Opportunity in a Pandemic: Ending the Eviction Cycle by Constitutionally Providing for Inclusionary Zoning with State-Enacted Land-Use Regulations

ABSTRACT

Evictions invite instability into every aspect of daily life. Children are uprooted from schools because their parents are no longer able to rent a home in the school district. Parents are fired from jobs because they take days off to find patchwork solutions to avoid homelessness. COVID-19 forced the public to become aware of many social issues, including the harsh reality of evictions. With the end of the pandemic is in sight, the impact of evictions cannot be forgotten. Action must be taken to ensure stable housing for generations to come. Broadening a state's general zoning power to explicitly include affordable housing is the proper solution. This Comment explores the legal history of inclusionary zoning and provides model language to local governments for the constitutional implementation of such policies that ensure private developers receive a reciprocal benefit for their role in providing affordable housing. Constitutionally providing for inclusionary zoning is an important step towards ending the eviction cycle in many states, especially in North Carolina.

INTRODUCTION

In March 2020, the United States entered one of the largest pandemics in its history. As of January 2021, roughly 20 million cases of COVID-19 were confirmed in the United States.[1] More than 346,000 individuals lost their lives.[2] At the state and federal level, leaders were forced to acknowledge the economic effect of the pandemic and rapidly respond to assist the most vulnerable populations. As a result, evictions came to the forefront of national and state policy. On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief and Economic Security Act (CARES ACT). In part, the CARES Act imposed a moratorium[3] on

1. CDC COVID Data Tracker, *United States COVID-19 Cases and Deaths by State*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html [https://perma.cc/RX5T-VK7F].

2. *Id.*

3. A moratorium is "a legally authorized period of delay in the performance of a legal obligation or the payment of a debt." *Moratorium*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/moratorium [https://perma.cc/433D-E94H].

evictions for tenants living in housing assisted by federal dollars.[4] North Carolina Governor Cooper and North Carolina Supreme Court Chief Justice Beasley responded to the CARES Act by enacting a statewide moratorium on evictions and prohibiting summary ejectment proceedings.[5] Eviction filings for the nonpayment of rent resumed in North Carolina from June 21 to September 1, 2020.[6] These filings came to a halt on September 1, 2020, when, in a historic show of authority, the Center for Disease Control and Prevention (CDC) issued a declaration stopping all evictions for nonpayment of rent until December 31, 2020, if the tenant met certain criteria.[7] Governor Cooper issued Executive Order 171 solidifying the protections provided by the CDC declaration and imposing a duty on landlords to provide information about the declaration to tenants.[8]

As these moratoria lift, the spotlight is fading on vulnerable populations. The issue of housing stability in North Carolina, however, must remain center stage. In 2016, approximately 171 evictions occurred each day in North Carolina.[9] Greensboro, North Carolina, has the seventh

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4. Nat'l Hous. L. Project, *Summary and Analysis of Federal CARES Act Eviction Moratorium* (2020), https://www.nhlp.org/wp-content/uploads/2020.03.27-NHLP-CARES-Act-Eviction-Moratorium-Summary.pdf [https://perma.cc/FGT5-384S].

5. Order of the Chief Justice of the N.C. Supreme Court, Emergency Directive 17–19 (2020) [hereinafter Emergency Directive 17–19] (staying all eviction proceedings until June 21, 2020); N.C. Exec. Order No. 142 (May 30, 2020), https://files.nc.gov/governor/documents/files/EO142-Temp-Prohibitions-on-Evictions-and-Extending-Prohibition-on-Utility-Shut-Offs.pdf [https://perma.cc/Q7K5-F7XV] (imposing a moratorium on evictions between May 30, 2020, and June 21, 2020, and prohibiting landlords from pursuing summary ejectment proceedings and assessing fees for late rent payment). A summary ejectment proceeding is "an action by a landlord asking the court to terminate the lease of a breaching tenant and award possession to the landlord." Dona Lewandowski, *A Judgment for Possession Is Only Step 1 in Summary Ejectment Cases*, ON THE CIVIL SIDE: A UNC SCH. OF GOV'T BLOG (May 31, 2018, 2:43 PM), https://civil.sog.unc.edu/a-judgment-for-possession-is-only-step-1-in-summary-ejectment-cases/ [https://perma.cc/9V5X-JAVL].

6. Ben Sessoms, *Thousands of NC Residents at Risk of Eviction as Rent Payment Protections Expire*, NEWS & OBSERVER (Aug. 23, 2020, 10:05 AM), https://www.newsobserver.com/news/coronavirus/article244880452.html [https://perma.cc/67YV-29A2].

7. Lauren Lindstrom & Ben Sessoms, *CDC Halts Evictions, But Advocates Say More Relief Needed to Avoid Rent 'Cliff,'* CHARLOTTE OBSERVER (Sept. 3, 2020, 4:46 PM), https://www.charlotteobserver.com/news/coronavirus/article245440790.html [https://perma.cc/K9A9-UZY5].

8. N.C. Exec. Order No. 171 (Oct. 28. 2020), https://files.nc.gov/governor/documents/files/EO171-Assisting-North-Carolinians-At-Risk-of-Eviction.pdf [https://perma.cc/WU5D-HDQM].

9. *Eviction Rate: North Carolina*, EVICTION LAB, https://evictionlab.org/map/#/2016?geography=states&bounds=-178.743,26.577,-56.882,69.69&type=er&locations=37,-79.354,35.534 **[**https://perma.cc/6TQ8-UQHE]. Roughly 2.3 million evictions were filed in

highest rate of evictions in the country.[10] Each court filing and subsequent eviction places vulnerable populations further away from stable homes.[11] Without this stability, it is more difficult for parents to maintain employment, children to focus on education, and families to participate in their communities. Before the spotlight goes out, the time is now to ensure stable housing for low-income families for decades to come.

This Comment argues that an inclusionary zoning policy[12] that incorporates alternative means to provide for affordable housing with a reciprocal benefit to private developers is a constitutional solution to address housing insecurity.[13] In particular, this Comment analyzes the constitutionality of monetary exactions as a component of inclusionary zoning policies. North Carolina, unlike home-rule[14] states, permits cities and counties to enact only local regulations that are clearly authorized by state legislation.[15] State legislation does not provide an explicit power for cities or counties to enact inclusionary zoning policies.[16] Acting on implicit authority granted under a general zoning power,[17] the towns of Davidson,

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the United States in 2016. Terry Gross, *First-Ever Evictions Database Shows: 'We're in the Middle of a Housing Crisis,'* NAT'L PUB. RADIO (Apr. 12, 2018, 1:07 PM), https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis [https://perma.cc/V72R-DZUP].

10. *Eviction Rankings*, EVICTION LAB, https://evictionlab.org/rankings/#/evictions?r=United%20States&a=0&d=evictionRate&lang=en [https://perma.cc/DD6W-ZS85].

11. *See* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 252 (2017) ("Eviction itself often explained why some families lived on safe streets and others on dangerous ones, why some children attended good schools and others failing ones.").

12. Inclusionary zoning policies are "local policies that tap the economic gains from rising real estate values to create affordable housing for lower income families." *What is Inclusionary Housing?*, INCLUSIONARY HOUSING, https://inclusionaryhousing.org/inclusionary-housing-explained/what-is-inclusionary-housing/ [https://perma.cc/V9ES-LAF9].

13. *See, e.g.*, Joe Marusak, *Developers Sue Davidson Over Affordable-Housing Mandate*, CHARLOTTE OBSERVER (Oct. 22, 2014, 5:04 PM), https://www.charlotteobserver.com/news/local/article9204884.html [https://perma.cc/N684-JZYC].

14. "Under home rule, a county or municipality can do anything that's not specifically denied by the state constitution, the General Assembly, or the charter itself." Kate Lao Shaffner, *What is Home Rule?*, WHYY (July 24, 2014), https://whyy.org/articles/what-is-home-rule/ [https://perma.cc/X9RG-FRFW].

15. Matthew Norchi, *Affordable Housing Toolkit Snapshot: Inclusionary Zoning*, ANGLES FROM THE CAROLINA PLAN. J. (Feb. 20, 2018), https://carolinaangles.com/2018/02/20/affordable-housing-toolkit-inclusionary-zoning/ [https://perma.cc/LQ4G-FYSR].

See infra Part III for proposed statutory language.

16. *See* N.C. GEN. STAT. § 160A-381 (2019), 153A-340 (2019).

17. A county or city may not take a particular action "unless and until the legislature grants such authority." Bowen C. Houff, *North Carolina Legislature Revamps Zoning*

Chapel Hill, and Manteo developed inclusionary zoning policies that provide for affordable housing.[18] However, without clear guidance from the North Carolina General Assembly, municipalities are hesitant to enact inclusionary zoning policies out of a growing concern that doing so may raise a constitutional challenge.

At the federal level, in December 2019, the United States Supreme Court denied a petition for writ of certiorari to hear *Cherk v. County of Marin*, a case that addresses the constitutionality of monetary exactions within inclusionary zoning policies.[19] By denying certiorari, the United States Supreme Court signaled that this is an issue for the states to resolve.[20] Resolution of this issue is difficult because the United States Supreme Court takes a divided stance on whether a monetary exaction imposes an impermissible restriction on an owner's use rights. This divide is explained in *Koontz v. Saint Johns River Water Management District*.[21] The dissent, written by Justice Kagan and joined by Justices Ginsburg, Breyer, and Sotomayor, properly distinguished an unconstitutional taking from a monetary exaction.[22] Acknowledging that a monetary exaction does not deprive an owner of any property interest, the dissent challenged the majority's interpretation that the exaction required an analysis under the "nexus" and "rough proportionality" tests established in *Nollan* and *Dolan*.[23] This divide leaves many states to wonder: What is the appropriate next step? The dissent's analysis in *Koontz* is the appropriate next step to

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Regulation Statutes, BLANCO TACKABERY, https://www.blancolaw.com/north-carolina-legislature-revamps-zoning-regulation-statutes/ [https://perma.cc/2SQR-CY3N].

18. Marusak, *supra* note 13.

19. Cherk v. Cnty. of Marin, No. 18-1538, 2018 Cal. App. Unpub. LEXIS 8454, *1 (Cal. Ct. App. Dec. 14, 2018), *cert. denied*, 140 S. Ct. 652 (2019). The Cherks applied for a permit to divide a vacant 2.9-acre parcel of land into two single-family residential lots. *Id.* The permit was subject to an in-lieu fee to the County for affordable housing projects. *Id.* Approval of the Cherk's permit was conditioned on the payment of a $39,960 fee. *Id.*

20. Monetary exactions are an important power for local governments to solve various social issues, such as providing for affordable housing. *Exactions and Impact Fees*, UNIV. OF FLA. LEVINE COLL. OF L., https://www.law.ufl.edu/_pdf/academics/centers-clinics/clinics/conservation/resources/exactions.pdf [https://perma.cc/2UT4-FNV2] ("Exactions are burdens or requirements a local government places on a developer to dedicate land or construct or pay for all or a portion of the costs of capital improvements needed for public facilities as a condition of development approval.").

21. 570 U.S. 595 (2013).

22. *Id.* at 622–24 (Kagan, J., dissenting).

23. *Id.* at 622 (Kagan, J., dissenting); *see also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994). *Cherk* asserted that the frameworks established in *Nollan* and *Dolan* were the proper analyses for all conditions on building permits, including monetary exactions. *Cherk*, 2018 Cal. App. Unpub. LEXIS 8454, at *23–25.

ensure inclusionary zoning remains a constitutional means to provide affordable housing and to help low-income renters find the stability they need.

Furthermore, an inclusionary zoning policy that requires a private developer to allocate a set number of units for affordable housing or in lieu of doing so pay an annual fee to support affordable housing projects necessarily impacts private developers and their ability to do business. The goal of inclusionary zoning policies is not to prevent or overly encumber private development. Rather, the goal is to provide reciprocal benefits to private developers in the form of tax benefits and density bonuses to ensure the developer and those seeking affordable housing are equally benefited by these policies. It is this shared benefit that further prevents constitutional concerns.

Part I of this Comment provides the United States Supreme Court's progression to *Koontz*, including an analysis of the decisions in *Nollan* and *Dolan*, and the impact of *Penn Central* on inclusionary zoning policies moving forward. Part II analogizes the preservation of wetlands, at issue in *Koontz*, to the need for affordable housing and provides a simple framework to guide inclusionary zoning policies across the state. Part III proposes statutory language to provide North Carolina with the opportunity to legally encourage the private development of affordable housing at the local level.

I. THE PROGRESSION TO *KOONTZ*

Inclusionary zoning is typically enforced by a local ordinance that utilizes "policies that tap the economic gains from rising real estate values."[24] The development of a legal framework to assess the constitutionality of inclusionary zoning began with the Supreme Court's decision in *Village of Euclid*, which marked the beginning of an important thread of cases that defined zoning laws and local governments' rights to institute ordinances to provide for the health, safety, and welfare of the community.[25] The decisions that followed—*Penn Central Transportation Co.*, *Loretto*, *Lucas*, *Nollan*, *Dolan*, and *Koontz*—narrowed *Euclid*'s legacy and developed an important foundation for analyzing inclusionary zoning.[26]

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24. *What is Inclusionary Housing?*, *supra* note 12.

25. *See generally* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

26. *See generally* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

Village of Euclid established that municipalities are permitted to enact zoning ordinances as an exercise of police power in order to support the health, safety, and welfare of the community.[27] *Penn Central Transportation Co.* applied a three-part test to assess if and when a zoning restriction results in a Fifth Amendment taking.[28] Building on the holding in *Penn Central*, the Supreme Court decided in *Loretto* that a taking, no matter how small, is a taking if it excludes the property owner from any part of her exclusive possession.[29] The Supreme Court went on to hold in *Lucas* that a restriction may have the power to render a parcel of land completely valueless.[30] Municipalities continued to place conditions precedent on land use permits in order to gain easy access to public areas or decrease traffic congestion.[31] These conditions precedent were discussed in the *Nollan* and *Dolan* decisions.[32]

Based on the precedent following *Village of Euclid*, land use regulation is now defined by two analytical frameworks. The first was established in *Penn Central* and was further defined by the holdings in *Loretto* and *Lucas*.[33] The second was established in *Nollan* and *Dolan*.[34] Depending on which framework is applied, inclusionary zoning, which imposes a monetary exaction, may or may not be constitutional.[35] This section explains the distinctions in the frameworks and the proper application of each.

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27. *Village of Euclid*, 272 U.S. at 387.

28. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

29. *Loretto*, 458 U.S. at 435–39.

30. *Lucas*, 505 U.S. at 1027–28.

31. *See Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 395.

32. *See Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 395.

33. *Lucas*, 505 U.S. at 1027–28; *Loretto*, 458 U.S. at 435–39; *Penn Cent. Transp. Co.*, 438 U.S. at 124.

34. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 395.

35. This Comment focuses on the adoption of inclusionary zoning policies that impose a monetary exaction, or in the alternative, requires developers to provide a set number of affordable housing units. In applying the *Nollan* and *Dolan* framework, the Supreme Court in *Koontz* held that the monetary exaction imposed on the private landowner was a taking. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 612 (2013). However, without engaging in the analysis, the dissent argued that the monetary exaction may be permissive if analyzed under the framework established in *Penn Central*. *Id.* at 629 (Kagan, J., dissenting). This section analyzes the holding in *Koontz* followed by the holdings in *Nollan* and *Dolan*.

A. The Legacy Left by Koontz

In 1972, Coy A. Koontz Jr. purchased 14.9 acres of undeveloped wetlands in Florida.[36] That same year, Florida enacted the Water Resources Act (Act) authorizing water management districts (district) across the state to regulate "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state."[37] As a result of the Act, landowners were required to obtain a permit that "may impose 'such reasonable conditions' . . . as are 'necessary to assure' that construction will 'not be harmful to the water resources of the district.'"[38] In addition, the Henderson Wetlands Protection Act required "permit applicants . . . to provide 'reasonable assurance' that proposed construction on wetlands [was] 'not contrary to the public interest[.]'"[39]

Twenty-two years after purchasing his undeveloped land, Mr. Koontz applied for the necessary permits to build on a portion of the parcel.[40] At the time of his application, he offered an eleven-acre conservation easement on the land.[41] The district determined that the easement failed to adequately provide reasonable assurances for the protection of the wetlands in Florida.[42]

Prior to approval, and to mitigate the harmful effects that his development would have, the district proposed that Mr. Koontz reduce the size of his development from 3.7 acres to one acre, or proceed with his original plan, and deed a conservation easement on the remaining land.[43] The district agreed that Mr. Koontz could move forward with the development of 3.7 acres if he deeded the easement on his land and provided monetary support to improve wetlands located elsewhere in the state.[44] Mr. Koontz found the district's proposals excessive and filed suit.[45]

In *Koontz v. Saint Johns River Water Management District*, the Supreme Court held that the monetary exactions affected Mr. Koontz's rights and, like conditions subsequent and precedent, required analysis under the "nexus" and "rough proportionality" test established in *Nollan*

36. *Koontz*, 570 U.S. at 599.
37. *Id.* at 600 (quoting FLA. STAT. § 373.403(5) (2010)).
38. *Id.* (quoting FLA. STAT. § 373.413(1) (2010)).
39. *Koontz*, 570 U.S. at 601.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 601–02.
44. *Id.*
45. *Id.* at 602.

and *Dolan*.[46] This decision was one of the first to hold that monetary exactions may attach to a particular parcel in a way that deprives a landowner of a property use right.[47]

In the five–four decision in *Koontz*, the dissent properly argued that imposing a monetary exaction was not a Fifth Amendment taking and that the application of *Nollan* and *Dolan* was unnecessary.[48] The dissent went on to appropriately distinguish *Koontz* from *Nollan* and *Dolan*, in that the latter cases applied to unconstitutional conditions subsequent and precedent to building permits that in effect deprived the owner of a use right, whereas the facts in *Koontz* solely raised the issue of a monetary exaction.[49] Justice Kagan argued that monetary exactions are simply obligations "to perform an act, the payment of benefits."[50] It is not a deprivation of a use right.[51] She went on to say that the majority's decision extends the complex issues of *Nollan* and *Dolan* into local land-use regulation and services.[52] As a result, the Supreme Court decreased the states' flexibility to take routine actions, such as land-use regulation to enhance their communities.[53] Before applying the facts in *Koontz* to the analysis in the dissent's opinion, it is important to understand why the majority applied *Nollan* and *Dolan*.

B. A Perfect Fit? An Assessment of the Frameworks Established in Nollan, Dolan, *and* Penn Central

In assessing whether a condition subsequent or precedent to the approval of a land-use permit is constitutional, a court must apply the "nexus" test established in *Nollan* and the "rough proportionality" test

46. *Id.* at 604–06, 612.

47. *Id.* at 623 (Kagan, J., dissenting) (citing E. Enters. v. Apfel, 524 U.S. 498, 540–41 (1998)) (distinguishing between the appropriation of a specific property interest and the imposition of an order to pay money).

48. *Id.* at 623–24 (Kagan, J., dissenting).

49. *Id.* at 623 (Kagan, J., dissenting) ("[D]oes requiring a person to pay money to the government, or spend money on its behalf, constitute a taking requiring just compensation? Only if the answer is yes does the *Nollan*-*Dolan* test apply.").

50. *Id.* at 624 (Kagan, J., dissenting) (quoting *Apfel*, 524 U.S. at 540); A.J. CASNER ET AL., CASES AND TEXT ON PROPERTY 1221, 1221–22 (5th ed. 2004) (noting that a monetary exaction is a requirement imposed on a parcel of land for the developer to mitigate anticipated negative impacts of the development).

51. *Koontz*, 570 U.S. at 623 (Kagan, J., dissenting) ("[T]he law did not effect a taking because it did not 'operate upon or alter' a 'specific and identified propert[y] or property right[.]'" (alterations in original) (quoting *Apfel*, 524 U.S. at 540–41)).

52. *Id.* at 620 (Kagan, J., dissenting).

53. *Id.* at 626–27 (Kagan, J., dissenting).

established in *Dolan*. Both tests ensure that the condition imposed is connected to a legitimate use of the state's police power.

1. Conditions Subsequent or Precedent

The *Nollan* decision analyzed the "nexus" test for assessing the constitutionality of conditions precedent to building permits.[54] In *Nollan*, a couple was required to obtain a coastal development permit from the California Coastal Commission (Commission).[55] The Commission recommended that the permit be granted if the Nollans approved an easement for public access to the adjacent beach.[56] The Nollans argued that "absent evidence that their proposed development would have a direct adverse impact on public access to the beach," the condition could not be enforced.[57] The Supreme Court agreed, holding that the condition on the Nollans' building permit was a taking requiring just compensation.[58] The Court reasoned that there must be a nexus between the proposed condition and the developmental ban.[59] A nexus is the relationship between "the condition [imposed] and the original purpose of the building restriction."[60] Therefore, a lawful land-use regulation must further the purported governmental purposes.[61] The Commission's inability to assert a nexus between the imposed condition and the original purpose of the building restriction rendered the condition an unconstitutional taking under the Fifth Amendment.[62]

Building on the holding in *Nollan*, the *Dolan* decision established the "rough proportionality" test for assessing the constitutionality of conditions precedent to building permits.[63] The Oregon City Planning Commission conditioned approval of a business owner's application on her agreement to dedicate a portion of the land for improvements to a storm drainage system, a public greenway, and a pedestrian pathway.[64] The purpose of the

54. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).
55. *Id.* at 828.
56. *Id.*
57. *Id.*
58. *Id.* at 841–42.
59. *Id.* at 837.
60. *Id.*
61. *Id.* at 834.
62. *Id.* at 841–42.
63. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).
64. *Id.* at 380.

condition was to reduce flooding and relieve traffic congestion.[65] Applying the holding in *Nollan*, the Court stated:

> In evaluating [Dolan's] claim, we must first determine whether [an] "essential nexus" exists between the "legitimate state interest" and the permit condition enacted by the city . . . . If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.[66]

The Supreme Court held that "[u]ndoubtedly, the prevention of flooding . . . and the reduction of traffic congestion . . . qualify as the type of legitimate public purposes we have upheld."[67] Applying the "rough proportionality" test, the Court analyzed whether the required dedication was related in both nature and extent to the proposed development's impact and if the reasoning was constitutionally sufficient to justify the conditions.[68] The State failed to provide evidence that the requirement was roughly proportional to the prevention of flooding and reducing traffic congestion.[69] The Court stated, "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[70] Therefore, the Court held that the risk for flooding or increased traffic congestion was not roughly proportional to Dolan's proposed construction.[71]

The issues in *Nollan* and *Dolan* apply to physical invasions on private property.[72] In contrast, the monetary exaction at issue in *Koontz* did not present a physical invasion on private property.[73] The *Nollan* and *Dolan* frameworks "have no application when governments impose a general financial obligation as part of the permitting process, because . . . such an action does not otherwise trigger the Takings Clause's protections."[74] The

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65. *Id.*

66. *Id.* at 386 (citing *Nollan*, 483 U.S. at 837).

67. *Id.* at 387 (citing Agins v. City of Tiburon, 447 U.S. 255, 260–62 (1980)).

68. *Id.* at 388–91.

69. *Id.* at 394–95.

70. *Id.* at 396 (alteration in original) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

71. *Id.* at 394–95.

72. *See* Nollan v. Cal. Costal Com'n, 483 U.S. 825, 831 (1987); *Dolan*, 512 U.S. at 393.

73. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 621 (2013) (Kagan, J., dissenting).

74. *Id.* at 630; *see also* E. Enters. v. Apfel, 524 U.S. 498, 524 (1998) (noting that retroactively requiring the petitioner to pay money for the medical benefits of its former workers after it left the industry was controlled by well-settled due process principles).

owner is not deprived of a use right.[75] Instead, a monetary exaction is merely an exercise of the local police power.[76]

2. Monetary Exactions

Because a monetary exaction does not deprive a landowner of her use rights, the question becomes whether the law at issue exceeds the state's local police power to provide for the health, safety, and welfare of the community. This question requires an analysis under the factor balancing test discussed in *Penn Central*.[77] The test includes three factors: (1) economic impact, (2) investment-backed expectations, and (3) the character of the governmental action.

In *Penn Central,* New York City enacted the Landmarks Preservation Law (Preservation Law) to protect historic landmarks from "precipitate decisions to destroy or fundamentally alter" the landmark's character.[78] The Preservation Law was enforced by the New York City Landmarks Preservation Commission (Preservation Commission). Penn Central Transportation Company (Penn Central) sought approval from the Preservation Commission for the construction of a fifty-story office building over Grand Central Terminal, a historic landmark.[79] The Preservation Commission denied Penn Central's request, stating, "To protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off."[80] Penn Central brought suit, alleging an unconstitutional taking under the Fifth Amendment.[81]

The Court analyzed whether the State exceeded its police power by enacting the Preservation Law.[82] In doing so, the Supreme Court considered three factors: (1) economic impact, (2) investment-backed expectations, and (3) the character of the governmental action.[83] The Court balanced these factors to assess whether the Preservation Law resulted in a taking that required just compensation, declaratory relief, or both.[84]

75. *Koontz,* 570 U.S. at 623–24 (Kagan, J., dissenting).
76. *See id.*
77. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
78. *Id.* at 109.
79. *Id.* at 116. Penn Central Transportation Company owns Grand Central Terminal.
80. *Id.* at 117.
81. *Id.* at 119.
82. *Id.* at 144 (Rehnquist, J., dissenting).
83. *Id.* at 124.
84. *Id.* at 128–29.

First, under economic impact, the Court assessed the total amount of loss over the parcel as a whole.[85] Second, under investment-backed interest, the Court looked to the idea of reasonable return.[86] If the property could continue to operate as it historically had, then the property could likely achieve a reasonable return on its investment.[87] Third, the Court reviewed the character of the governmental action on a sliding scale.[88] Meaning, if the government's action results in a physical invasion of the land, then there is most likely a taking.[89] A physical invasion of land, such as an easement, deprives the landowner of certain property rights.[90]

In assessing economic impact, Penn Central argued that the Preservation Law effectively deprived them of any use right within the airspace over the train station.[91] The Court reasoned that, although the use right may have been removed from the area directly over the station, it was not denied from the eight other parcels owned by Penn Central within the vicinity of the train station.[92] Viewing the parcel as a whole, the prohibited use of airspace over one parcel out of nine weighed against a taking requiring just compensation.[93] As for investment-backed expectations, the Preservation Law did not interfere with the use of Grand Central as a train station, and thus the law did not interfere with Penn Central's primary expectation to use the parcel for a train station.[94] In addition, because New York City did not impose a permanent physical invasion on Penn Central's land, the character of the governmental action weighed against a taking requiring just compensation.[95] The Court reasoned that "the government may execute laws or programs that adversely affect recognized economic values."[96] Economic deprivation alone is typically not enough to weigh in favor of a taking.[97]

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85. *Id.* at 130–31.

86. *Id.* at 136.

87. *Id.* at 136–37.

88. *Id.* at 124.

89. *Id.* at 128–29. As stated above, a monetary exaction, rather than a physical exaction, occurred in *Koontz*. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 629 (2013) (Kagan, J., dissenting). Moreover, the monetary exaction did not interfere with the owner's possessory interests. *Id.* at 629–30.

90. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 451 (1982).

91. *Penn Cent. Transp. Co.*, 438 U.S. at 130.

92. *Id.*

93. *Id.*

94. *Id.* at 136.

95. *Id.* at 124–26 (citing examples).

96. *Id.* at 124.

97. *Id.* at 124–25.

The holding in *Penn Central* has since been elaborated upon in *Loretto* and *Lucas.* The Court's holding in *Loretto* reinforced that a law that imposes a physical invasion is often a per se taking.[98] In *Lucas*, focusing on the economic impact factor, the Supreme Court recognized that a total taking—meaning a total economic deprivation of value—may exist.[99] In that situation, the land is rendered completely valueless to the market, and a taking without just compensation may only be permissible if the proposed use is a common law nuisance.[100]

In *Loretto*, a New York statute required that property owners allow a television company to install cables on the property.[101] The owner of a rental building sued the television company, claiming the installation was a taking in violation of the Fifth Amendment.[102] The Supreme Court agreed.[103] The Court affirmed "the traditional rule that a permanent physical occupation of property is a taking."[104] The cable's presence on the building, although small, was a permanent physical invasion that deprived the owner of property rights.[105] As a result, the state could not impose the burden without just compensation.[106]

In *Lucas*, an individual bought two residential lots on a South Carolina barrier island to build single-family homes.[107] Two years after the purchase, the state enacted the Beachfront Management Act (Act), which barred the petitioner from building any permanent habitable structure on the parcels.[108] The Act was intended to prevent further erosion of coastal areas in South Carolina.[109] The Supreme Court, despite reservations from dissenting justices, accepted the trial court's finding that the Act rendered the owner's land completely valueless.[110] In order to justify the Act, the State was required to show that the owner's interest in building single-family homes was a common law nuisance.[111] A nuisance is not a legally protected use

98. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982).
99. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030–32 (1992).
100. *Id.* at 1034 (Kennedy, J., concurring).
101. *Loretto*, 458 U.S. at 423.
102. *Id.* at 424.
103. *Id.* at 441.
104. *Id.*
105. *Id.* at 437–38.
106. *Id.* at 441.
107. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006–07 (1992).
108. *Id.* at 1007.
109. *Id.* at 1009–10.
110. *Id.* at 1034 (Kennedy, J., concurring).
111. *Id.* at 1031.

right.[112] The Court reasoned that if the owner's proposed use is a nuisance, then it is a use right that was never part of his title.[113] Because an individual cannot be deprived of a right that she never had, it is not a taking.[114] The decision in *Lucas* determined that, even though a law renders a parcel valueless, it may be constitutional if the owner's use is a common law nuisance.[115]

The decisions in *Penn Central*, *Loretto*, and *Lucas* established an analytical framework to help assess if and when land-use regulations go beyond the constitutional use of police power and result in a taking.[116] The framework is defined by three questions.[117] First, is there a permanent physical invasion?[118] If yes, the analysis ends and there is a per se taking.[119] If no, has the regulation totally deprived the owner of economically viable use?[120] If yes, the analysis ends and there is a per se taking.[121] If no, after balancing economic impact, investment-backed expectations, and the character of the governmental action, do the facts weigh in favor of finding a per se taking?[122]

The *Penn Central* analysis, supported by the holdings in *Loretto* and *Lucas*, is the appropriate framework for assessing when a regulation, created in pursuit of the health, safety, and welfare of the public, goes too far as to impede upon an individual's constitutionally protected property rights.[123]

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112. *Id*. at 1029–30.

113. *Id.* ("Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful . . . .").

114. *Id.*

115. *Id.*

116. Michael B. Kent, Jr., *More Questions than Answers: Situating Judicial Takings within Existing Regulatory Takings Doctrine*, 29 VA. ENV'T L.J. 143, 148–50 (2011).

117. *Id.* at 149.

118. *Id.* "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Loretto*, 458 U.S. at 435 (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945)). "To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights." *Id.*

119. Kent, Jr., *supra* note 116, at 162.

120. *See id.* Total deprivation of economically viable use renders the parcel valueless. *See* Lucas v. S.C. Coastal Council 505 U.S. 1003, 1034 (1992).

121. Kent, Jr., *supra* note 116, at 162.

122. *See generally id.* at 163–66.

123. The dissent in *Koontz* signals that a monetary demand does not fall into the category of a condition precedent or subsequent in need of analysis under *Nollan* and *Dolan*. Rather, it requires analysis under a due process or *Penn Central* framework. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 629 (2013) (Kagan, J., dissenting).

II. A PATH FORWARD FOR INCLUSIONARY ZONING

A. Empowering Local Governments to Provide for Affordable Housing

A monetary exaction may be imposed prior to the approval of a building permit to benefit any number of social issues, whether it be the conservation of wetlands or providing affordable housing. States have the power to enact laws to benefit the health, safety, and welfare of the community.[124] Florida exercised this power by enforcing a monetary exaction, requiring conservation easements, or modifying building plans on all new developments in order to mitigate wetland destruction.[125] The state likely reasoned that each new development on Florida's wetlands threatened the health, safety, and welfare of the community because surface water may be contaminated or natural habitats may be destroyed.[126]

Similarly, a state may exercise this power by enforcing a monetary exaction on all new residential-building developments in order to provide affordable housing. The state could reason that each new residential building impacts the health, safety, and welfare of the community because it limits the supply of affordable housing.[127] If such development continues unabated, lower-income residents would be deprived of affordable housing options.

Although wetland conservation and affordable housing are distinct social issues, they may share a common solution. The monetary exaction imposed on the developer in *Koontz* is directly analogous to a monetary exaction that could be imposed on housing developers.[128] Just as the developer in *Koontz* was required to fund projects to assist in the preservation of wetlands, a private developer could be required to fund projects to assist in the construction of affordable housing.[129] Similarly, just as a private developer could be required to limit the size of the construction to protect wetlands, so too could a developer be asked to modify his or her

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124. *Cf.* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

125. *See Koontz*, 570 U.S. at 600–01.

126. *See id.*

127. *See* Diana Olick, *Rents Are Rising at the Fastest Pace in Almost Two Years*, CNBC (Mar. 22, 2018, 1:28 PM), https://www.cnbc.com/2018/03/22/rents-are-rising-at-the-fastest-pace-in-almost-two-years.html [https://perma.cc/8BZR-5F22].

128. *Koontz*, 570 U.S. at 600–02.

129. *Id.* at 601–02.

construction plan, in exchange for a reciprocal benefit, to provide a set number of affordable housing units.[130]

The dissent's discussion in *Koontz* provides an opportunity for North Carolina, and other states across the country, to empower local governments to solve any number of social issues that threaten the health, safety, and welfare of a community. Because a monetary exaction does not deprive the owner of a use right, it does not result in a taking in need of just compensation.[131]

B. Applying Koontz *to the* Penn Central *Factor Balance*

A monetary exaction imposed to resolve a social issue that impacts the health, safety, and welfare of a community is constitutional. The primary issue in *Koontz* was whether the monetary exaction was a condition requiring a takings analysis or was a regulation that threatened to exceed the local police power.[132] The Supreme Court previously held that a requirement to pay money does not require a takings analysis.[133] The payment of money does not alter a specific and identified property interest, such as use or exclusive possession.[134] Understanding this fact to be true, it is likely that the dissent in *Koontz* would have become the majority.[135]

This is reinforced by applying the facts in *Koontz* to the analytical framework that summarizes the holdings of *Penn Central*, *Loretto*, and *Lucas*.

The first question is whether there is a permanent physical invasion.[136] Unlike the building owner in *Loretto*, the property owner in *Koontz* did not experience a permanent physical invasion.[137] "Koontz claims that the

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130. *Id.*

131. *Id.* at 623 (Kagan, J., dissenting).

132. *Id.* at 608–09.

133. *Id.* at 623–24 (majority opinion) (Kagan, J., dissenting) ("[T]he law did not effect a taking because it did not 'operate upon or alter' a 'specific and identified propert[y] or property right[].' Instead, '[t]he law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so.'") (alterations in original) (quoting E. Enters. v. Apfel, 524 U.S. 498, 540–41 (1998)).

134. *Id.* at 623 (Kagan, J., dissenting).

135. *See id.* ("[D]oes requiring a person to pay money to the government, or spend money on its behalf, constitute a taking requiring just compensation? Only if the answer is yes does the *Nollan-Dolan* test apply.").

136. Kent, Jr., *supra* note 116, at 161.

137. *See Koontz*, 570 U.S. at 621 (Kagan, J., dissenting) ("[N]o taking occurred in this case because Koontz never acceded to a demand (even had there been one), and so no property changed hands . . . ."). The holding in *Loretto* reaffirmed the reasoning in *Penn*

District demanded that he spend money to improve public wetlands, not that he hand over a real property interest."[138] Mr. Koontz held every stick in the bundle of his property rights at the time he brought his claim. Therefore, it cannot be said that he suffered a permanent physical invasion requiring just compensation.[139]

The second question is whether there was total economic deprivation.[140] Unlike the barrier island landowner in *Lucas*, the property owner in *Koontz* was not totally deprived of all economically viable use.[141] The district was willing to approve the development of 3.7 acres of land if Mr. Koontz agreed to fund mitigation projects to offset the damage of the construction.[142] Mr. Koontz retained the right to build on his land.[143] Therefore, it cannot be said that he was deprived of all economically viable use as to render his land valueless.

The third question is whether economic impact, investment-backed expectations, and the character of the governmental action weigh in favor of a taking.[144] First, economic impact is assessed based on the amount of loss over the value of the parcel as a whole.[145] Mr. Koontz, having not agreed to any of the demands presented by the district, continued to hold the full value and rights in the parcel.[146] At a minimum, he was permitted to develop 3.7 acres of land.[147] His only potential loss was the money spent to fund the mitigation projects to assist in wetland conservation.[148] If this

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Central that a permanent physical invasion likely constitutes a per se taking in violation of the Fifth Amendment. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

138. *Koontz*, 570 U.S. at 623 (Kagan, J., dissenting).

139. In *Loretto*, the Supreme Court held that the presence of cable equipment on the landowner's property was a permanent physical invasion that deprived him of his use right over a portion of his parcel. *Loretto*, 458 U.S. at 421. Unlike the landowner in *Loretto*, the district in *Koontz* did not physically invade any portion of the petitioner's land. *Koontz*, 570 U.S. at 600–02. Rather, the district requested the payment of a benefit for land completely unconnected to Mr. Koontz's parcel. *Id.*

140. Kent, Jr., *supra* note 116, at 162.

141. *Koontz*, 570 U.S. at 601–02 (noting that under the district's proposed exactions to help mitigate the environmental harm Mr. Koontz's construction would impose, Mr. Koontz retained 3.7 acres to construct upon as he wished).

142. *Id.* at 602.

143. *Id.*

144. Kent, Jr., *supra* note 116, at 163.

145. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978).

146. *Koontz*, 570 U.S. at 600–02.

147. *Id.*

148. *Id.*

amount is less than the overall value of the parcel as a whole, then this factor weighs against a taking.[149]

Second, as for the investment-backed interest, Mr. Koontz purchased the land undeveloped.[150] After owning the land for twenty-two years, he applied for a building permit.[151] Mr. Koontz purchased the land as undeveloped and the land continued to be undeveloped.[152] Therefore, his investment-backed interest weighs against a taking.

Third, as for the character of the governmental action, the regulation was created for the preservation of wetlands to benefit the health of the general public.[153] The government did not permanently deprive Mr. Koontz of his land, but simply required that he assist in funding projects to help mitigate the damage of the construction.[154] Therefore, under the *Penn Central* framework, Florida lawfully exercised its police power by requiring the petitioner to pay funds to assist in the conservation of wetlands.

In summary, a fee that mitigates the harmful effects of development is not a taking because the owner is not deprived of any of her property interest. She continues to hold every stick in her bundle of property rights. The majority in *Koontz* erred by viewing the monetary exaction as a deprivation of property interests.[155] By doing so, the Court improperly applied the "rough proportionality" and "nexus" tests from *Nollan* and *Dolan*.[156] Because no property interests are affected by imposing a monetary exaction, an alternative analysis must be applied, specifically, the above-mentioned framework established by the holdings in *Penn Central*, *Loretto*, and *Lucas*. In doing so, the Court may determine on a case-by-case basis if the monetary exaction is a regulation that exceeds the state's police power.[157] Based on the application of this framework to the facts in *Koontz*, a monetary exaction is not a constitutional taking.

Therefore, a monetary exaction imposed on a private developer provides a constitutional way to allow local governments to address social

149. *See Penn Cent. Transp. Co.*, 438 U.S. at 137.

150. *Koontz*, 570 U.S. at 599.

151. *Id.* at 601.

152. *Id.* at 600–01.

153. *See, e.g.*, *Penn Cent. Transp. Co.*, 438 U.S. at 124 (stating that a taking is more readily found in a physical invasion than "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.").

154. *See, e.g.*, *id.* ("[The] government may execute laws or programs that adversely affect recognized economic values.").

155. *Koontz*, 570 U.S. at 623–24 (2013) (Kagan, J., dissenting).

156. *Id.* at 633, 635–36 (Kagan, J., dissenting).

157. *Id.* at 629 (Kagan, J., dissenting).

issues, such as affordable housing. The question then becomes: What is the best statutory framework to resolve this social issue?

III. HOW CAN NORTH CAROLINA CONSTITUTIONALLY PROVIDE FOR AFFORDABLE HOUSING?

A. What Work is Already Being Done

Towns in North Carolina have begun the process of incorporating affordable housing policies into local zoning ordinances. In 2001, Davidson, North Carolina, enacted a mandatory inclusionary zoning ordinance.[158] The ordinance applies "to all new developments that result in or contain two (2) or more residential lots of dwelling units . . . ."[159] "Developments with 7 or fewer residential units must either provide one affordable unit or make a payment in lieu to the Town."[160] Developments with "8 or more [residential] units" must provide 12.5% of all units at a below market rate.[161] In 2014, two developers challenged the legality of this ordinance.[162] The developers alleged that Davidson exceeded its power granted by the North Carolina General Assembly.[163] The parties settled before any legal conclusions were made.[164] As of 2020, the Ordinance has provided 145 affordable housing units in Davidson.[165]

In 2010, Chapel Hill, North Carolina, enacted a mandatory inclusionary zoning ordinance.[166] The ordinance "applies to all development . . . [with] at least 5 single-family dwelling units."[167] Depending on the zoning of the new development, a developer may be required to set aside 10–15% of all units for a below market rate.[168] Developers required to set aside 15% of units may receive up to a 15%

158. DAVIDSON, N.C. PLANNING ORDINANCE § 5.1–.5 (2015).

159. *Id.* § 5.2.

160. *Id.* § 5.2(A)(1).

161. *Id.* § 5.2(A)(2).

162. Marusak, *supra* note 13.

163. *Id.*

164. *Id.*

165. § 5.1–.5; *Affordable Housing in Davidson*, AFFORDABLE HOUS. ONLINE, https://affordablehousingonline.com/housing-search/North-Carolina/Davidson [https://perma.cc/R6CY-CNVH].

166. Chapel Hill, N.C., Ordinance 2010-06-21/O-11 (June 21, 2010).

167. *Id.* § 3.10.1(a)(1).

168. *Id.* § 3.10.2(a).

density bonus, with some exceptions.[169] In lieu of providing units at below-market rates, the Planning Board may allow the developer to provide a land dedication, existing unit dedication, offsite construction, a payment to fund affordable housing projects, or an alternative proposed by the developer.[170] There are currently 336 affordable housing units in Chapel Hill.[171]

As of 2016, "inclusionary zoning laws existed in 886 jurisdictions" within twenty-five states and the District of Columbia.[172] Washington, D.C., Maryland, and Virginia reflect different approaches to the same social issue and offer valuable case studies for states hoping to adopt similar policies.

In Washington, D.C. below-market rate (BMR) units became available in 2011.[173] D.C.'s policy "applies to residential projects of 10 units or more, and requires that 8 to 10 percent of the project square footage (not unit count) be designated as BMR housing."[174] In exchange, "developers can receive up to a 20 percent increase in density over the set zoning."[175] "The price of the BMR units is set to 80 percent of the area median income for for sale units, and 60 percent AMI for rental units."[176] As of 2016, there were 402 BMR units in the District of Columbia.[177]

Montgomery County's Moderately Priced Dwelling Unit (MPDU) program applies to development with 20 or more units.[178] The program

169. *Id.* A density bonus is "the maximum number of dwelling units approved in the zoning district." *Id.* § 3.10.2(d)(1).

170. *Id.* § 3.10.3(d)(1)–(4).

171. *See* TOWN OF CHAPEL HILL OFF. FOR HOUS. & CMTY., AFFORDABLE HOUSING ANNUAL REPORT 4 (2020).

172. Benjamin Schneider, *CityLab University: Inclusionary Zoning*, BLOOMBERG CITYLAB (Jul. 17, 2018, 4:15 PM), https://www.citylab.com/equity/2018/07/citylab-university-inclusionary-zoning/565181/[https://perma.cc/R53Y-YBXZ].

173. *Id.* Below-market rate denotes rental properties that are offered for a rental price below the market's average rental price.

174. *Id.*

175. *Id.* Cities and towns are typically controlled by a series of zoning ordinances. *See* Michael Chandler & Gregory Dale, *Zoning Basics*, 42 PLAN. COMM'RS J. 13, 13–14 (2001). At a minimum, these ordinances divide an area into several zoning districts for residential, commercial, or industry use. *Id*. at 16. To help regulate population and area density, the ordinance may provide stipulations that a residential building within the zone may not have more than 100 units. This is the set density for that zone.

176. Schneider, *supra* note 172.

177. *Id.*

178. *Case Study of Long-Term Program Contributes to Understanding of Inclusionary Zoning*, NAT'L LOW INCOME HOUS. COAL. (Jan. 18, 2013), https://nlihc.org/resource/case-study-long-term-programs-contributes-understanding-inclusionary-zoning [https://perma.cc/FT3G-SG3R] [hereinafter *Case Study of Long-Term Program*].

requires "12.5 and 15 percent of the total number of units in every subdivision or high-rise building of 20 or more units" to be "moderately priced."[179] As of October 31, 2018, "developments with less than 20 but more than 10 units are required to make a payment to the Housing Initiative Fund in lieu of an MPDU requirement on-site."[180] Individuals earning a minimum of "$30,000 to a maximum of $81,500" may qualify to rent or purchase a MPDU unit.[181] The program has created approximately 13,000 units at an average rate of 368 units per year.[182]

Fairfax County's Affordable Dwelling Unit (ADU) program applies to developments with at least 50 units.[183] The program requires that one-third of rental units "be reserved for households that make 50% [AMI] or less, while all for-sale and the remaining two-thirds of rental ADUs must go to households with incomes of 70% AMI or less."[184] The program has created approximately 2,448 units at an average rate of 122 units per year.[185]

B. Statutory Language that Complies with Penn Central*?*

There is no uniform way to impose inclusionary zoning policies. Below is recommended language to assist local governments in North Carolina to enact inclusionary zoning policies. The provisions are written to avoid a taking as defined in *Penn Central*, *Loretto*, and *Lucas*. This recommended language is dependent on expanding the definition of "use" under North Carolina's general zoning power to explicitly permit inclusionary zoning policies for affordable housing.[186] Interwoven with the bolded statutory provisions are brief explanations of each specific provision's purpose and constitutionality.

> **Prior to the approval of any building permit that authorizes the construction of residential units, all private developers who propose the construction of eight or more units[187] in [City, Town, County] are**

179. *Housing*, MONTGOMERY PLAN., https://montgomeryplanning.org/planning/housing/ [https://perma.cc/9GCC-NMWM] (last updated Mar. 25, 2020).

180. *Id.*

181. *Case Study of Long-Term Program*, *supra* note 178.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *See* N.C. GEN. STAT. § 160A-381 (2019), 153A-340 (2019).

187. DAVIDSON, N.C. PLANNING ORDINANCE § 5.1–.5 (2015) (noting that "[d]evelopments with 7 or fewer residential units must either provide one affordable unit or make a payment in lieu to the Town," and that "[d]evelopments with 8 or more units shall provide all required affordable units in accordance with Section 5.2").

hereby required to reserve ten percent[188] of all residential units for tenants with eighty percent or less area median income (AMI).[189]

The requirement of eight or more units ensures that the financial impact of requiring developers to charge a below-market rate on a percentage of units minimally impacts the developer's projected profits.

Individuals opposed to inclusionary zoning may argue that this provision is a permanent physical invasion. But the government is not denying the developer a right to exclusive possession of its land or any rights to the property. Instead, the provision merely places a regulation on the use of a parcel for the benefit of the public. This is directly analogous to the development restrictions imposed in *Penn Central*.[190] There, the property owner was not permitted to develop the airspace above Grand Central Terminal because of the city's interest in preserving historical landmarks.[191] The Court held that this was permissible by viewing the parcel as a whole.[192] The restriction on development in *Penn Central* was on one parcel out of nine.[193] Here, viewing the parcel as a whole, only 10% of the total development is impacted. Therefore, a court will likely find that this is a permissible restriction on private development.

Developers that reserve ten percent or more of all residential units for individuals with eighty percent or less AMI will qualify for ten percent more density over the set zoning. [194]

188. *Id.* § 5.2(C)(1) (requiring "12.5% of the total number of residential units within any development shall be affordable housing units and shall be located on the site of the development."); Chapel Hill, N.C., Ordinance 2010-06-21/O-11 (June 21, 2010) (requiring developments of five or more units to provide 15% of their units at prices affordable to low- and moderate-income households").

189. DAVIDSON, N.C. PLANNING ORDINANCE § 5.2(C)(2), Table 5–1 (requiring that 12.5% of affordable housing units 30%–100% must be reserved for tenants with less than 50% AMI, 0%–70% must be reserved for tenants with between 50%–80% AMI, and 0%–20% must be reserved for tenants with between 80%–120% AMI).

190. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978).

191. *Id.* at 117–18.

192. *Id.* at 130–31. Viewing the affected parcels as a whole—that is, nine separate parcels with a restriction imposed on one—the Court held that this factor did not weigh in favor of taking. Similarly, when assessing a residential development as a whole, limiting the use of 10% does not weigh in favor of a taking.

193. *Id.* at 137.

194. DAVIDSON, N.C. PLANNING ORDINANCE §§ 5.2(C)(3) ("Affordable units do not count towards maximum density standards . . . .").

If the developer is able to build more units than were originally permitted, then there will automatically be a more favorable profit calculus. For example, if the original set density is sixty units, and the private developer is required to reserve 10% of those units—here six units—at below-market rates, increasing the set area density allows the developer to make the same projected profit, and slightly more, while still providing affordable housing.

This provision further ensures that there is not a permanent physical invasion and that developers' investment-backed interests are preserved.[195] A set density increase provides additional units that the developer would not have been permitted to construct. Therefore, it cannot be a permanent physical invasion. A person cannot claim a taking of property that he or she would not have been permitted to possess in the first instance.[196] Also, the set density increase ensures that the developer's profitability is not reduced and that the cost of providing for affordable housing is not passed on to renters paying the full market price.

> **Alternatively, the [Town, City, or County] "may approve one or more of the following options"[197] in lieu of setting aside affordable housing units. First, the developer may dedicate land to the [Town, City, or County].[198] Second, the developer may provide payment in lieu of setting aside the required units for affordable housing "if . . . the payment provides opportunity for an equivalent or greater amount of Affordable Dwelling Units."[199] "The per unit average of the subsidies will be calculated, and this average will be multiplied by the average percent increase in the cost of new homes constructed in the Town[, City, or County] for that fiscal year. The result will be the payment in lieu fee for the coming year."[200] The [Town, City, or County] "shall annually establish the per unit payment amount."[201] "The payment shall be made to the Town[, City, or County] and reserved to be used for affordable housing purposes."[202] Third, the developer may propose an alternative plan to provide for affordable housing subject to the approval of the proper zoning authority.**

195. *See Penn Cent. Transp. Co.*, 438 U.S. at 127.
196. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030–32 (1992).
197. Chapel Hill, N.C., Ordinance 2010-06-21/O-11 § 3.10.3(d) (June 21, 2010).
198. *Id.* § 3.10.3(d)(1).
199. *Id.* § 3.10.3(d)(4)(B).
200. *Id.*
201. *Id.*
202. *Id.* § 3.10.3(d)(4)(C).

Rather than reserving a set number of below-market units, this option allows a developer to dedicate land, make an annual payment to assist in affordable housing projects, or propose an alternative plan. Furthermore, this provision safeguards against a constitutional challenge. Even if a court were to apply the *Nollan* and *Dolan* test to the monetary exaction "so long as a permitting authority offers the landowner at least one alternative [to the monetary exaction] that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition."[203]

> **Projects funded by payment in lieu of setting aside affordable housing units must include housing projects for individuals with eighty percent or less AMI, financial assistance to private developers constructing housing for renters with eighty percent or less AMI, or financial assistance to existing owners or developers that convert ten percent or more of existing units to affordable housing for individuals with eighty percent or less AMI.**

This provision ensures that the funds collected are used to support individuals in need of affordable housing. The state may also elect to use the funds to encourage private developers to construct affordable housing units. Encouragement may come in the form of grants or planned housing projects to assist in the cost of construction. This creates a new market of development and an opportunity for private businesses to profit.

> **Residential developments that set aside ten percent or more of units for affordable housing must require households to sign one-year leases and to certify every three years[204] that they remain below the designated income threshold.**

Housing stability provides greater opportunities for families to increase their income because it allows them to focus on work without the fear of losing their home. Yearly income certification discourages families from increasing their income. Income certification every three years provides families with the opportunity to increase their income and prepare to move to a market-rate unit or purchase a home all while benefiting from the stability provided by an affordable home.

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203. *Koontz*, 570 U.S. at 611.

204. DAVIDSON, N.C. PLANNING ORDINANCE § 5.5(A)(2) (2015) ("The Town shall adopt and review, at least every three years, asset limitations."); s*ee also* § 5.5(C)(4) ("Rents charged for an affordable unit must not exceed the rental rate limitations published annually by HUD . . . .").

The phasing,[205] style,[206] quality,[207] size,[208] and location[209] of affordable housing units must be equivalent or functionally equivalent[210] to market rate units.

This provision ensures equality between market rate and below market rate units.

Residents who meet the required AMI limit shall not be denied residence based on prior eviction records.

A single instance of an eviction or an eviction filing can detrimentally impact an individual's ability to find a new rental unit.[211] As a result, individuals are typically forced to rent unsafe and overpriced units from landowners who are willing to overlook their eviction records.[212] This often results in a subsequent eviction because the rent is unaffordable.[213] By excluding eviction records from a resident's application for a below-market rate unit, this policy does not perpetuate the cycle of eviction.

CONCLUSION

Evictions systematically invite instability into every aspect of daily life. Children are uprooted from schools because their parents are no longer able to rent a home in that district. Parents are fired from jobs because they

205. § 5.3(A)(7).

206. Chapel Hill, N.C., Ordinance 2010-06-21/O-11 § 3.10.7(c) ("The exterior appearance of the affordable housing units in any development subject to these regulations shall be compatible in style and quality with the market rate units in the development, subject to Town Manager approval.").

207. *Id.*

208. *Id.* § 3.10.7(d) ("The affordable housing units shall have a number of bedrooms in the . . . same proportion as the market rate units.")

209. *Id.* § 3.10.7(a) ("Affordable housing units or lots shall be located within the development subject to these regulations . . . .").

210. DAVIDSON, N.C. PLANNING ORDINANCE § 5.5(A)(1) ("Affordable units shall be 'functionally equivalent' to market rate units.").

211. DESMOND, *supra* note 11, at 297 (pointing out that many public housing authorities consider evictions when evaluation eligibility for benefits, resulting in denials of benefits to those who most need it).

212. *Id.* ("These families are often compelled to accept substandard housing conditions."); *see also id.* at 351–52 nn.1–2.

213. *Id.* at 297.

take days off to find patchwork solutions to avoid homelessness. COVID-19 forced policymakers to acknowledge the impact of evictions on vulnerable populations. However, as eviction moratoria lift, the light is once again fading on efforts to end the eviction cycle for the 171 families that are evicted every day in North Carolina.[214] Before the light goes out, North Carolina needs a long-term solution. The best solution is expanding North Carolina's general zoning power to explicitly permit inclusionary zoning policies that provide for affordable housing and empowering local governments to enact these policies if it will benefit their communities.

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214. *North Carolina Data*, EVICTION LAB, https://evictionlab.org/map/#/2016?geography=states&bounds=-190.672,5.659,-44.648,65.839&type=er&locations=37,-79.374,35.533 [https://perma.cc/6TQ8-UQHE].

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