a public hearing in which the neighboring communities objected to the rezoning, claiming the developer had a history of building in low-cost, high crime neighborhoods that catered to Hispanics. The court recognized that a disparate treatment claim was plausible, as well as a potential claim for disparate impact. The developers allege specific facts demonstrating city officials’ awareness that the effect of their denial of the developers’ application would “bear more heavily on one race than another” in light of historical patterns of segregation by race and class. The city relied on the decision in *Hallmark Developers v. Fulton County,* arguing that the city was able to deny the request because there was similarly priced housing available in another area of the city. The court rejects that reasoning, as the *Inclusive Communities* decision had been decided, and the reasoning in *Hallmark* would run directly against the goals of the FHA. The court rejected the *Hallmark* analysis of disparate impact claims and remanded the case to be evaluated under the *Inclusive Communities* causality analysis.

*Smith v. City of Boston,* 144 F. Supp. 3d 177 (D. Mass. 2015)

The plaintiffs are Boston police officers, who brought suit against the City of Boston alleging that the examinations used to select which of-
ficers to promote had a disparate impact against the minority police officers. The court reviewed the statistical results from past examinations, as well as testimony from expert witnesses, and concluded there was sufficient evidence to establish a causal connection required after the Inclusive Communities decision. The plaintiffs met their burden of proof to show that the disparity between races was not the result of mere chance. The burden then shifted to the city to show that the examination was a “business necessity.” The court found that the results of the examination did not correlate to job performance and were therefore potentially liable under disparate impact.


The plaintiff brought suit against Wells Fargo alleging that the economic impact of its policy and practice of steering minority borrowers in Miami into mortgage loans that have higher costs and risks, and for its policy of refusing to extend credit to minority borrowers who desired to refinance had a disparate impact when compared to their white borrowers. The court found, using the Inclusive Communities analysis that the plaintiff failed to meet the second, third, and fourth prong of the test. The court reasoned:

First, the policies alleged by the City are not facially neutral. Rather, the City’s contentions that minority borrowers were “targeted” are comprised of allegations that minorities were intentionally discriminated against, not allegations that a neutral policy or policies produced a statistical imbalance. In fact, the City alleges a pattern of steering minority borrowers into disadvantageous loans. This is alleged intentional conduct, which is not a basis for a disparate impact FHA claim under the pleading standards set forth in Inclusive Communities. The City also fails to allege facts demonstrating that the Defendants’ alleged policies constituted “artificial, arbitrary, and unnecessary barriers.”

Finally, the City fails to meet Inclusive Communities’ “robust causality requirement,” which requires the City to “allege facts at the pleading stage . . . demonstrating a causal connection” between the challenged policy and the alleged statistical disparity.

In conclusion, while there has yet to be a particularly notable decision subsequent to the Supreme Court’s decision in *ICP*, its effect is palpable. Lower courts appear to be in agreement that, although the Court found disparate impact claims cognizable under the FHA, *ICP* nevertheless requires more from plaintiffs at the pleading and prima facie stages. The district court’s treatment of *ICP* on remand from the Supreme Court, having found it necessary to reevaluate its prior decision that *ICP* had sufficiently made out a prima facie case of disparate impact, best illustrates this effect.
The remedy, therefore, absent a showing of discriminatory intent, is discriminatory impact under the Federal Fair Housing Act. The usual way of showing such impact is by showing disparate impact on a protected class.

C. Affirmative Fair Housing

Affirmatively providing fair housing is required of recipients of federal funds under the Housing and Community Development Act of 1974. In particular, the grantee of such funds must certify that the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 and the Fair Housing Act and that the grantee will affirmatively further fair housing. This section discusses HUD’s implementation of the Fair Housing Act’s Discriminatory Effects Standard promulgated by a final rule, 24 C.F.R. Part 100.

A local government applicant for HUD housing funds has always had to prepare consolidated plans and an analysis of impediments to fair and affordable housing in its jurisdiction, and certify that the grant recipient will affirmatively further fair housing as required by the FHA. Following United States ex rel. Anti-Discrimination Center of Metro New York v. Westchester County, 668 F. Supp. 2d 548 (S.D.N.Y. 2009), these requirements have been increased and tightened. In Westchester County, the county was found to have made a false or fraudulent claim because it had not sufficiently analyzed racial discrimination as an impediment to fair housing and had not taken steps to require production of affordable housing in certain of the municipalities in the county. The county settled by paying a $62 million fine, constructing 750 units of affordable housing in non-minority areas, and undertaking affirmative marketing of such affordable units. As a result of this litigation, the affirmative obligations of HUD affordable housing funds recipients are: (1) define affirmatively furthering fair housing and related terms; (2) make a new assessment of fair housing process and tools; (3) focus on patterns of segregation as compared to prior regulatory regime; and (4) in particular focus on the effect of regulations like zoning codes on affordable housing.

There is an increasing overlap between fair housing and affordable housing. Local government/municipal actions that have the effect of reducing the supply of affordable housing are increasingly vulnerable to claims that such actions have a disparate impact on a protected class of persons under the Inclusive Communities (and other federal circuit court cases) standards. Thus, for example, women, ethnic and racial minorities, and persons with disabilities can all be defined as compar-
atively low-income wage earners. Therefore, so the reasoning goes, making it difficult for these groups to find affordable housing can be construed as having a disparate impact on a protected class. In the context of local land use controls such as zoning, the following either drive up the cost of housing and/or prevent the construction of affordable housing in a municipality:

1. minimum lot size
2. minimum house size
3. restrictions on multi-family development or density
4. restrictions on manufactured housing
5. costly design and site development standards (landscaping, open space/side-front yards, expensive materials)
6. restrictions on group living arrangements for FHAA protected classes, like spacing requirements, special or conditional permit requirements, and development or service standards

III. Inclusionary Zoning: Mandatory Set-Asides or Quotas of Affordable, Workforce Housing as a Land Development Condition

As the costs of providing affordable, workforce housing increase and the burdens upon local government of providing such housing using federal (HUD) funds, together with the risk of compliance failure as noted in Part II above also increases, the trend toward obtaining such housing from private sector land developers as conditions for development approval also increase. Such mandatory affordable housing requirements are subject to the standards set out by the U.S. Supreme Court in a series of three cases decided between 1987 and 2015, none of which deal with affordable housing requirements per se. As a result, some state supreme courts have decided that the federal standards set by the U.S. Supreme Court do not apply to mandatory fair/affordable housing quotas.

A. The Federal Cases

While much of the recent case law dealing with such conditions and exactions has developed from challenges to impact fees, the language is applicable to all three. To be enforceable and valid, an impact fee must be levied upon a development to pay for public facilities, the
The need for which is generated, at least in part, by that development.\textsuperscript{67} This is the so-called “rational nexus” test developed by the courts in Florida and other jurisdictions that have considered such fees and exactions.\textsuperscript{68} First proposed in 1964,\textsuperscript{69} it became the national standard by the end of the 1970s.\textsuperscript{70} The test essentially has two parts. First, the particular development must generate a need to which the amount of the exaction bears some rough proportionate relationship. Second, the local government must demonstrate that the fees levied will actually be used for the purpose collected.\textsuperscript{71}

This test was made applicable to all land development conditions by the U.S. Supreme Court in 1987. Decided on the last day of the Court’s 1987 term, \textit{Nollan v. California Coastal Commission}\textsuperscript{72} deals ostensibly with beach access. Property owners James and Marilyn Nollan sought a coastal development permit from the California Coastal Commission to tear down a beach house and build a bigger one. The commission granted the permit only upon condition that the owners give the general public the right to walk across the owners’ backyard beach area, an easement over one-third of the lot’s total area. The purpose, the commission said, was to preserve visual access to the water, which was impaired by the much bigger beach house. The Court, however, held that, assuming the commission’s purpose to overcome the psychological barrier to the beach created by overdevelopment was a valid public purpose, it could not accept that there was


\textsuperscript{69} Ira Michael Heyman & Thomas K. Gilhool, \textit{The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions}, 73 \textit{YALE L.J.} 1119 (1964); see also Fred P. Bosselman & Nancy Stroud, \textit{Legal Aspects of Development Exactions, in Development Exactions} (Frank & Rhodes ed. 1987) [hereinafter Bosselman & Stroud, \textit{Legal Aspects}].

\textsuperscript{70} See Bosselman & Stroud, \textit{Legal Aspects}, supra note 69, at 74.


\textsuperscript{72} 483 U.S. 825 (1987).
any nexus between that interest or purpose and the public lateral access or easement condition attached to the permit.\footnote{73}

The Court stated, however, that it is an altogether different matter if there is an "essential nexus" between the condition and what the landowner proposes to do with the property.\footnote{74} Thus, local governments must consider several important factors when levying impact fees:

1. The fees must generally be charged as part of the land development process, not the land reclassification or rezoning process. Fees are development-driven, and land reclassification, while it may well be a prelude to development, does not create any need for public facilities whatsoever.\footnote{75}

2. Collected fees do not belong in the general fund, or the need is questionable.

3. The fees cannot be kept by government indefinitely, or the need is questionable.

Ignoring the foregoing raises a presumption, as a matter of both law and policy, that the impact fee is nothing more than a revenue-raising device, either for a facility that has nothing to do with the land development upon which the fee is raised, or for undetermined fiscal purposes generally. In either case, the "fee" is then presumed to be a tax. This characterization as a tax is almost always fatal to an impact fee since most local governments have very little specific authority to tax beyond the property tax and, occasionally, a sales or income tax. Because an impact fee is none of the above, and because all local gov-

\footnote{73. Id. at 838–39. For full discussion, see J. David Breemer, The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here, 59 WASH. & LEE L. REV. 373 (2002).}

\footnote{74. Nollan, 483 U.S. at 836–37; see also CALLIES ET AL., CASES AND MATERIALS ON LAND USE, supra note 67; Bosselman & Stroud, Mandatory Tithes, supra note 71; Brenda Valla, Linkage: The Next Stop in Development Exactions, 2 GROWTH MGMT. STUDIES NEWSLETTER 4 (1987); Callies, Impact Fees, supra note 67; Jerold S. Kayden & Robert Pollard, Linkage Ordinances and Traditional Exactions Analysis, 50 L. & CONTEMP. PROBS. 127 (1987); Rachelle Alterman, Evaluating Linkage and Beyond, 32 WASH. U. J. URB. & CONTEMP. PROBS. 127 (1988). But see Holmdel Builders Ass'n, 583 A.2d 277 (upholding impact fees for housing as functional equivalents of mandatory set-asides, which the court had already approved under New Jersey’s constitutionally based "fair share" doctrine).}

\footnote{75. Although in California such fees are charged when land is rezoned to planned unit development (PUD), a special zone in most jurisdictions, often carrying with it developmental rights.}
ernment taxes must be supported by specific statutory authority, the fee is almost always declared illegal.\textsuperscript{76}

The \textit{Nollan} Court did not discuss the required degree of connection between the exaction imposed and the projected impacts of the proposed development. This issue was left open until 1994 when the Supreme Court decided \textit{Dolan v. City of Tigard}.\textsuperscript{77} In this 5-4 decision, the Court held for the first time that a city must demonstrate a "reasonable relationship" between the conditions imposed on a development permit and the development's impact.\textsuperscript{78}

Florence Dolan owned a plumbing business and electrical supply store located in the business district of Tigard, Oregon, along Fanno Creek, which flowed through the southwestern corner of the lot and along its western boundary. Dolan applied to the city for a building permit to double the size of the store and pave the 39-space parking lot. To mitigate for increased runoff from her property that would result from her expansion plans, the commission required that Dolan dedicate to the city the portion of her property lying within the 100-year flood plain along Fanno Creek for a public greenway. To mitigate for increased traffic and congestion caused by an increase in visitors to her store, the commission also required that Dolan dedicate an additional 15-foot strip of land adjacent to the flood plain as a public pedestrian and bicycle pathway.

While in \textit{Dolan} there was a clear nexus between the impact of the proposed development and the conditions required by the commission, the Supreme Court adds a second test beyond "nexus"; whether the degree or amount of the exactions demanded by the city's permit conditions were sufficiently related to the projected impact of the development proposed. The Court coined the term "rough proportionality" to describe the required relationship between the exactions and the projected impact of the proposed development.\textsuperscript{79} While "[n]o precise mathematical calculation is required . . . the city must make some

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\textsuperscript{77} 512 U.S. 374 (1994).

\textsuperscript{78} Id. at 390.

\textsuperscript{79} Id. at 391. After coining the term "rough proportionality," the Court, in its majority opinion, never used that term again when it applied its decision to the facts; instead it continued to use the words "required reasonable relationship" or "reasonably related." Notably, the Court rejected stricter standards as the constitutional norm. \textit{See} Herron v. Mayor of Annapolis, 388 F. Supp. 2d 565, 570–71 (D. Md. 2005).
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sort of individualized determination that the required dedication is related 
both in nature and extent to the impact of the proposed development.”

The Court reviewed the exactions (the two required dedications of 
the public greenway and the pedestrian and bicycle pathway) and 
found that the city’s burden on the development was not roughly pro-
portional to the adverse effects of the development would create. 
Therefore, the exactions were unconstitutional.

Together, Nollan and Dolan require that to pass constitutional mus-
ter, land development conditions imposed by government must:

1. Seek to promote a legitimate state interest;

2. Be related to the land development project upon which they are 
   being levied by means of a rational or essential nexus; and

3. Be proportional to the need or problem which the land develop-
   ment project is expected to cause, and the project must accord-
   ingly benefit from the condition imposed.

Under the first standard, legitimate state interest, an agency may 
only require a landowner to dedicate land (or interests in land) or con-
tribute money for public projects and purposes, such as public facili-
ties and, in most jurisdictions, public housing.

Under the second standard, essential nexus, an agency must find a 
close connection between the need or problem generated by the proposed 
development and the land or other exaction or fee required from the land-
owner or developer. Thus, for example, a residential development will in 
all probability generate a need for public schools and parks. A shopping 
center or hotel in all probability will not. Both will generate additional 
traffic and therefore generate a need for more streets and roads.

Under the third standard, proportionality, a residential development of, 
say, three hundred units may well generate a need for additional class-
room space, but almost certainly, not a new school or school site. On 
the other hand, such a residential development of several thousand units 
would, when constructed, likely generate a need for a new school and 
school site, depending upon the demographics of the new residents.

More recently, the U.S. Supreme Court decided Koontz v. St. Johns 
River Water Management District, holding that both the Nollan and 
Dolan nexus and proportionality requirements apply to monetary ex-
actions like mitigation fees, in-lieu fees, and impact fees, as well as 
government-required dedication of land or interests in land (such as

easements). Thus, for example, government could constitutionally re-
quire a land owner to provide a public school site or in-lieu fee as a 
condition for approval of a large residential development, or a fee rep-
resenting a development’s fair share of the cost of such a school site 
on a small residential development. However, it could not require ei-
ther a site or a fee from a commercial center development for lack of a 
nexus: commercial developments do not drive a need for schools, but 
residential developments do.

A CONSTITUTIONAL ISSUE: NEXUS

Because impact or “linkage” fees for affordable or workforce housing 
are a form of exaction, they are subject to the “essential nexus” takings 
test of Nollan.81 Under Nollan, “a permit condition that serves the same 
legitimate police-power purpose as a refusal to issue to permit should not 
be found to be a taking if the refusal to issue to permit would not con-
stitute a taking.”82 In addition, under Nollan, the government bears the 
burden of proving this nexus.83 Linkage fees satisfy this test “only if 
the municipality can show that development contributes to the housing 
problem84 the linkage exaction is intended to remedy.”85

There is no disagreement in federal courts that Nollan’s nexus test, 
or its close equivalent, applies to linkage fees. For example, in Com-
mercial Builders of Northern California v. Sacramento,86 the Ninth 
Circuit held that an ordinance that imposed a linkage “fee in connec-
tion with the issuance of permits for nonresidential development of the 
type that will generate jobs,”87 (in other words, a workforce affordable 
housing requirement) was constitutional under Nollan.88

81. Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 837 (1987); see Commercial 
Builders of N. Cal. v. Sacramento, 941 F.2d 872, 874 (9th Cir. 1991).
82. Nollan, 483 U.S. at 836 (emphasis added).
83. Dolan, 512 U.S. 391 n.8 (citing Nollan, 483 U.S. at 836).
84. DANIEL R. MANDELKER, LAND USE LAW § 9.23. A “housing problem” is the typi-
ical interest that the counties of Hawai’i identify as a legitimate state interest in their 
ordinances. See, e.g., MAUI, HAW., CODE § 2.94.010 (2007) (“The council finds that 
there is a critical shortage of affordable housing in the county.”); HAWAI’I, HAW., 
CODE § 11-2(5)(2010) (setting forth the objective of “Requir[ing] large resort and indus-
trial enterprises to address related affordable housing needs as a condition of re-
zoning approvals, based upon current economic and housing conditions”). In Ass’n 
Court of Appeals of Hawai’i acknowledged the legitimacy of this interest in the con-
text of the challenge to a condominium declaration, stating that “affordable housing 
and public parking for downtown Honolulu were important to the welfare of the com-

85. MANDELKER, LAND USE LAW, supra note 84, § 9.23.
86. 941 F.2d 872 (9th Cir. 1991).
87. Id. at 873 (emphasis added).
88. Id. at 875.
challenged the ordinance directly on *Nollan* grounds: lack of nexus or connection between the development and the affordable housing condition. First, the court addressed the holding of *Nollan*. *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld.\(^89\) The court then explained that “the [o]rdinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be address.”\(^90\)

The court related at some length what the City of Sacramento did to establish the “substantial connection between the development and the problem” of affordable housing. First, it commissioned a study of the need for low-income housing, the effect of non-residential development on the demand for such housing, and the appropriateness of exacting fees in conjunction with such developments to pay for housing:

> [The study] estimated the percentage of new workers in the developments that would qualify as low-income workers and would require housing. [The study] also calculated fees for development. . . . Also as instructed, however, in the interest of erring on the side of conservatism in exacting the fees, it reduced [the] final calculation[ ] by about one-half. *Based upon this study*, the City of Sacramento enacted the Housing Trust Fund Ordinance [which] . . . included the finding that *nonresidential* development is ‘a major factor in attracting new employees to the region’ and that the influx of new employees ‘creates a need for *additional* housing in the City.’ *Pursuant to these findings*, the Ordinance imposes a fee in connection with the issuance of permits for nonresidential development of the type that will generate jobs.\(^91\)

Consequently, the court found “that the nexus between the fee provision here at issue, designed to further the city’s legitimate interest in housing, and the burdens caused by commercial development is sufficient to pass constitutional muster.”\(^92\)

B. *The State Cases*

Nevertheless, there are a few state cases upholding inclusionary housing programs.

In *Home Builders Ass’n of Northern California v. City of Napa*,\(^93\) the city enacted an inclusionary zoning ordinance requiring 10% of all newly constructed units be affordable, but again only after the city made significant findings and studied possible affordable housing solutions, much like the City of Sacramento.\(^94\) Moreover, the court specifi-

\(^89\) Id.

\(^90\) Id.

\(^91\) *Commercial Builders of N. Cal.*, 941 F.2d at 873.

\(^92\) Id. at 875.

\(^93\) 108 Cal. Rptr. 2d 60 (Ct. App. 2001).

\(^94\) Id. at 62.
cally recognized that “The City’s inclusionary zoning ordinance imposes significant burdens on those who wish to develop their property.” 95 Therefore, the court noted specifically that “the ordinance also provides significant benefits to those who comply with its terms . . . expedited processing, fee deferrals, loans or grants and density bonuses.” 96 The municipality provided over 700 pages of documentation for its program and set its required set-aside at only 10%.

Also, in June 2015 the California Supreme Court rendered its decision in California Building Industry Ass’n v. City of San Jose, which upheld a city inclusionary zoning ordinance requiring that 15 percent of the dwelling units in a new development be set aside for affordable or workforce housing. Alternatively, the landowner could construct affordable units off-site equal to 20 percent of the total projected market-rate units or pay an in-lieu fee. While the decision applies only to California, the case has been widely reported in national media.

The California Supreme Court specifically held that nexus and proportionality do not apply to mandatory affordable housing requirements. Instead, the court agreed with the lower court of appeals that since California’s planning statutes require each local government to formulate a comprehensive plan and to include an affordable housing element, the San Jose ordinance was not different from any zoning ordinance regulation like use, yard, and set-back regulations. Moreover, the court further held that the mandatory housing requirement was no more than the equivalent of a rent-controlled ordinance, most of which have been approved where litigated, especially in California.

The court’s demonstrated ignorance of basic zoning law—indeed local land-use controls generally—is breathtaking. Zoning ordinances are regulatory: They prevent certain uses or limits the size of permitted structures through bulk requirements such as height, setback, and yard maximums and minimums. By contrast, the mandatory workforce housing requirement in San Jose requires a landowner to affirmatively provide a public need or benefit—affordable housing—just as other land development conditions require water and sewer systems, roads, schools, parks, and other public facilities, provided the development drives a need for them. There is no such need for affordable housing driven by or caused by a residential development for market-rate housing.

Moreover, these decisions must be read in the context of California’s Density Bonus Law, which requires local governments to “reward devel-

95. Id. at 64.
96. Id.
operators that agree to build a certain percentage of low-income housing with increased density bonuses above those permitted by applicable local regulations.97 While the Density Bonus Law can, by itself, be considered a voluntary inclusionary zoning program, these density bonus mandates are then tacked on to those already provided by a local government’s inclusionary zoning program.98 Therefore, developers building in jurisdictions that impose inclusionary zoning ordinances have a state guaranteed avenue to mitigate the burdens of providing affordable housing required by local governments, and developers who build in jurisdictions without inclusionary zoning programs nonetheless have incentives to build affordable housing.

California Code section 65915 requires local governments to provide applicants who “seek and agree to construct a housing development” containing at least 5% of the units affordable to very low-income households or 10% of the units affordable to lower-income households with at least a 20% density bonus.99 Developers may also set aside 10% moderate-income affordable units but will only receive a 5% density bonus.100 In order to create better incentives for developers to produce affordable housing, the Density Bonus Law offers increased density bonuses on a sliding scale for developers that meet and surpass the minimum set-aside requirements.101 Depending upon the type of affordable unit set aside, developers will receive a higher percent density bonus for every percent increase in affordable housing they offer above the minimum threshold. The developer will earn an increased density bonus of 2.5% for every percent of very low-income housing set-aside, 1.5% for every percent of lower-income housing set-aside, and 1% for every percent of moderate-income housing set aside.102 These density bonuses are capped at 35%. Thus, a developer who sets aside 11% of the development’s units for very low-income units, 20% lower-income units, or forty moderate-income units will earn the maximum density bonus.103 Although the mandatory density bonus award under the state’s Density Bonus Law is capped at 35%, this maximum cannot be “construed to pro-

98. BARBARA A. KAUTZ, A PUBLIC AGENCY GUIDE TO CALIFORNIA DENSITY BONUS LAW (2005).
100. Id.
101. Id. § 65915(f).
102. Id. § 65915(f)(1)-(4).
103. Id.
hibit a [local government] from granting a density bonus greater” than that required by state law. ¹⁰⁴

California Code section 65915 also requires local governments to provide developers who meet the above mentioned minimum set-aside requirements with incentives or concessions that “result in identifiable, financially sufficient, and actual cost reductions.”¹⁰⁵ These concessions and incentives include, but are not limited to, (1) reductions in development standards, (2) modifications of zoning or building code requirements, and (3) “approval of mixed use zoning in conjunction with the housing project” if it is compatible with the project and will reduce costs.¹⁰⁶ Local governments are required to provide developers with one concession or incentive for every 10% of the total units dedicated to lower-income households, 5% to very low-income households, or 10% to moderate-income households.¹⁰⁷ However, a developer may only receive up to three concessions or incentives.¹⁰⁸

¹⁰⁴. CAL. GOV’T CODE § 65915(n) (West 2008).
¹⁰⁵. Id. § 65915(k).
¹⁰⁶. Id. § 65915(l).
¹⁰⁷. Id. § 65915(d)(2).
¹⁰⁸. Id.