

---

---

DEVELOPING LAS VEGAS: CREATING INCLUSIONARY  
AFFORDABLE HOUSING REQUIREMENTS IN  
DEVELOPMENT AGREEMENTS

*Ngai Pindell\**

I. INTRODUCTION

The lack of affordable shelter for all of America's families often appears to be an immutable part of America's housing landscape.<sup>1</sup> One would hope that a city as imaginative and inventive as Las Vegas<sup>2</sup> would have found a solution to its affordable housing problem.<sup>3</sup> The same creative energy that established an international entertainment center in the middle of the Mojave Desert should certainly be able to find housing for all of the residents who make the city function.<sup>4</sup> Las Vegas depends on

---

\* Associate Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. Thank you to Nestor Davidson, Joan Howarth, and Elaine Shoben for their valuable comments, and Lauren Calvert and Eva Segerblom for excellent research assistance.

1. Despite a national call to arms to solve our housing crisis in 1949, many families remain unable to obtain decent shelter. The Housing Act of 1949 established the national goal of a "decent home and a suitable living environment for every American family." Housing Act of 1949, 42 U.S.C. § 1441 (2000). The literature on affordable housing techniques and critiques is extensive. Two sources provide a rich collection of on-the-ground examples and essays exploring the reasons for our housing crisis and possible solutions. See *THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT* (Tim Iglesias & Rochelle E. Lento eds., 2005) [hereinafter *IGLESIAS & LENTO*]; *A RIGHT TO HOUSING* (Rachel G. Bratt et al. eds., 2006).

2. I use the shorter "Las Vegas" to describe a larger metropolitan region in the southern portion of Clark County, Nevada. This region is comprised of four incorporated cities—Las Vegas, North Las Vegas, Henderson, and Boulder City—and some areas not encompassed by these cities known as unincorporated Clark County.

3. In Nevada, affordable housing is defined as "housing affordable for a family with a total gross income less than 110 percent of the median gross income for the county concerned based upon the estimates of the United States Department of Housing and Urban Development of the most current median gross family income for the county." NEV. REV. STAT. ANN. § 278.0105 (LexisNexis 2002).

4. On the formation and growth of Las Vegas, see SALLY DENTON & ROGER

service industries such as entertainment, gaming, dining, and hotel services.<sup>5</sup> These industries require people, and people need places to live for themselves and their families. Moreover, Las Vegas is isolated. The federal government owns over eighty percent of the land in Nevada.<sup>6</sup> The Las Vegas metropolitan area is surrounded by publicly owned land and is literally an “island in a sea of federal land.”<sup>7</sup> It does not enjoy the safety valve of nearby cities where workers can live in more affordable housing and commute into the city. These areas may develop in the future, but they do not exist now.<sup>8</sup> One would think that the search for adequate shelter for Las Vegas workers would command as much attention and importance as the search for water in the desert.<sup>9</sup>

Affordable housing<sup>10</sup> is a challenge in many jurisdictions. Las

---

MORRIS, *THE MONEY AND THE POWER: THE MAKING OF LAS VEGAS AND ITS HOLD ON AMERICA, 1947-2000* (2001); HAL ROTHMAN, *NEON METROPOLIS: HOW LAS VEGAS STARTED THE TWENTY-FIRST CENTURY* (2002).

5. The impact of early African American migration to Las Vegas to work in service industry jobs and achieve economic power is richly detailed in ANNELISE ORLECK, *STORMING CAESARS PALACE: HOW BLACK MOTHERS FOUGHT THEIR OWN WAR ON POVERTY* (2005).

6. Nicholas G. Vaskov, *Continued Cartographic Chaos, or a New Paradigm in Public Land Reconfiguration? The Effect of New Laws Authorizing Limited Sales of Public Land*, 20 *UCLA J. ENVTL. L. & POL'Y* 79, 94 (2002).

7. *Id.*

8. See, e.g., Jennifer Robison, *Home Builders Unfazed by Delay in Dam Bypass: Developers Have Little Doubt Investment Will Pay Off When Road Complete*, *LAS VEGAS REV.-J.COM*, Jan. 30, 2007, [http://www.reviewjournal.com/lvrj\\_home/2007/Jan-30-Tue-2007/business/12223700.html](http://www.reviewjournal.com/lvrj_home/2007/Jan-30-Tue-2007/business/12223700.html) (describing a residential community forty-five minutes from Las Vegas to be constructed in Arizona in 2009).

9. The head of the Southern Nevada Water Authority, Patricia Mulroy, reflects on Las Vegas's unyielding growth in the face of limited water resources: “People always ask me, when are we going to run out of water? . . . As long as there are options available, we don't have to. It is a matter of going from your least expensive supply to your most expensive supply.” Launce Rake, *Water Official: Drought Won't Stop Growth*, *LAS VEGAS SUN*, June 9, 2004, at 1A (internal quotation marks omitted).

10. Affordable housing is commonly defined as housing available to households earning eighty percent or less of the area median income. See Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. § 1437a(b)(2) (2000). A related widely used guideline is that households should not spend more than thirty percent of their income on housing costs. In areas with high housing prices, median and above-median income households encounter housing burdens higher than thirty percent. 12 U.S.C. § 1701z-11(b)(5) (2000). This phenomenon, coupled with the political attractiveness of limiting public subsidies to more “deserving” working families, has encouraged affordable housing efforts geared toward higher income families through “attainable” and “workforce” housing programs.

Vegas, because of its rapid growth, geography, and relative isolation among surrounding federal land holdings, illustrates the need for a much more conscious awareness of the importance of collaboration among private and public entities as well as federal, state, and local entities to produce an adequate supply of affordable housing. The Southern Nevada Public Land Management Act (“SNPLMA”),<sup>11</sup> as the primary source of new land for development in Las Vegas, provides a common framework for productive affordable housing collaboration. What is missing is both a substantive commitment to affordable housing and a mechanism to represent this commitment.<sup>12</sup> Development agreements, properly crafted, can provide the perfect mechanism to solve these problems. An inclusionary affordable housing requirement within development agreements is the appropriate strategy to effectuate this commitment.

This inclusionary affordable housing proposal, similar to traditional inclusionary zoning measures, would require local developers to include a set number of affordable housing units within new residential developments created under development agreements.<sup>13</sup> Development agreements are an appropriate place to focus affordable housing strategies for four reasons.

First, jurisdictions nationwide, including Las Vegas, increasingly rely on development agreements to create new residential communities as well as communities enjoying a mix of residential and commercial uses. Development agreements provide a flexible alternative to the more traditional, rigid land use approval process.<sup>14</sup>

Second, bilateral discussions between developers and local governments over development agreement terms create a need for specific affordable housing terms to guide and limit negotiations. Developers and local governments would be required to incorporate affordable housing terms within development plans in return for the land use flexibility offered by development agreements.<sup>15</sup>

Third, structural barriers in the land use approval process often limit effective community advocacy for affordable housing. To the extent local governments occupy the role of mediator within the development agreement process, it is an opportunity for local

---

11. Southern Nevada Public Land Management Act of 1998, Pub. L. No. 105-263, 112 Stat. 2343.

12. I am indebted to conversations with Nestor Davidson for sharpening this insight.

13. For examples of inclusionary housing programs, see *infra* Part II.B.

14. See *infra* Part III.B.1.

15. See *infra* Part III.B.2.

governments to include affordable housing considerations when community groups are unable to advance a successful affordable housing argument on their own.<sup>16</sup>

Fourth, because development agreements are typically used to negotiate public and private provisions of infrastructure to support a new community, development agreements provide an opportunity to view adequate affordable housing as an equivalent infrastructure concern.<sup>17</sup>

Las Vegas residents share many commonalities in their views on land use policy with urban residents nationwide. Las Vegas residents, like those in other cities, exhibit the “Not In My Back Yard” mentality (“NIMBYism”) or resistance to nearby land uses perceived as unfavorable to existing property uses and values.<sup>18</sup> Las Vegas residents are also, unsurprisingly, resistant to new forms and greater levels of general taxation. In other ways, the Las Vegas metropolitan area is unusual. The area has experienced a significant population explosion in the last ten to fifteen years.<sup>19</sup> After 2001, this growth was accompanied by a public land auction process under SNPLMA.<sup>20</sup> This population growth, and the area’s land use attempts to accommodate it, created an affordable housing problem that persists and shows little sign of abating.

Las Vegas also enjoys demographic and geographic features that support an analysis of inclusionary and affordable housing. A relatively small number of local government entities comprise the Las Vegas region (compared to more than 500 local jurisdictions in a state like New Jersey), suggesting a realistic opportunity for affordable housing collaboration.<sup>21</sup> These jurisdictions currently

---

16. See *infra* Part III.B.3.

17. See *infra* Part III.B.4.

18. See Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 78 (2002); Kevin Jackson, *Attitudes, Values and Community Acceptance of Affordable Housing*, in NAT’L LOW INCOME HOUS. COAL., THE NIMBY REPORT, GETTING TO YIMBY: LESSONS IN YES IN MY BACKYARD 9, 10-12 (2003) (discussing strategies for minimizing community opposition to affordable housing).

19. Nancy Kubasek, *Perspectives on the Southern Nevada Public Land Management Act*, 32 REAL EST. L.J. 168, 172 (2003) (describing Las Vegas as a “rapidly growing area” with “burgeoning infrastructure needs”).

20. Southern Nevada Public Land Management Act of 1998, Pub. L. No. 105-263, 112 Stat. 2343.

21. At the southern edge of the region, Boulder City employs a strict growth control policy limiting the number of development permits issued each year. The Official Web Site of Boulder City, Nevada: About Us <http://www.bcnv.org/aboutus.html> (last visited Apr. 24, 2007). This policy necessarily contributes to a smaller population in Boulder City, and may lead to increasing friction in the future among the jurisdictions. For the moment,

participate in voluntary regional planning efforts through the Southern Nevada Regional Planning Coalition (“SNRPC”).<sup>22</sup> Although this regional planning body lacks meaningful enforcement powers, it allows local governments to regularly cooperate and coordinate overlapping land use concerns such as managing growth and creating policies addressing homelessness.<sup>23</sup>

Las Vegas also illustrates the possibilities for collaboration among federal, state, and local governments to provide affordable housing. In Nevada, local governments are limited to express grants of state authority.<sup>24</sup> The federal government also has a dramatic influence on the geographic footprint of the city in addition to the traditional influence of the federal government through public housing, lending requirements, and affordable housing funding opportunities. The federal government owns the land surrounding Las Vegas. As a result, Las Vegas has long been forced to include the federal government directly in its land use policy calculations, whether through SNPLMA or through negotiations to preserve endangered species like the desert tortoise.<sup>25</sup> The affordable housing question in Las Vegas will only be solved by coordinated federal, state, and local efforts. None individually has the power to affect change, and each is part of a nationwide chronicle spanning decades of missed opportunities, failed promises, and intentional harms.<sup>26</sup>

Part II of this Article describes the need for affordable housing in Las Vegas and the approaches to inclusionary housing policies in

---

Boulder City’s small size, its lack of perceived social and economic exclusiveness, and its minimal economic impact on the larger region soften sources of friction. See The Official Web Site of Boulder City, Nevada <http://www.bcnv.org/index.html> (last visited Apr. 24, 2007) (“With a population of slightly more than 15,000 people, Boulder City residents enjoy a quaint, small town atmosphere with a low crime rate and high quality police and fire services.”).

22. Ed Bolen et al., *Smart Growth: A Review of Programs State by State*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 145, 188 (2002).

23. See Southern Nevada Regional Planning Coalition, Policies, Plans and Reports, <http://www.snrpc.org/PoliciesandPlans.htm> (last visited Mar. 16, 2007).

24. Nevada is a Dillon’s rule state in which local governments can only exercise those powers stated in state enabling statutes. The opposite of Dillon’s rule jurisdictions, home rule jurisdictions, may generally exercise any power not specifically prohibited by state statute. See David Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2285 (2003).

25. See *infra* Part III.A.

26. For a treatment of the history of metropolitan growth and accompanying community conflicts, including affordable housing, see KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985).

other cities. Part III.A establishes a federal statute, SNPLMA, as a common framework that federal, state, and local entities can use to create additional affordable housing. Part III.B advances the use of development agreements to reflect a commitment to affordable housing by analyzing three conceptions of development agreements in the legal literature and showing how each conception supports a more substantive incorporation of affordable housing.

## II. AFFORDABLE HOUSING AND INCLUSIONARY HOUSING

### A. *The Need for Affordable Housing in Las Vegas*

The sheer volume of local press coverage of the scarcity of affordable housing, and attempts to address this shortfall, demonstrate the emergence and importance of affordable housing as an issue in Las Vegas.<sup>27</sup> Particular characteristics of Las Vegas contributed to an even higher escalation of housing values than the rest of the nation,<sup>28</sup> including excessive condominium construction, speculation, and rapid population growth.<sup>29</sup> Although the housing

---

27. See, e.g., Adrienne Packer, *Mobile Home Action Planned*, LAS VEGAS REV.-J., Jan. 15, 2006, at 1B (describing effect of mobile home park sales on availability of affordable housing); Timothy Pratt, *Low-Income Residents Pushed Closer to Streets: Tenants Have Until Sunday to Move Out of Moulin Rouge's Inexpensive Apartments*, LAS VEGAS SUN ONLINE, Sept. 14, 2006, <http://www.lasvegassun.com/sunbin/stories/sun/2006/sep/14/566689617.html> (describing closing of low-rent housing because of code violations); Emily Richmond, *No Home Sweet Home: New Teachers Have Trouble Affording Housing*, LAS VEGAS SUN ONLINE, Dec. 17, 2005, <http://www.lasvegassun.com/sunbin/stories/sun/2005/dec/17/519834816.html> (explaining affordable housing difficulties for new teachers and negative effects on recruitment); John L. Smith, *Affordable Housing Vanishes as Society Goes to the Dogs*, LAS VEGAS REV.-J., Oct. 3, 2006, at 1B (comparing high spending on pets to little spending on affordable housing).

28. Nevada reported the highest one-year housing appreciation rate of thirty-one percent in the first quarter of 2005. See Press Release, Office of Fed. Hous. Enter. Oversight, U.S. House Prices Continue to Rise Rapidly: OFHEO's House Price Index Shows a 12.5 Percent Increase Over the Past Year 8 (June 1, 2005), available at <http://www.ofheo.gov/media/pdf/1q05hpi.pdf>. The Office of Federal Housing Enterprise Oversight ("OFHEO") monitors the safety of the Federal Home Loan Mortgage Corporation ("Freddie Mac") and the Federal National Mortgage Association ("Fannie Mae") and publishes a quarterly report on housing values. Office of Fed. Hous. Enter. Oversight, About OFHEO, <http://www.ofheo.gov/Mission.asp> (last visited Mar. 16, 2007).

29. See Jesse M. Keenan, *Affordable Housing Policy in Miami: Inclusionary Zoning and the Median-Income Demographic*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 110, 111 (2005) (discussing impact of condominium construction on housing prices); Ngai Pindell, *Fear and Loathing: Combating*

market in Las Vegas and nationwide cooled after 2005, land prices remain high in Las Vegas in 2007.<sup>30</sup> This trend made affordable housing scarce and put greater pressure on preserving existing sources of affordable housing threatened by emerging profitable land use alternatives.<sup>31</sup>

Statistics support popular perceptions of affordable housing scarcity. The median family income in the Las Vegas valley in 2005 was approximately \$47,741.<sup>32</sup> This median income figure has climbed slightly over the last ten years from \$36,710 in 1995.<sup>33</sup> In stark contrast, the overall median home price figure has increased at a much steeper rate. In 1995, the median sales price stood at \$125,100.<sup>34</sup> This figure climbed slowly and steadily through 2003 when the median sales price was \$209,611.<sup>35</sup> Over the next two years, however, the median price rocketed upwards. In 2004, it was \$290,287 and in 2005, rose to \$309,990.<sup>36</sup> If sales figures are limited to new single-family residential housing, the median price figure climbed from \$220,163 in 2000 to \$345,130 in 2005.<sup>37</sup> These housing

---

*Speculation in Local Communities*, 39 U. MICH. J.L. REFORM 543 (2006) (proposing an anti-speculation ordinance to limit speculation and rampant housing appreciation in some communities).

30. See Hubble Smith, *Real Estate: Price of Land Jumps 78 Percent*, LAS VEGAS REV.-J.COM, Feb. 1, 2007, [http://www.reviewjournal.com/lvrj\\_home/2007/Feb-01-Thu-2007/business/12315868.html](http://www.reviewjournal.com/lvrj_home/2007/Feb-01-Thu-2007/business/12315868.html) (reporting that the average price of vacant land in the Las Vegas area was up seventy-eight percent from a year ago due to "speculation, increasing development densities and relatively low interest rates").

31. See, e.g., J. Craig Anderson, *Sun Sets on Mobile Homes: Sunrise Resident Needs New Place for Twilight Years*, LAS VEGAS SUN ONLINE, Feb. 8, 2006, <http://www.lasvegassun.com/sunbin/stories/sun/2006/feb/08/566636270.html> (discussing mobile home closures); Packer, *supra* note 27, at 1B (discussing a proposed mobile home conversion moratorium to study effect on affordable housing availability); Hubble Smith, *Detrimental to Rental Health*, LAS VEGAS REV.-J., Dec. 6, 2005, at 1D (discussing a proposed condominium conversion moratorium in Las Vegas and challenges to apartment developers to find affordable land). Clark County ultimately did not enact a moratorium on mobile home park closures, opting instead to address displaced residents' concerns on an individual basis. See Adrienne Packer, *Parks' Investors Get Break*, LAS VEGAS REV.-J., Feb. 9, 2006, at 1B (discussing the moratorium's initial postponement).

32. RESTREPO CONSULTING GROUP LLC, SOUTHERN NEVADA WORKFORCE HOUSING STUDY, at IV-15 (2006), available at <http://www.co.clark.nv.us/FINANCE/crm/PDF/FINALSNWFHS.pdf>.

33. *Id.*

34. *Id.* at IV-16.

35. *Id.*

36. *Id.*

37. *Id.*

figures show how housing prices have significantly outpaced increases in family income.

Much of the increase in housing prices has been due to an increase in land costs. Developers have purchased six very large parcels through Bureau of Land Management ("BLM") sales since the beginning of the auction program in 1998.<sup>38</sup> These parcels have been, or will soon be, developed into master-planned communities. Each large parcel purchase has been accompanied by a substantial increase in land prices.<sup>39</sup> In May 2001, 1905 acres sold for \$24,776 an acre and were developed into the Aliante community.<sup>40</sup> Subsequent sales in 2005 were \$298,095 per acre.<sup>41</sup>

The affordable housing problem in Las Vegas accompanied the housing boom between 2002 and 2005. At the same time, thousands of acres of additional land became available for residential development through public auctions under SNPLMA.<sup>42</sup> Contrary to conventional supply and demand analysis, this additional supply of land did little to temper rising land and housing prices. The city's expanding supply of housing did not prevent Las Vegas from becoming a leading national example of rising housing prices.

Serious attempts to develop affordable housing during this period were unsuccessful.<sup>43</sup> One jurisdiction's short-lived attempt to

---

38. See discussion *infra* notes 132-36 and accompanying text (regarding the auction process).

39. See Jennifer Shubinski, *Prices Could Level Off at Federal Land Auction*, LAS VEGAS SUN ONLINE, Nov. 15, 2005, <http://www.lasvegassun.com/sunbin/stories/sun/2005/nov/15/519665832.html>. These master planned communities have attractive names including Aliante, Mountain's Edge, Providence, and Inspirada. Dan Kulin, *Kyle Gateway to Grow: 3,000 More Homes Planned for Focus Project*, LAS VEGAS SUN ONLINE, Feb. 7, 2006, <http://www.lasvegassun.com/sunbin/stories/sun/2006/feb/07/566647872.html>.

40. Shubinski, *supra* note 39.

41. Jennifer Shubinski, *BLM Land Auction Draws High Prices: Results May Confirm Confidence in Market*, in BUS. LAS VEGAS ONLINE, Nov. 19-24, 2005, <http://www.inbusinesslasvegas.com/2005/11/18/story3.html>.

42. Southern Nevada Public Land Management Act of 1998, Pub. L. No. 105-263, 112 Stat. 2343.

43. Three formal, sustained public efforts have addressed affordable housing concerns specifically or growth concerns generally. First, Clark County initiated a Growth Task Force to study growth issues affecting the Las Vegas valley and make recommendations to the Clark County Commissioners in four areas: urban design; natural resource conservation; facility adequacy, timing, and planning; and coordinating and integrating processes, plans, and functional assignments. CLARK COUNTY COMMUNITY GROWTH TASK FORCE REPORT 87-99 (2005), available at [http://www.co.clark.nv.us/Administrative\\_services/GeneralAdmin-SpecialProjects/SpecialProjects/Growth%20Task%20Force%20Report%20\(Final\).pdf](http://www.co.clark.nv.us/Administrative_services/GeneralAdmin-SpecialProjects/SpecialProjects/Growth%20Task%20Force%20Report%20(Final).pdf). Under urban design, the task force made several

impose inclusionary housing requirements on new residential housing was publicly and emphatically rebuked by developers.<sup>44</sup> Local jurisdictions continue to plan future strategies, and state legislators in the biennial legislative session will debate and pass measures attempting to address the issue.<sup>45</sup> If history is any guide, however, new laws will focus more on planning than requiring specific, substantive affordable housing outcomes. Considering the extensive planning laws and local government practices that have existed over the last five years, it is doubtful that merely enacting better planning laws will improve affordable housing outcomes locally.<sup>46</sup> The Las Vegas experience with affordable housing

---

recommendations addressing affordable housing including streamlining the regulatory process, establishing a land or housing trust, retaining a percentage of Bureau of Land Management (“BLM”) land from auction for affordable housing purposes, requiring jurisdictions to provide a minimum level of designated land for affordable and attainable housing, and studying the impact of speculation on sustainable growth. *Id.* at 87-89.

Following the recommendations of the Growth Task Force, the Southern Nevada Regional Planning Coalition, a planning group comprised of local government representatives, created a Workforce Housing Subcommittee to study affordable and attainable housing in greater detail. This effort is ongoing. The Clark County School District sponsored a third effort, a day-long symposium to spearhead a longer conversation toward finding solutions to the affordable housing problem, particularly for teachers. *See* WORKFORCE HOUSING IN SOUTHERN NEVADA: A SPRINGBOARD TO ACTION (2006), available at <http://www.homemeansnv.com/register.cfm>. Clark County has the fifth largest school district in the country, and recruiting teachers to serve an expanding student population was becoming increasingly difficult as housing affordability lessened. Clark County Sch. Dist. Human Res. Div., Alternative Routes to Licensure Program Overview (Sept. 24, 2006), <http://www.ccsd.net/jobs/LLParl.htm>; *see also* Antonio Planas, *Clark County School District Recruits Teachers in Philippines*, LAS VEGAS REV.-J.COM, Mar. 28, 2005, [http://www.reviewjournal.com/lvrj\\_home/2005/Mar-28-Mon-2005/news/26153393.html](http://www.reviewjournal.com/lvrj_home/2005/Mar-28-Mon-2005/news/26153393.html) (recognizing the affordable housing shortage as a deterrent for teachers).

44. *See* discussion *infra* Part II.B.

45. The Nevada legislature meets every other year for approximately four months between February and June.

46. Nevada statutes require local governments to regulate land uses taking into account “[t]he availability of and need for affordable housing in the community.” NEV. REV. STAT. ANN. § 278.020(2)(b) (LexisNexis 2002). Additionally, cities in the Las Vegas valley must create a master plan that may include, as appropriate, eighteen detailed planning elements, including a housing element. § 278.160(1)(a)-(r). This housing element must include:

- (1) An inventory of housing conditions, needs and plans and procedures for improving housing standards and for providing adequate housing.
- (2) An inventory of affordable housing in the community.
- (3) An analysis of the demographic characteristics of the community.
- (4) A determination of the present and prospective need for affordable housing in the community.
- (5) An analysis of any

planning provides a lesson for other cities on the limits of the effectiveness of planning laws to create affordable housing and supports the call for more substantive provisions to instantiate a commitment to affordable housing.

*B. The Possibilities of Inclusionary Housing Programs*

Inclusionary housing programs refer generally to a range of housing policies that encourage or mandate the incorporation of affordable housing as a component of development.<sup>47</sup> Related or complimentary affordable housing strategies include fair share requirements,<sup>48</sup> zoning override statutes,<sup>49</sup> developer special remedies,<sup>50</sup> regulatory exemptions,<sup>51</sup> and housing finance

---

impediments to the development of affordable housing and the development of policies to mitigate those impediments. (6) An analysis of the characteristics of the land that is the most appropriate for the construction of affordable housing. (7) An analysis of the needs and appropriate methods for the construction of affordable housing or the conversion or rehabilitation of existing housing to affordable housing. (8) A plan for maintaining and developing affordable housing to meet the housing needs of the community.

§ 278.160(1)(e). Lastly, land use regulations must be “in accordance with” the master plan and designed “[t]o ensure the development of an adequate supply of housing for the community, including the development of affordable housing.” NEV. REV. STAT. ANN. § 278.250(2)(l) (LexisNexis Supp. 2005).

47. For discussions of inclusionary zoning, see Nico Calavita et al., *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 HOUSING POLY DEBATE 109 (1997); Laura Padilla, *Reflections on Inclusionary Zoning and a Renewed Look at Its Viability*, 23 HOFSTRA L. REV. 539 (1995); Peter Salsich, *State and Local Regulation Promoting Affordable Housing*, in IGLESIAS & LENTO, *supra* note 1, at 89-94. Inclusionary zoning is subject to fierce political and social debate. See, e.g., Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23 (1996); Robert Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167 (1981); Benjamin Powell & Edward Stringham, *“The Economics of Inclusionary Zoning Reclaimed”: How Effective are Price Controls?*, 33 FLA. ST. U. L. REV. 471 (2005).

48. For a discussion of California and New Jersey statutes, see *infra* notes 57-72 and accompanying text.

49. Zoning override statutes allow developers to challenge zoning decisions denying a project containing affordable housing administratively or in court. See Peter Salsich, *State and Local Regulation Promoting Affordable Housing*, in IGLESIAS & LENTO, *supra* note 1, at 73, 74-87 (discussing statutes in Massachusetts, Rhode Island, Illinois, California, and Connecticut).

50. See discussion of *Mount Laurel* *infra* note 70.

51. For example, developments that include affordable housing could be exempt from state environmental review or impact fees. See, e.g., CAL. PUB. RES. CODE § 21159.23 (Deering Supp. 2007) (exempting affordable housing developments below one hundred units from the California Environmental Quality Act (“CEQA”)); GA. CODE ANN. § 36-71-4(1) (2006) (exempting certain

strategies.<sup>52</sup> Cities within the Las Vegas valley have adopted some of these incentive strategies,<sup>53</sup> but they have not embraced inclusionary housing measures. Although cities and counties across the United States employ versions of inclusionary housing programs, most discussion focuses on programs in Maryland, California, and New Jersey.<sup>54</sup> A brief examination of programs illustrates how inclusionary housing could be successful in Las Vegas.

Las Vegas could make some minimum number of affordable housing units a mandatory component of communities negotiated through development agreements. Montgomery County, Maryland, has employed a similar, well-known inclusionary housing program since 1974. The Moderately Priced Development Unit (“MPDU”) ordinance requires subdivisions and high-rise dwellings over a certain size to include a minimum amount of affordable housing.<sup>55</sup> It

---

affordable housing development from development impact fees in Georgia).

52. See, e.g., Rick Judd & Barbara E. Kautz, *Local Government Financing Powers and Sources of Funding*, in IGLESIAS & LENTO, *supra* note 1, at 287 (describing tax set-asides, linkage and fee programs, land transfers, bonds, and fee waivers); Rochelle E. Lento, *Federal Sources of Financing*, in IGLESIAS & LENTO, *supra* note 1, at 215 (discussing the low income housing tax credit program, HOME, the Community Development Block Grant Program, bond financing, and other federal programs); Peter Salsich, *State Sources of Housing Finance*, in IGLESIAS & LENTO, *supra* note 1, at 259 (describing bonds, tax credit programs, housing trust funds, and tax financing).

53. Some city and county governments amended their zoning codes to facilitate the construction of accessory apartments, which are smaller dwellings attached to single-family homes providing a potential source of affordable rental or owner-occupied housing. See, e.g., CLARK COUNTY, NEV. CODE § 3433 (2006) (amending zoning code to permit accessory apartments as an accessory use in single family residential districts). The City of Henderson is beginning to use density bonuses to promote affordable housing. See Derek Olson, *Builder Promises Attainable Housing*, S. VALLEY NEWS, Feb. 1-7, 2007, at A1 (discussing the first attainable housing project by a new home builder in Henderson).

54. Whether a local inclusionary zoning measure is legal or not often depends on the state enabling statute or the existence of conflicting state laws. For example, the Colorado Supreme Court struck down an inclusionary zoning measure in *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 35 (Colo. 2000). The court found that the measure conflicted with a state anti-rent control statute. The Virginia Supreme Court invalidated an inclusionary zoning measure explaining that the inclusionary zoning program constituted socio-economic zoning and was beyond the zoning power delegated to local governments. *Bd. of Supervisors v. DeGroff Enters.*, 198 S.E.2d 600, 602 (Va. 1973). Nevada statutes enable local governments to adopt inclusionary programs. NEV. REV. STAT. ANN. § 278.250(4) (West 2005).

55. MONTGOMERY COUNTY, MD. DEP’T OF HOUS. & CMTY. AFFAIRS, MODERATELY PRICED DWELLING UNIT (MPDU) PROGRAM, CALCULATING RENTAL

has produced over eight thousand for-sale units and over three thousand rental units since its inception.<sup>56</sup>

Inclusionary housing provisions within development agreements could be prompted by state planning requirements as observed in California.<sup>57</sup> In California, local jurisdictions must prepare General Plans detailing, in part, a jurisdiction's capacity and efforts toward accommodating sufficient affordable housing units to meet its need.<sup>58</sup> One study found that inclusionary housing programs did not discourage overall housing production in jurisdictions containing these programs.<sup>59</sup> California jurisdictions also are subject to an affordable housing fair share planning requirement which is laid out in extensive detail in the statutory scheme.<sup>60</sup> This planning requirement, however, may focus more heavily on whether municipalities' housing elements comply with statutory requirements rather than whether sufficient affordable housing is being produced.<sup>61</sup>

---

RATES FOR MPDUS (Dec. 2005), available at [http://www.montgomerycountymd.gov/content/dhca/housing/housing\\_P/mpdu/pdf/rental\\_rates\\_for\\_mpdus\\_explained.pdf](http://www.montgomerycountymd.gov/content/dhca/housing/housing_P/mpdu/pdf/rental_rates_for_mpdus_explained.pdf); Salsich, *supra* note 47, at 93.

56. Montgomery County, Md. Dep't of Hous. and Cmty. Affairs, Number of MPDUs Produced Since 1976, [http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing\\_P/mpdu/Number\\_of\\_MPDUs\\_Produced.asp](http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_P/mpdu/Number_of_MPDUs_Produced.asp) (last visited Mar. 16, 2007). Additionally, public housing authorities in Montgomery County, Maryland and Fairfax, Virginia are able to purchase a percentage of units created under the inclusionary housing program to add to their housing stock and to increase the subsidy amount so that even lower income residents can afford the unit. POLICYLINK, EXPANDING HOUSING OPPORTUNITY IN WASHINGTON, DC: THE CASE FOR INCLUSIONARY ZONING 30 (2003).

57. See, e.g., CAL. GOV'T CODE §§ 65302(c), 65583 (Deering 1987).

58. CALIFORNIA COALITION FOR RURAL HOUSING, INCLUSIONARY HOUSING IN CALIFORNIA: 30 YEARS OF INNOVATION 2, 8 (2003), available at [http://www.nonprophousing.org/knowledgebank/publications/Inclusionary\\_Housing\\_CA\\_30years.pdf](http://www.nonprophousing.org/knowledgebank/publications/Inclusionary_Housing_CA_30years.pdf) [hereinafter CALIFORNIA COALITION].

59. *Id.* at 22. Jurisdictions whose programs created the most affordable housing also experienced a relatively higher population growth than other jurisdictions producing lower amounts of affordable housing through inclusionary programs. *Id.*

60. CAL. GOV'T CODE §§ 65580-65589.8; see also Ngai Pindell, *Planning for Housing Requirements*, in IGLESIAS & LENTO, *supra* note 1, at 8-11 (describing the operation of California's affordable housing planning laws).

61. Calavita et al., *supra* note 47, at 118. For additional critiques of the California fair share planning requirements, see Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35 (1993) and Brian Augusta, Comment, *Building Housing from the Ground Up: Strengthening California Law to Ensure Adequate Locations for Affordable Housing*, 39 SANTA CLARA L. REV. 503 (1999).

California's local jurisdictions provide inclusionary housing models that could work well in Las Vegas. California has the most inclusionary housing programs in the country with over one hundred jurisdictions adopting a form of inclusionary housing practice.<sup>62</sup> These policies are part of a local ordinance, a component of the comprehensive planning process, or part of the permit approval process.<sup>63</sup> Developers and local governments may also record affordable housing commitments within a project's development agreement.<sup>64</sup> In a typical program, a developer will be required to set aside some percentage of units, ranging from five to twenty-five percent, for affordable housing use.<sup>65</sup> A mandatory program will require this set-aside, but will also typically grant the developer density, height, or similar concessions to ease the financial burden.<sup>66</sup> Voluntary programs will give developers similar incentives to include affordable housing within developments, but ultimately leave the decision to the developer whether or not to participate. A study by the California Coalition for Rural Housing found that only six percent of jurisdictions reported that they employed a voluntary, rather than mandatory, inclusionary housing program.<sup>67</sup> These voluntary jurisdictions did not produce a high level of affordable housing,<sup>68</sup> which is consistent with the experiences of other jurisdictions.<sup>69</sup>

Some states, most notably New Jersey, take a more comprehensive approach to implementing inclusionary housing practices. After a series of landmark New Jersey Supreme Court decisions twenty to thirty years ago,<sup>70</sup> New Jersey instituted a

---

62. CALIFORNIA COALITION, *supra* note 58, at 2, 7.

63. *Id.* at 8.

64. *See, e.g.*, Development Agreement Between City of Oakland, Redevelopment Agency of the City of Oakland, and Oakland Harbor Partners, LLC, § 4.11, Exhibit L (2006), available at <http://www.oaklandnet.com/government/ceda/revised/planningzoning/MajorProjectsSection/Development%20Agreement%20-%20FINAL%20EXECUTION%20COPY%20-%2071806.pdf>.

65. Salsich, *supra* note 47, at 90-91.

66. POLICYLINK, *supra* note 56, at 39 (listing twelve programs with incentives, including density bonuses, expedited reviews, fee waivers, and increased height allowances).

67. CALIFORNIA COALITION, *supra* note 58, at 8.

68. *Id.* at 22.

69. POLICYLINK, *supra* note 56, at 24-25 (discussing inclusionary housing programs in Cambridge, Mass., and Boulder, Colo.); *see also* Nicholas J. Brunick, *Inclusionary Housing: Proven Success in Large Cities*, ZONING PRAC., Oct. 2004, at 1 (outlining inclusionary best practices).

70. The *Mount Laurel* litigation comprised three cases: *S. Burlington County NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975), *S. Burlington*

statutory regime centered around developer inclusionary remedies and fair share affordable housing amounts calculated by a state agency, the Council on Affordable Housing (“COAH”).<sup>71</sup> Municipalities complying with COAH requirements obtain substantial protection against exclusionary claims by builders who are denied approval of developments containing affordable housing.<sup>72</sup> This regime gives local governments an incentive to plan for affordable housing and places much of the enforcement obligation on the development community.

Applying the New Jersey model to Las Vegas suggests that affordable housing might not be included in every development. A particular development might omit affordable housing provisions, but these omissions may make a local jurisdiction vulnerable to suits by other developers who wish to build affordable housing but are denied land use approval. If the inclusionary housing regime in Las Vegas allowed local governments and developers any discretion in the decision to include affordable housing in a particular development agreement, the regime would have to establish an equivalent mechanism such as individual developer suits to check abuses of this discretion. Including affordable housing within the development agreement gives local governments the chance to effectively plan for this housing rather than be subject to suits demanding the inclusion of this housing by individual developers proposing a series of unrelated projects.

Local governments in the Las Vegas metropolitan area have the statutory authority to impose similar inclusionary housing

---

*County NAACP v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983), and *Hills Dev. Co. v. Twp. of Bernard*, 510 A.2d 621 (N.J. 1986).

71. See N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 2001). COAH calculates and allocates to each jurisdiction its fair share of affordable housing. § 52:27D-307-(c)1. COAH-proposed changes to the “fair share” calculation to incorporate a “growth share” formula have been controversial. See John M. Payne, *Remedies for Affordable Housing: From Fair Share to Growth Share*, 49 LAND USE L. & ZONING DIG., June 1997, at 3; The Coalition for Affordable Housing and the Environment, <http://www.cahenj.org> (last visited Mar. 17, 2007).

Another controversial component of the program, Regional Contribution Agreements, allows municipalities to trade fair share obligations. N.J. STAT. ANN. § 52:27D-312; see also John M. Payne, *Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. 365, 367-68 (2001); STUART MECK ET AL., REGIONAL APPROACHES TO AFFORDABLE HOUSING 35-37 (2003) (explaining fair share methodology). Jurisdictions may obtain COAH review of their planning efforts to achieve these proportional share numbers by completing a housing element and fair share plan. N.J. STAT. ANN. § 52:27D-314, -320.

72. § 52:27D-317.

requirements on developers.<sup>73</sup> Inclusionary housing experiences from other states demonstrate that successful programs must establish clear numerical goals for affordable housing, create a mechanism for enforcing these goals, and acquire the political will to lead developers and communities through difficult conversations about development alternatives.

Local governments in Las Vegas have declined to impose mandatory requirements, opting instead to offer incentives to private developers to facilitate the creation of affordable housing.<sup>74</sup> The lone, and dramatic, exception to Las Vegas's inclusionary housing pattern occurred in 2003. As part of SNPLMA, BLM planned to auction 1940 acres in the city of Henderson appraised at \$250 million.<sup>75</sup> The Henderson local government announced that it would require developers to build some affordable housing on the parcel but did not announce any specific number of units or discount amounts. The November auction yielded just over \$127 million in bids on other properties in the area, but no developers bid on the 1940 acres.<sup>76</sup> The city withdrew the affordable housing provisions, and developers bid \$557 million for the same parcel six months later.<sup>77</sup> Although some of the increased price might be attributed to general appreciation in land values, the \$307 million premium for land free of affordable housing requirements was a stinging blow to local governments' affordable housing planning aspirations and a dramatic reminder of the power and influence of private development interests.

Before the summer of 2006, BLM managed the sale of public land for affordable housing under temporary provisions.<sup>78</sup> These

---

73. NEV. REV. STAT. ANN. § 278.250(4) (LexisNexis 2002) (“[T]he governing body may use any controls relating to land use or principles of zoning that the governing body determines to be socially desirable, including, without limitation, density bonuses, inclusionary zoning and minimum density zoning.”).

74. *See supra* note 53.

75. BUREAU OF LAND MGMT., NEV. STATE OFFICE, ORAL AUCTION RESULTS (Nov. 6, 2003), *available at* [http://www.nv.blm.gov/snplma/land\\_sales/pdf/past\\_sales/nov03.pdf](http://www.nv.blm.gov/snplma/land_sales/pdf/past_sales/nov03.pdf).

76. *Id.*

77. BUREAU OF LAND MGMT., NEV. STATE OFFICE, ORAL AUCTION RESULTS (June 2, 2004), *available at* [http://www.nv.blm.gov/snplma/land\\_sales/pdf/past\\_sales/jun04.pdf](http://www.nv.blm.gov/snplma/land_sales/pdf/past_sales/jun04.pdf).

78. The policy defines affordable housing as housing for populations with incomes less than eighty percent of area median income per Section 104 of the Cranston-Gonzalez National Affordable Housing Act. *See* BUREAU OF LAND MGMT., NEV. STATE OFFICE, INSTRUCTION MEMO. NO. NV-2004-044, NEVADA INTERIM GUIDANCE: POLICY AND PROCEDURES FOR AFFORDABLE HOUSING

temporary provisions, called interim guidance, were not created until six years after the initial enactment of SNPLMA in 1998 per summary language in the statute authorizing sales of land for less than market value for affordable housing.<sup>79</sup> The short provisions in the statute and the 2004 interim guidance proved unsatisfactory to local governments and private developers, as evidenced by their failure to even attempt to develop affordable housing under the guidance provisions until late 2005.<sup>80</sup> The guidance was short, did not provide a deep enough discount for lands used for affordable housing purposes,<sup>81</sup> and required developers to commit time and money to a project long before the land was officially released from the BLM.<sup>82</sup>

Responding to affordable housing pressures and ongoing requests by local governments to provide low-cost land for affordable housing,<sup>83</sup> the BLM revised its provisions governing the sale of public land for affordable housing purposes in August of 2006.<sup>84</sup> The

---

DISPOSALS 1-1 to 1-2 (2004).

79. Southern Nevada Public Land Management Act of 1998, Pub. L. No. 105-263, § 7(b), 112 Stat. 2343, 2349 (“[Federal officials] may make available . . . land in the State of Nevada at less than fair market value and under other such terms and conditions as [they] may determine for affordable housing purposes. Such lands shall be made available only to State or local governmental entities, including local public housing authorities.”).

80. In conjunction with conversations with the BLM, Clark County began planning several pilot projects in late 2005. The first project will be affordable senior rental housing on a five-acre parcel. See J. Craig Anderson, *Affordable Senior Housing Program Takes Another Step Toward Viability*, LAS VEGAS SUN ONLINE, Feb. 17, 2006, <http://www.lasvegassun.com/sunbin/stories/sun/2006/feb/17/566629835.html> (discussing recommendation that Nevada H.A.N.D., a Las Vegas affordable housing developer, be awarded the contract to construct the pilot project).

81. Rental housing projects for renters earning 40% or less of median income were eligible for a 95% discount. This discount decreased to 90% for rental projects targeted at those earning 50% or less of median income and 75% percent for rental projects targeted at those earning 60% or less of median income. Ownership projects targeted at those earning 60% or less of median income were eligible for a 95% discount, ownership projects targeted at those earning 70% or less of median income received an 85% discount, and ownership projects targeted to those earning 80% or less of median income were eligible for a 75% discount. 2004 NEVADA INTERIM GUIDANCE, *supra* note 78, at 1-6.

82. *Id.* at 1-1.

83. See Resolution of the Clark County Bd. of County Comm’rs to Bureau of Land Mgmt. (Apr. 6, 1999) (requesting that the Bureau of Land Management provide federal land for affordable housing at no cost) (on file with Clark County).

84. BUREAU OF LAND MGMT., NEV. STATE OFFICE, INSTRUCTION MEMO. NO. NV-2006-067 (2006), available at [http://www.nv.blm.gov/-snplma/affordable\\_](http://www.nv.blm.gov/-snplma/affordable_)

new provisions allow a much steeper discount from fair market value for land used for affordable housing than before. Land used for single-family or multi-family developments containing affordable housing for populations at less than sixty percent of median income is eligible for a ninety-five percent discount from fair market value.<sup>85</sup> Land used for populations between sixty and eighty percent of median income is eligible for a ninety percent discount.<sup>86</sup> The affordable housing discount only applies if half or more of the total development acreage will be used for affordable housing.<sup>87</sup> Additionally, the discount only applies to the portion of land to be used for affordable housing.<sup>88</sup> The portion of land planned for market-rate development is sold at fair market value.<sup>89</sup> Also, the BLM and the Department of Housing and Development will determine how long affordability restrictions must remain “[d]epending upon the unique circumstances of each proposal,” but projects involving ownership will likely be restricted for twenty years, and projects involving rental units will likely be restricted for forty years.<sup>90</sup>

These new BLM provisions offer new opportunities to local governments and developers for affordable housing collaboration. The deeper land discounts reflected in the new provisions make it easier to create affordable housing, and therefore easier to incorporate affordable housing within development agreements.

A promising alternative would be to incorporate inclusionary housing provisions as a federal requirement under SNPLMA rather than as a state or local requirement under planning laws. A federal inclusionary housing requirement would sidestep the focused opposition that often thwarts local inclusionary efforts, such as the City of Henderson’s 2003 plan.<sup>91</sup> A 2006 federal bill proposed, unsuccessfully, that SNPLMA auctions of county land over 200 acres must contain five percent affordable housing.<sup>92</sup> In failing to

---

housing/pdf/IM\_NV\_2006\_067.pdf.

85. BUREAU OF LAND MGMT., NEV. STATE OFFICE, NEVADA GUIDANCE: POLICY AND PROCEDURES FOR AFFORDABLE HOUSING DISPOSALS, at 6 (2006), available at [http://www.nv.blm.gov/snplma/affordable\\_housing/pdf/Nevada\\_Guidance.pdf](http://www.nv.blm.gov/snplma/affordable_housing/pdf/Nevada_Guidance.pdf).

86. *Id.*

87. *Id.* at 3.

88. *Id.*

89. *Id.* at 6. Two illustrations in the guidance provide examples of discount calculations. *Id.*

90. *Id.* at 7.

91. See *supra* notes 74-77 and accompanying text.

92. This bill was known as the White Pine County Land Bill. S. 3772, 109th Cong. § 804 (2006). The affordable housing provision of the bill was deleted during the congressional approval process. Steve Tetreault & Keith

include affordable housing requirements in the 2006 bill, the federal government missed an opportunity to claim some modest progress towards meeting the housing goals articulated in the 1949 Housing Act. Considering the current extent of local-federal collaboration in Las Vegas, the inclusionary housing requirements in the federal bill might have created a new affordable housing model for other cities to emulate. As Las Vegas continues to barrel outward, converting thousands more desert acres to private residential communities, no sustained mechanisms exist to ensure that affordable housing is built or integrated within new developments.

### III. FEDERAL, STATE, AND LOCAL COLLABORATIONS IN LAS VEGAS

#### A. *Federal-Local Affordable Housing Collaborations*

Policymakers and scholars have long debated the potential for conflict and collaboration between federal and local land use decisionmakers.<sup>93</sup> Congressional lawmakers have unsuccessfully proposed national land use regimes advocating increased planning and resource sharing between state and federal agencies.<sup>94</sup> Federal programs have provided significant financial resources for urban planning generally<sup>95</sup> and remain a significant influence on local planning for affordable housing through Consolidated Plan

---

Rogers, *New Wilderness Areas Envisioned: White Pine County Land Bill Advances*, LAS VEGAS REV.-J.COM, Dec. 9, 2006, [http://www.reviewjournal.com/lvrj\\_home/2006/Dec-09-Sat-2006/news/11326326.html](http://www.reviewjournal.com/lvrj_home/2006/Dec-09-Sat-2006/news/11326326.html). The bill was incorporated within the Tax Relief and Health Care Act of 2006, which President Bush later signed into law. Press Release, White House, President Bush Signs the Tax Relief and Health Care Act of 2006 (Dec. 20, 2006), available at <http://www.whitehouse.gov/news/releases/2006/12/20061220-2.html>.

93. See, e.g., Otto J. Hetzel, *Asserted Federal Devolution of Public Housing Policy and Administration: Myth or Reality*, 2000 WASH. U. J.L. & POL'Y 415 (discussing the federalism implications of local governments' control over federally funded public housing programs); Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, WASH. U. J.L. & POL'Y, 2000, at 445 (concluding that no truly national land use planning program exists in the United States).

94. See John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform*, 30 HARV. ENVTL. L. REV. 1, 20-21 (2006) (describing the failed national Land Use Policy and Planning Assistance Act in 1970s, attacked as "federal zoning," as the last attempt at "a comprehensive approach to ordering the nation's land use system").

95. The federal 701 plan provided money to local governments for comprehensive planning. Housing Act of 1954, Pub. L. No. 83-560 § 701, 68 Stat. 590, 640 (repealed 1981); see also Nolon, *supra* note 94, at 19 (discussing the Act).

requirements.<sup>96</sup> Commentators have proposed model federal statutes to combat local exclusionary zoning.<sup>97</sup> Public housing, a well-known federal housing program, has had a significant impact on the local landscape historically<sup>98</sup> and in recent years as older projects are renovated in local communities across the country through the HOPE VI program.<sup>99</sup> But urban issues, including affordable housing, will not be solved unilaterally by either federal or local government intervention. Instead, both levels must work together.<sup>100</sup>

Although located many miles from Washington, D.C., the federal influence on Las Vegas is omnipresent and inordinate. The city is surrounded by major land uses governed by federal laws. Bold mountains within the Red Rock National Conservation Area sit on the city's western border. Nellis Air Force Base, a major base of operations for Predator unmanned drones flying in Iraq, lies directly to the northeast. Yucca Mountain, the proposed future repository for the nation's nuclear waste, lies a mere ninety miles to the northwest.

Federal environmental laws play a significant role in Las Vegas land use. Besides the array of water and air regulations,<sup>101</sup> local

---

96. The Consolidated Plan requires local jurisdictions that receive money under certain federal programs to plan for affordable housing by analyzing the local housing market, examining barriers to affordable housing, and developing strategies to create more affordable housing. 24 C.F.R. §§ 91.210-220 (2006). For more about the Consolidated Plan and its local planning requirements, see U.S. DEP'T OF HOUS. & URBAN DEV. OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, 1 FAIR HOUSING PLANNING GUIDE (1996) (providing information regarding fulfilling the requirements of the Consolidated Plan); Ed Gramlich, *Consolidated Plan and Community Development Block Grant Advocacy*, 32 CLEARINGHOUSE REV. 173, 174 (1998); Ngai Pindell, *Planning for Housing Requirements*, in IGLESIAS & LENTO, *supra* note 1, at 31-38.

97. Charles E. Daye, *Whither "Fair" Housing: Meditations on Wrong Paradigms, Ambivalent Answers, and a Legislative Proposal*, 2000 WASH. U. J.L. & POL'Y 241, 273-78.

98. See, e.g., LAWRENCE M. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION* (1968) (tracing the history of federal housing reform efforts).

99. See Ngai Pindell, *Is There Hope for HOPE VI? Community Economic Development and Localism*, 35 CONN. L. REV. 385 (2003) (examining the effects of HOPE VI on economic and racial segregation).

100. Peter W. Salsich, Jr., *Saving Our Cities: What Role Should the Federal Government Play?*, 36 URB. LAW. 475 (2004).

101. See, e.g., Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 (2000); Clean Air Act, 42 U.S.C. §§ 7401-7671(q) (2000). Moreover, some development projects require an environmental impact statement under the National Environmental Policy Act. See discussion *infra* notes 122-29 and accompanying

development is affected by the Endangered Species Act ("ESA").<sup>102</sup> The Clark County Multiple Species Habitat Conservation Plan ("MSHCP"),<sup>103</sup> negotiated in the shadow of litigation under the ESA, is a long-term compromise between environmentalists on one side and developers on the other, balancing the preservation of the desert tortoise habitat with the urban growth demands of a rapidly growing Las Vegas area.<sup>104</sup> The MSHCP employs a permit system limiting the amount of new land on which developers can build without designating other territory as protected tortoise habitat.<sup>105</sup> The MSHCP caps the total amount of land that can be permitted, or developed, thereby limiting local growth.<sup>106</sup> In these ways, Las Vegas officials and developers are accustomed to collaborating with federal agencies to achieve local land use goals. SNPLMA reinforces this long-standing interrelationship.

### 1. SNPLMA Statutory Provisions and Implementation

In contrast to the general approach of the federal government to maintain the nation's public lands, SNPLMA is designed to facilitate the sale of public lands to private developers in large part to accommodate the massive population growth of the Las Vegas metropolitan area.<sup>107</sup> Las Vegas's experience under SNPLMA holds lessons for other cities. It is in part an instructive lesson in collaborative planning. It is also a lesson in missed opportunities and the limits of planning for affordable housing.

The disposal of public lands in Las Vegas before 1998 was governed chiefly by the Federal Land Policy and Management Act of 1976 ("FLPMA").<sup>108</sup> FLPMA expresses the modern federal policy of managing and conserving public lands.<sup>109</sup> Both land sales and land

---

text.

102. 16 U.S.C. § 1533 (2000).

103. CLARK COUNTY DEPT' OF COMPREHENSIVE PLANNING, CLARK COUNTY COMPREHENSIVE PLAN 14 (1996) [hereinafter CLARK COUNTY COMPREHENSIVE PLAN].

104. See TIMOTHY BEATLEY, HABITAT CONSERVATION PLANNING: ENDANGERED SPECIES AND URBAN GROWTH 146-59 (1994); E. Andrew Long, *Two Prongs of Public Interest Lawyering Under the Endangered Species Act: Building a Cooperative Strategy from Litigation and Collaborative Efforts*, 35 ENVTL. L. REP. 10,690 (2005).

105. CLARK COUNTY COMPREHENSIVE PLAN, *supra* note 103, at 14.

106. *Id.*

107. See Kubasek, *supra* note 6, at 169-71; Melanie Tang, *SNPLMA, FLTFA, and the Future of Public Land Exchanges*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 55 (2002); Vaskov, *supra* note 6, at 79.

108. 43 U.S.C. §§ 1701-1785 (2000).

109. See Tang, *supra* note 107, at 57-58 (describing reasons for enactment of

exchanges are available under the Act.<sup>110</sup> The disadvantage of land sales for Nevada, as well as the BLM, is that proceeds from these sales go to the U.S. Treasury rather than remain in Nevada.<sup>111</sup> A limited exception to this rule, the Santini-Burton Act, allowed the BLM to transfer no more than 700 acres of land to private ownership and to use the proceeds to purchase environmentally sensitive land around Lake Tahoe.<sup>112</sup> The relatively small amount of acreage transfer allowed under Santini-Burton forced public officials to use land exchanges as the primary mechanism to transfer public lands to private ownership in Nevada before SNPLMA.<sup>113</sup> In a land exchange, federal and non-federal owners voluntarily trade land parcels.<sup>114</sup> Private owners would exchange valuable land holdings they owned elsewhere in the state with the BLM in return for BLM land in the Las Vegas metropolitan area.<sup>115</sup> Given the fragmented nature of federal land ownership, it was often advantageous for the government to exchange land it owned in an urbanized area in order to consolidate public ownership of environmentally sensitive land elsewhere.<sup>116</sup> Although effective in mitigating some inefficiencies in the checkerboard pattern of federal land ownership, the land exchange process in Las Vegas raised concerns.<sup>117</sup> Critics noted a large number of deals providing disproportionate economic benefit to private parties in the exchange with little corresponding public benefit, the difficulty in appropriately valuing land to be exchanged, exchanges failing to serve the public interest, the apparently easy manipulation of the exchange process, and the length and complexity of the process.<sup>118</sup>

Two additional trends heightened the need for the enactment of a statute to regulate the transfer of land from public to private ownership. First, the BLM had difficulty managing many scattered, isolated parcels of land within urbanizing Las Vegas.<sup>119</sup> These many

---

FLPMA and its sale provisions).

110. See Vaskov, *supra* note 6, at 85, 94.

111. *Id.*

112. Santini-Burton Act of 1980, Pub. L. No. 96-586 § 1(b), 94 Stat. 3381; see also Vaskov, *supra* note 6, at 95.

113. Vaskov, *supra* note 6, at 95.

114. *Id.* at 82-86.

115. *Id.* at 94-95.

116. *Id.* at 80-82.

117. Tang, *supra* note 107, at 62-65. “[C]ritics claim that the land management agencies often get ‘snookered’ conducting exchanges, that taxpayers get a ‘bad deal,’ and that land exchanges are a ‘nightmare.’” Vaskov, *supra* note 6, at 86.

118. Vaskov, *supra* note 6, at 86-93.

119. *Id.* at 94-97.

parcels scattered across the region proved increasingly difficult to incorporate within local government land use plans.<sup>120</sup> Second, the Las Vegas region began to experience tremendous population growth.<sup>121</sup> This growth fueled a demand for land, especially vast tracts suitable for large-scale, master-planned communities at the periphery of the urban area.<sup>122</sup>

A diverse coalition of interests supported the development of SNPLMA.<sup>123</sup> For environmentalists, SNPLMA provided resources to purchase sensitive lands throughout Nevada and also to fund other environmental projects and studies.<sup>124</sup> For developers, SNPLMA facilitated the availability of acreage for private residential and commercial development. For local governments, SNPLMA facilitated better urban planning and the provision of infrastructure through its more orderly and predictable growth scheme. Instead of having to provide water and other infrastructure connections to leapfrog developments resulting from intermittent land exchanges, local governments could use the SNPLMA process to grow incrementally outward.<sup>125</sup>

Las Vegas sits within a geographic area known as the BLM Disposal Boundary. This boundary designates land that may be sold through auction under SNPLMA.<sup>126</sup> This Disposal Boundary acts as an artificial urban growth boundary limiting development to a centralized urban core. The creation and operation of the disposal boundary is primarily a federally governed process with significant

---

120. *See id.* at 96 (explaining that the process under FLPMA limited land sales to those that the Secretary of Interior deemed eligible).

121. *Id.* at 94.

122. *See* LAS VEGAS VALLEY DISPOSAL BOUNDARY ENVIRONMENTAL IMPACT STATEMENT: FINAL, at 1-1, 1-2 (2004), available at <http://www.nv.blm.gov/lvdiseis/documents.htm> [hereinafter FINAL EIS].

123. The 1998 SNPLMA legislation is not the first federal legislation to authorize the sale of public land in Nevada. *See, e.g.*, Recreation and Public Purposes Act of 1926, 43 U.S.C. §§ 869 to 869-4 (2000); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (2000); Small Tract Act of 1983, Pub. L. No. 97-465, 1983 Stat. 705; Santini-Burton Act of 1980, Pub. L. No. 96-568, 94 Stat. 3381; Airport Act of 1928, Pub. L. No. 69-712, 45 Stat. 1698. SNPLMA was amended by the Clark County Conservation of Public Land and Natural Resources Act to expand the land disposal boundary to include more acreage. Pub. L. No. 107-282, 116 Stat. 1994 (2002).

124. Some environmental groups thought even more money could be raised from the SNPLMA auction process by selling smaller parcels rather than larger parcels. Tang, *supra* note 107, at 77. Still other groups feared the effects of SNPLMA on the growth of Las Vegas, arguing that the land should remain in public hands. Kubasek, *supra* note 19, at 175.

125. *See* Kubasek, *supra* note 19, at 171.

126. FINAL EIS, *supra* note 122, at 4-3.

local government input. Local governments negotiate with federal authorities and private developers to designate public land suitable for private development.<sup>127</sup> This geographic footprint was drawn in 1998 with the inception of the Act and initially covered 51,820 acres in the Las Vegas metropolitan area,<sup>128</sup> but the Clark County Conservation of Public Land and Natural Resources Act extended the disposal boundary lines in 2002 by about 22,000 acres.<sup>129</sup> Local builders are pushing for yet another extension of the boundary in 2007,<sup>130</sup> despite a decrease in demand at recent land auctions.<sup>131</sup>

The SNPLMA process is relatively straightforward. In most instances, a private developer will contact a local government with a description of land the developer wants to nominate for sale.<sup>132</sup> Local government agencies begin an internal review of the parcel to determine whether the parcel is needed for public purposes or if infrastructure and planning goals support development of the particular parcel.<sup>133</sup> Next, the parcel undergoes a joint selection process in which affected federal, state, and local agencies evaluate the merits of sale and development.<sup>134</sup> The joint selection process permits local governments to integrate land sold under SNPLMA, particularly large acreages for master-planned communities, within existing infrastructure and land use plans.<sup>135</sup> Parcels identified for

---

127. Vaskov, *supra* note 6, at 97-98.

128. Southern Nevada Public Land Management Act of 1998, Pub. L. No. 105-263, 112 Stat. 2343.

129. Clark County Conservation of Public Land and Natural Resources Act of 2002, Pub. L. No. 107-282, 116 Stat. 1994; Changes to the 1998 SNPLMA Boundary, Pub. L. No. 107-282, *available at* <http://www.nv.blm.gov/snplma/mapspdf/comparisonmap.pdf>. An Environmental Impact Statement under NEPA accompanied the initial creation and subsequent expansion of the disposal boundary. FINAL EIS, *supra* note 122, at 4-1 to 4-67.

130. Brian Wargo, *Time Is Ripe for Debate on Land Supply Shortage*, IN BUS. LAS VEGAS, Mar. 9-15, 2007, at 17 (describing a consultant's report that only six and one-half years worth of developable land remains in Las Vegas).

131. See Brian Wargo, *Latest BLM Auction Shows Tepid Demand for Land*, IN BUS. LAS VEGAS, Mar. 16-22, 2007 at 27 (noting more modest results from land auctions in August 2006 and March 2007.)

132. IMPLEMENTATION AGREEMENT: SOUTHERN NEVADA PUBLIC LAND MANAGEMENT ACT OF 1998, PUBLIC LAW 105-263 (AS AMENDED), FEDERAL LAND TRANSACTION FACILITATION ACT OF 2000, PUBLIC LAW 106-248, at 22 (2006).

133. *Id.* at 22-23.

134. Federal, state, and local agencies reviewing nominated parcels include the State of Nevada Division of State Lands, Community College of Southern Nevada, the School District, Regional Flood Control, Regional Transportation Commission, Clark County Aviation, Las Vegas Valley Water District, U.S. Air Force, BLM, Nevada Department of Transportation, Clark County Sanitation District, Southern Nevada Water Authority, and the Library District. *Id.* at 23.

135. Vaskov, *supra* note 6, at 97-98.

disposal are published and sold at public auction every six months.<sup>136</sup>

SNPLMA allows Nevada to retain much of the economic benefit from sales. Public land sales in the Las Vegas metropolitan area have generated impressive sums of money and transferred thousands of acres to private ownership. Since 1998, just under 13,000 acres have been sold at auction, generating over \$2.7 billion.<sup>137</sup> The proceeds of these sales go to three main use categories: the State of Nevada General Education Fund receives five percent of the proceeds, the Southern Nevada Water Authority receives ten percent, and the remaining eighty-five percent goes to projects within Nevada.<sup>138</sup> The Act generally limits authorized projects to those related to recreation or environmental conservation and includes projects in the following six broad categories: (1) the development of parks, trails, and natural areas within Clark County; (2) capital improvements in public recreation areas such as the Lake Mead National Recreation Area and the Red Rock Canyon National Conservation Area; (3) conservation initiatives on federal land within Clark County; (4) the development of a multi-species habitat conservation plan; (5) environmentally sensitive land acquisitions; and (6) projects under the Lake Tahoe Restoration Act.<sup>139</sup>

The SNPLMA process is especially conducive to creating additional affordable housing. The new BLM affordable housing guidance makes it easier for local governments and developers to create affordable housing. The combination of the joint selection process to approve land for auction and the development agreement process to obtain land development approvals offers the two parties ample time to resolve inclusionary housing questions. Mandatory affordable housing terms would guide the parties' pricing and development expectations while assuring that some affordable housing will be developed.

---

136. Kubasek, *supra* note 19, at 170.

137. Bureau of Land Mgmt., Nev. State Office, Southern Nevada Public Land Management Act (SNPLMA), as Amended: Quick Facts as of Jan. 31, 2007, [http://www.blm.gov/style/medialib/blm/nv/field\\_offices/las\\_vegas\\_field\\_office/snplma/pdf/quick\\_facts.Par.47679.File.dat/SNPLMA\\_quick\\_facts\\_01\\_31\\_07.pdf](http://www.blm.gov/style/medialib/blm/nv/field_offices/las_vegas_field_office/snplma/pdf/quick_facts.Par.47679.File.dat/SNPLMA_quick_facts_01_31_07.pdf) [hereinafter SNPLMA Quick Facts].

138. Kubasek, *supra* note 6, at 170.

139. *Id.* In addition to the three primary uses of SNPLMA proceeds, the Act also authorizes the transfer of certain BLM-owned land to McCarran International Airport, the main airport in Clark County. See Vaskov, *supra* note 6, at 101 (discussing "airport environs" portion of SNPLMA).

### B. *State-Local Collaborations*

Analyzing affordable housing in the context of development agreements is a pragmatic response to recent growth patterns and the increasing use of these flexible land use tools. The Las Vegas experience suggests that existing planning laws and incentive programs show limited effectiveness in producing affordable housing units.

#### 1. *Growth and Development Agreements*

Developers have purchased the vast majority of land under SNPLMA through large acreage sales. Since the first auction in May of 2001, SNPLMA auctions have transferred 12,948.81 acres of land from public to private ownership.<sup>140</sup> There were 10,955.85 total acres sold in fifty acre parcels.<sup>141</sup> Moreover, these large parcel sales (over fifty acres) account for only thirteen of 489 total sales.<sup>142</sup> In short, eighty-seven percent of the land acreage was sold in only three percent of the total auction purchases. Only three of the fourteen large parcel sales involved parcels below 200 acres.<sup>143</sup> Seven sales involved parcels between 247 and 485 acres.<sup>144</sup> The remaining four sales involved extremely large tracts of land: three between 1700 and 2000 acres and one sale in 2005 of 2654 acres.<sup>145</sup>

In many instances, local governments and developers negotiated the terms of the development of these parcels through development agreements. Potentially eighty-seven percent of SNPLMA acreage—developed or soon to be developed as large-scale, master-planned residential communities—will be planned largely between local governments and developers behind closed doors and out of public view. The resulting development agreements memorialize months of private conversations, bargains, and negotiations between the two parties. None of these development agreements mention affordable housing considerations.

Both developers and local governments value the land use planning flexibility embodied by the development agreement. Developers obtain certainty of land use regulation over the long

---

140. SNPLMA Quick Facts, *supra* note 137

141. *Id.* The BLM website provides detailed results of each auction. Bureau of Land Mgmt., Nev. State Office, SNPLMA: Past Auctions, [http://www.blm.gov/nv/st/en/fo/lvfo/snplma/Land\\_Auctions/past\\_auctions.html](http://www.blm.gov/nv/st/en/fo/lvfo/snplma/Land_Auctions/past_auctions.html) (last visited Mar. 17, 2007) [hereinafter SNPLMA Past Auctions].

142. SNPLMA Quick Facts, *supra* note 137.

143. *See* SNPLMA Past Auctions, *supra* note 141.

144. *Id.*

145. *Id.*

period of time it can take to develop a large project.<sup>146</sup> Local government obtains developer concessions and conditions that would be difficult to obtain otherwise. The Las Vegas experience reflects the increasing use of development agreements nationwide. As communities and land use professionals exhibit a greater acceptance and tolerance for collaborative, negotiated land use arrangements, new opportunities and challenges emerge for effective affordable housing planning and creation.

Parts III.B.2-4 explore three reasons why development agreements are an appropriate land use instrument to focus affordable housing strategies. These reasons are rooted within three development agreement conceptions—a bilateral contract and regulatory view, an interest mediator view, and an exactions and privatization view. This taxonomy of development agreement descriptions attempts to capture the many, disparate critiques of development agreements and their effects. This approach, however, is not meant to be an exhaustive summary of development agreement critiques. Instead, it is meant to provide a useful summary of these critiques so that affordable housing issues can be analyzed alongside. Other commentators have explored similar groupings of development agreement critiques. For example, Alejandro Camacho cogently describes and critiques a bilateral view of land use regulation and how development agreements reinforce many of the weaknesses of this approach.<sup>147</sup> Camacho proposes a collaborative land use model as an alternative to the bilateral view.<sup>148</sup> This collaborative model has much in common with the

---

146. California was one of the earliest states to adopt a development agreement statute after the California Supreme Court limited a developer's ability to rely on a particular regulatory scheme when the developer had not yet obtained a building permit, though it had made extensive utility improvements and incurred significant costs. *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n*, 553 P.2d 546, 551 (Cal. 1976). Most development agreements provide certainty to developers by detailing a developer's ability to rely on existing land use regulations over the course of a project's construction. Absent a development agreement, developers must rely on the vested rights law in each state. See Thomas G. Pelham et al., "What Do You Mean I Can't Build?!" *A Comparative Analysis of When Property Rights Vest*, 31 URB. LAW. 901 (1999) (reporting different judicial and legislative approaches to vested rights).

147. Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment One*, 24 STAN. ENVTL. L.J. 3, 33 (2005).

148. Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment Two*, 24 STAN. ENVTL.

interest mediator view, and other commentators have noted a role for local government in mediating diverse land use interests.<sup>149</sup> Finally, the exactions and privatization view borrows equally from land use literature on exactions and local government law literature on infrastructure provisions to describe the effects of development agreements. In each of the views, development agreements are limited by a structural, procedural, or practical weakness. The inclusion of affordable housing provisions within development agreement terms responds to the strengths and weaknesses of each approach.

## 2. *Bilateral Contract and Regulatory View*

A bilateral view focuses on the flexibility that development agreements offer local governments and developers in the land use process. This view examines that flexibility largely in terms of the bilateral conversations between builders and local governments sparring over the permissible scope and character of land development. Development agreements and their cousins—contingent zoning, floating zones, and planned unit developments—allow local governments to adjust land use regulations to fit specific circumstances and better address the expectations of interested parties.<sup>150</sup> Development agreements represent a flexible alternative to local governments' traditional "top-down" or "command and control" land use authority under the zoning power.<sup>151</sup> Local governments traditionally manage land uses throughout the community by dividing the community into a number of zones permitting or prohibiting certain land uses. Although developers can seek to change zoning classifications through discrete circumstances, such as zoning amendment applications, this traditional land use narrative encourages clear, bright-line development rules that require mostly ministerial application,

---

L.J. 269, 279 (2005).

149. See, e.g., Daniel J. Curtin, Jr. & Jonathan D. Witten, *Windfalls, Wipeouts, Givings, and Takings in Dramatic Redevelopment Projects: Bargaining for Better Zoning on Density, Views, and Public Access*, 32 B.C. ENVTL. AFF. L. REV. 325 (2005) (discussing landowners' attempts to bargain for relaxed zoning requirements to better enjoy amenities created by the Boston "Big Dig" project); Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337 (2002) (advocating meaningful participation by all parties as a check on abuses).

150. Pelham, *supra* note 146, at 985-86.

151. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 5.31 (2003).

rather than encouraging a large number of discretionary, case-by-case adjudications.

Development agreements allow local governments and developers to bargain over applicable land uses outside of this rigid framework.<sup>152</sup> Compared to traditional zoning, development agreements are very lightly regulated. Development agreements are desirable to both the developer and the local government because of their extreme flexibility. Developers often attribute high housing costs to excessive local government land use regulations, and seek relief from prevailing wage rates, density requirements, and multiple permitting delays.<sup>153</sup> Development agreements, in theory and often in practice, allow developers to evade some of these costly requirements.

Instead of viewing these agreements as an incremental, evolutionary step of flexible zoning, some consider development agreements a more radical and mostly unchecked land use tool that permits limitless land use options.<sup>154</sup> The relative lack of substantive, statutory limits on the exercise of the development agreement power invites public neglect or private abuses.<sup>155</sup> One response to unbridled, bilateral discretion is to impose substantive terms to guide discussions, such as affordable housing requirements. Including mandatory, substantive affordable housing terms that decisionmakers must consider preserves both flexibility and affordable housing considerations.

Statutory language describing the required and permissive

---

152. David L. Callies & Malcolm Grant, *Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements*, 23 URB. LAW. 221, 239 (1991) (“The purpose of the agreement is to vest certain development rights in the developer in exchange for the construction and dedication of public improvements.”).

153. See U.S. DEP’T OF HOUS. & URBAN DEV., “WHY NOT IN OUR COMMUNITY?": REMOVING BARRIERS TO AFFORDABLE HOUSING (2004) (offering strategies to improve government approval processes and strategies to minimize existing residents’ objections to affordable housing); Jennifer Robison, *Developers Seeking Ways to Dodge Building Costs*, LAS VEGAS REV.-J.COM, Feb. 23, 2006, [http://www.reviewjournal.com/lvrj\\_home/2006/Feb-23-Thu-2006/business/6009736.html](http://www.reviewjournal.com/lvrj_home/2006/Feb-23-Thu-2006/business/6009736.html) (discussing creative developer approaches).

154. Camacho, *supra* note 147, at 33.

155. See, e.g., Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 1024 (1987) (“[Land use decisions under development agreements] cannot result in unjustified confiscation—public abuse—or in unwarranted giveaways—private abuse—but must seek to gain an appropriate public advantage or remedy a public necessity.”).

content of development agreements varies. At the most basic level, some states, like Nevada, require development agreements to identify “the permitted uses of the land, the density or intensity of its use, the maximum height and size of the proposed buildings and any provisions for the dedication of any portion of the land for public use.”<sup>156</sup> The Hawaii statute is similarly broad, adding that the development agreement may cover “any other matter not inconsistent with this chapter, nor prohibited by law.”<sup>157</sup> The Hawaii statute, however, notes expressly that “[p]ublic benefits derived from development agreements may include . . . affordable housing” and that “[s]uch benefits may be negotiated for in return for the vesting of developing rights for a specific period.”<sup>158</sup> The Washington statute goes one step further by including affordable housing within the definition of standards that a development agreement must include.<sup>159</sup> This affordable housing requirement refers to local jurisdictions’ planning requirements under the Washington Growth Management Act.<sup>160</sup> Several statutes expressly require development agreements to be consistent with underlying comprehensive plans.<sup>161</sup>

The language of the Washington development agreement statute embodies the language called for in this Article.<sup>162</sup> Washington benefits from an integrated planning regime connecting state, regional, and local plans to development decisions.<sup>163</sup> Other states do not enjoy similar levels of planning integration. As a result, the Washington development agreement statute reflects a broader commitment to planning for affordable housing than an approach focused more squarely on the use of development

---

156. NEV. REV. STAT. ANN. § 278.0201 (LexisNexis 2002). California has a similar provision. See CAL. GOV’T CODE § 65865.2 (Deering 1987).

157. HAW. REV. STAT. § 46-126(c) (1993).

158. *Id.* § 46-121.

159. WASH. REV. CODE ANN. § 36.70B.170(3)(e) (West 2003).

160. *Id.* §§ 36.70A.010-.902.

161. See, e.g., CAL. GOV’T CODE § 65867.5 (Deering 1987); FLA. STAT. ANN. § 163.3231 (West 2006); HAW. REV. STAT. § 46-129 (1993); NEV. REV. STAT. ANN. § 278.0203(1) (LexisNexis 2002); WASH. REV. CODE ANN. § 36.70B.170(1) (West 2003). The Florida statute also requires development agreements to ensure that public facilities are provided concurrently with new development. FLA. STAT. ANN. § 163.3227(d) (West 2006). Some commentators have argued that affordable housing should be considered a concurrent public facility to new development. See Jerry Anthony, *The Effects of Florida’s Growth Management Act on Housing Affordability*, 69 J. AM. PLAN. ASS’N 282, 291 (2003); Marc T. Smith & Ruth L. Steiner, *Affordable Housing as an Adequate Public Facility*, 36 VAL. U. L. REV. 443, 444-45 (2002).

162. See WASH. REV. CODE ANN. § 36.70B.170(3) (West 2003).

163. See, e.g., WASH. REV. CODE ANN. §§ 36.70A.100, 120 (West 2003).

agreements. An alternative approach, reflected in this Article, would be to root the provision of affordable housing in the exercise of the development agreement mechanism itself. In other words, using development agreements in the land use approval process would trigger inclusionary housing requirements. In return for the flexibility development agreements offer, local governments would be required to include affordable housing considerations in new developments.

A potential safeguard of effective affordable housing planning under development agreements could be the expertise of planners and other local government officials. If they are competent and effective negotiators, it is possible that they can accurately ascertain and protect the public interest. But local government officials are seldom omniscient or omnipotent negotiators.<sup>164</sup> These officials frequently fail to properly account for key community interests.<sup>165</sup> Moreover, repeat-player developers obtain the upper hand in negotiations.<sup>166</sup>

The consequence for affordable housing is that local governments eschew their public responsibility to address the housing needs of residents of all income levels by trading governmental oversight of the zoning approval process for private negotiations driven by private development needs.<sup>167</sup> Affordable housing goals become subordinate to traditional private development goals. Inclusionary housing requirements within development agreements ensure affordable housing issues are always in the forefront of development decisions and offer a fair check on the unlimited flexibility of this land use tool.

---

164. Camacho, *supra* note 147, at 50-53.

165. *Id.* at 49-50.

166. *Id.* at 51-53.

167. The bilateral view is similarly concerned with whether local government possesses the necessary legal authority to enter into development agreements and whether the local government has abrogated its duty to manage land uses in the public interest. If development agreements are not expressly authorized by statute, they may not be legally enforceable. See Michael B. Kent, Jr., *Forming a Tie That Binds: Development Agreements in Georgia and the Need for Legislative Clarity*, 30 ENVIRONS ENVTL. L. & POL'Y J. 1, 17-18 (2006) (discussing adoption of a development agreement statute in Georgia to ensure development agreement enforceability). This duty, arising under a municipality's police power, cannot be contracted away. In states with development agreement statutes, this concern is largely illusory. See, e.g., *Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors*, 100 Cal. Rptr. 2d 740, 747-48 (Ct. App. 2000) (finding development agreement valid in face of public concerns that government had entered into agreement with developer too early in the planning process).

### 3. *Local Government as Interest Mediator*

A second view examines the role of local governments as mediators of diverse land use interests. Under this perspective, development agreements result from negotiated, participatory land use planning. It enlarges the bilateral bargaining view to include community residents in the bargaining process. It is concerned with the effectiveness of the decisionmaking process, including its accountability to those most directly affected by land use decisions.<sup>168</sup> This model roots the legitimacy of local government land use decisionmaking in local participation as well as the possibility of local departure.<sup>169</sup> Challenges to a development decision after the decision has been made, whether made through the courts or through a voter referendum, provide some public check on developer and local government discretion.<sup>170</sup> Concentrating on

---

168. Although this Article concentrates on the land use process in the absence of judicial challenges, a slight variation of the mediation critique focuses on a court's role in negotiated settlements of land use disputes. See Richard S. Cohen et al., *Settling Land Use Litigation While Protecting the Public Interest: Whose Lawsuit Is This Anyway?*, 23 SETON HALL L. REV. 844, 844-45 (1993).

169. Camacho, *supra* note 147, at 36-42; Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 892 (1983) ("The government mediator has a stake in reaching an accommodation acceptable to all . . . and in avoiding both the pain and cost of overparticipation and the exit of valuable developers and/or community members.").

170. Land use regulations that are considered legislative are generally subject to referendum and initiative processes. Administrative land use regulations are not. The line between the two classifications is difficult to draw, and some states have enacted statutes to clarify the ambiguity with respect to development agreements. See, e.g., HAW. REV. STAT. § 46-131 (1993) (declaring development agreements to be administrative acts). The time allowed for referenda may be limited. See, e.g., CAL. ELEC. CODE § 9237 (Deering 1995) (limiting referenda to thirty days after the adoption of the ordinance). Some also express concern over land use decisions on smaller parcels of land. If these decisions are deemed legislative, courts give local governments a great deal of deference and are highly unlikely to second guess decisions. If these decisions are deemed quasi-judicial, courts display a greater willingness to scrutinize whether a local government followed applicable law in its decision. Local government bodies are much smaller than national legislative bodies, and are likely to evaluate individual land use decisions under a standard, the comprehensive plan, that is too vague or too difficult to apply. Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1170-71 (1985).

In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), the Supreme Court upheld the use of the referendum process in the provision of affordable housing in failing to find an equal protection,

the government's role in the development agreement discussions, however, focuses more squarely on the role of the government as mediator in the land use process and avoids difficult questions over the amount of deference courts should give land use decisions.<sup>171</sup>

Since the development agreement negotiation is typically conducted largely outside of public view and critique, conversations about affordable housing similarly go undiscussed publicly. A public hearing process could serve as a check on abuses but typically does not. Although local governments must adopt these agreements in a public hearing,<sup>172</sup> the hearing does not allow the public a sufficient opportunity to meaningfully comment on the agreement terms. The public hearing arises after months of conversations and negotiations between the developer and planning staff within the local government. The resulting agreement is often fifty pages or more in length, making it difficult for the average citizen to meaningfully comment, and decreasing the chances the governing body will significantly reevaluate key terms. These individual decisions are not always coordinated with an underlying comprehensive planning process.<sup>173</sup> At best, decisions that do not conform to the comprehensive planning process do not advance important planning policy. At worst, these decisions work adversely to the planning process by creating outcomes contrary to underlying planning goals.<sup>174</sup>

Increased public participation by those affected by land use decisions would provide some check against abuses of power in

---

substantive due process, or Fair Housing Act violation in the submission of the land use action to a referendum process allowed under Ohio state law. *City of Cuyahoga Falls*, 538 U.S. at 200.

171. Judicial review can be an attempt to "create legitimacy after the fact through less deferential judicial review that allows courts to second-guess local government decisions and substitute their own judgments as to the appropriateness of bargained-for agreements." Camacho, *supra* note 147, at 7.

172. See, e.g., CAL. GOV'T CODE § 65867 (Deering 1987); FLA. STAT. ANN. § 163.3184(7) (West 2006).

173. See Camacho, *supra* note 147, at 28 (citing states where development agreements do not have to be consistent with underlying plans or zoning codes). Some statutes do require development agreements to be consistent with underlying comprehensive plans. The most far-reaching of these statutes, Washington's, requires development agreements to be consistent with underlying growth management plans that local governments must adopt. Washington's growth management regime requires local governments to consider the availability of affordable housing. See WASH. REV. CODE ANN. § 36.70A.070(2) (West 2003). This requirement is echoed in the development agreement statute. § 36.70B.170.

174. See Camacho, *supra* note 147, at 53-56.

development agreements.<sup>175</sup> Greater public participation would increase the quality and accountability of the development process.<sup>176</sup> Similarly, individualized, ad hoc decisions made by an “expert” city planning staff in relative isolation do not create the most favorable results for those most affected by new development.<sup>177</sup> Greater public participation is required when fewer substantive standards exist to govern the development agreement power.<sup>178</sup> Broad and meaningful public participation requires that “those most affected by a regulatory decision [have] immediate and ongoing opportunities to represent their own interests in the planning, construction or operation of a development.”<sup>179</sup> Proposals to enhance public participation in discrete land use decisions or in the planning process, however, should be viewed with appropriate caution. Local NIMBY sentiments would have to be appropriately addressed.<sup>180</sup>

Affordable housing interests are harmed when proponents of affordable housing do not have an adequate voice when development decisions occur. By requiring development agreements to include some analysis of affordable housing considerations, local governments and developers may be forced to consult local affordable housing proponents early in the process. Alternatively, affordable housing proponents can trace housing statements within development agreements to make a more forceful case for the inclusion of affordable housing in a particular future development or across a jurisdiction.

The ongoing, closed discussions between the developer and local government in the land use approval process present an added

---

175. Camacho, *supra* note 148, at 279.

176. Although all development agreement statutes require a local government to hold at least one public hearing before adopting a development agreement, these public hearings come after substantial work has already been done on the agreement terms. The developer and the local government will have worked for months planning the terms of a development agreement before the public is formally involved.

177. Camacho, *supra* note 148, at 328-29.

178. *Id.* at 282.

179. *Id.* at 279. Camacho proposes a collaborative governance model to respond to closed discussions between local governments and developers. This model has five principal components: broad and meaningful public participation, a focus on problem solving, a view of the government planner as an active mediator of diverse community and developer interests, adaptable comprehensive plans and agreements, and creative mechanisms to encourage implementation and enforcement. *See id.* at 277-303.

180. *See generally* NAT'L LOW INCOME HOUS. COAL., *supra* note 18 (discussing strategies for minimizing community opposition to affordable housing).

difficulty. Even if formal opportunities for public input and review exist, the local government will be viewed more as a partner of the developer than as a disinterested regulator.<sup>181</sup> The close relationship between developers and local governments provides a further rationale for creating substantive affordable housing terms to guide their discussions.

A similar, but more cumbersome, method to enhance public participation in the development agreement approval process would be to employ land use mediators to resolve contested land use disputes.<sup>182</sup> Some state statutes provide for land use mediation before final approval of a land use decision.<sup>183</sup> A more focused expression of this structure is a "People's Counsel," whose duties can vary from providing information to citizens about pending land use proposals to participating as a party of record in land use proceedings as an advocate for the public interest.<sup>184</sup> While formally adding another party to the development agreement discussion could improve affordable housing outcomes, inclusionary housing provisions focus more directly on the affordable housing issue. To the extent that effective public participation in the development agreement process is difficult, substantive affordable housing terms keep community concerns about affordable housing squarely in the middle of the development agreement discussion.

#### 4. *Exactions and Privatization View*

A third approach focuses more closely on the goals and

---

181. See, e.g., Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & POL. 451, 474 (2005).

182. See generally Jonathan M. Davidson & Susan L. Trevarthen, *Land Use Mediation: Another Smart Growth Alternative*, 33 URB. LAW. 705 (2001) (providing an overview of land use mediation and several examples). States vary in mediation qualification requirements. See, e.g., Paula M. Young, *Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems That Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 OHIO ST. J. ON DISP. RESOL. 721, 864 n.706 (2006) (describing requirements to be a land use mediator in Maine).

183. See, e.g., CONN. GEN. STAT. ANN. § 8-8a (West 2001); HAW. REV. STAT. § 205-5.1(e) (2001); IDAHO CODE ANN. § 67-6510 (2006); ME. REV. STAT. ANN. tit. 5, § 3341 (2002). The American Planning Association also included model land use mediation provisions in its Growing Smart Project. See AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE § 10-504 (Stuart Meck ed., 2002); see also Nolon, *supra* note 94, at 33-34 (reporting court decisions in Hawaii and California endorsing the use of land use mediation).

184. See generally Nicole M. Lacoste, *A Growing Resource: People's Counsel*, MD. B.J., Sept.-Oct. 2006, at 24 (exploring diverse duties of the "People's Counsel" position across Maryland).

outcomes of the development agreement process. Instead of focusing on development agreements as flexible land use devices or as the result of negotiations between developers and local government bodies, this view examines development agreements within the context of urban infrastructure provision and avoiding Constitutional exactions scrutiny.<sup>185</sup>

Focusing on substantive outcomes, such as public facilities, reflects a more social vision of the city. More than an instrument avoiding takings scrutiny or mediating multiparty development concerns, the development agreement can be viewed as an affirmative tool of local governments to limit the harms to cities caused by development and to advance a broader, more community-oriented view of urban planning and urban life.

Affordable housing is not usually included in infrastructure conversations. This omission is due, in part, to typical references to infrastructure being limited to facilities provided by the government for public consumption, such as roads, water treatment, schools, and parks. However, several trends have emerged to recast this conversation. First, private parties increasingly provide infrastructure through development agreements. Second, conversations about infrastructure and growth are increasingly cast in terms of privatization. Slogans like “growth paying for growth”<sup>186</sup> imply that new communities are expected to bear most of the cost of the new infrastructure that serves them. This infrastructure is not often viewed as part of the whole community, but instead as facilities serving marginally increased needs. Third, the provision of affordable housing maintains consistent ties to the public sector. The public sector subsidizes its production and facilitates affordable housing through planning requirements. This public involvement reinforces the connection between affordable housing and other public contributions commonly viewed as community infrastructure. Similarly, to the extent that a list of local infrastructure includes significant economic development resources, then the provision of

---

185. Common exactions include developer in-kind infrastructure or monetary contributions to the local city in exchange for approval of a land use application. Courts apply more scrutiny to this application of government power because of the fear of local government overreaching. Governments may make developers contribute more than what appears equitable, or governments may ask for contributions to public projects unrelated to the new development.

186. See, e.g., Henry Brean, *Water Panel OKs Third Lake Intake*, LAS VEGAS REV.-J., May 20, 2005, at 1B; Jeremy P. Meyer, *Aurora Pursues Tax on New Homes*, DENVER POST, June 18, 2006, at 1A; see also R. Lisle Baker, *Using Special Assessments as a Tool for Smart Growth: Louisville's New Metro Government as a Potential Example*, 45 BRANDEIS L.J. 1, 4 n.13 (2006).

affordable housing for local workers should qualify for inclusion on such a list.<sup>187</sup>

The ability of local governments to extract infrastructure concessions, or exactions, from developers is limited by the Supreme Court cases of *Nollan v. California Coastal Commission*<sup>188</sup> and *Dolan v. City of Tigard*.<sup>189</sup> *Nollan* establishes that a government may only demand exactions—like schools, parks, or roads—from developers that have an “essential nexus” with a valid government goal.<sup>190</sup> For example, a residential development attracting families with children will likely create a need for increased schools and parks, but a commercial development will not create these same needs.<sup>191</sup> Both new uses may increase traffic and generate a need for more roadways.<sup>192</sup> *Dolan* establishes that the degree and extent of the exaction must be proportionate to the degree of impact of the new development.<sup>193</sup> In other words, the severity of the exaction must be proportionate to the severity of the impact of the development. A smaller residential development, for example, may not generate enough demand to justify an additional school.<sup>194</sup>

This *Nollan-Dolan* limitation has evolved into a special subsection of takings inquiries and is characterized by its heightened scrutiny.<sup>195</sup> The overarching concern is that governments will use individual land use approval processes to leverage public benefits from a developer for which the government should have to pay. This concern is heightened when applied to individual parcels and individual development decisions and somewhat lessened as government regulation is applied more generally to a broad range of developers and development decisions.

The *Nollan-Dolan* limitations on exactions have been subject to much academic commentary. Some argue that the legal limitations are an appropriate safeguard of developers’ property rights and appropriate limitations to government overreaching.<sup>196</sup> Others

---

187. See Smith & Steiner, *supra* note 161, at 444-45.

188. 483 U.S. 825 (1987).

189. 512 U.S. 374 (1994).

190. *Nollan*, 483 U.S. at 837.

191. David L. Callies & Adrienne I. Suarez, *Privatization and the Providing of Public Facilities Through Private Means*, 21 J.L. & POL. 477, 487 (2005).

192. *Id.*

193. *Dolan*, 512 U.S. at 391.

194. Callies & Suarez, *supra* note 191, at 487.

195. *Id.* at 486.

196. See, e.g., 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, 408 (2002); Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor*

believe that the *Nollan-Dolan* invocations of heightened scrutiny are misplaced and misguided attempts to limit government planning.<sup>197</sup> A recent critique would reform the *Nollan-Dolan* test to force courts to better evaluate the appropriate distribution of benefits and burdens of a particular regulation.<sup>198</sup>

Development agreements allow local governments and developers to transact for benefits and burdens outside of the reach of exactions law.<sup>199</sup> Development agreements fall beyond the reach of *Nollan-Dolan* because they are deemed voluntary agreements rather than government-imposed requirements on developments.<sup>200</sup> While this voluntariness is true in fact, it may not be true in principle. As development agreements become more and more commonplace, it is increasingly likely that developers will have fewer chances to negotiate new terms with the local government. This is not to suggest that development agreements are not effective tools for local land use planning, nor to suggest that *Nollan-Dolan* should apply to development agreements. Instead, this examination reveals an opportunity for local governments to introduce affordable housing as a substantive provision within the terms that development agreements must address given how often they are employed in growing cities like Las Vegas. The inclusion of substantive affordable housing provisions reflects a broader view of the development agreement as an instrument to more fairly allocate public and private benefits and burdens. This inclusion responds to the observation that the chief concerns reflected in *Nollan-Dolan*—namely the equitable sharing of a community's benefits and burdens—are not adequately resolved in typical, individualized negotiations over development agreement terms.<sup>201</sup> Instead, the

---

*Obtuse*, 88 COLUM. L. REV. 1630, 1650-51 (1988).

197. See, e.g., Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 475 (1991); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1302-03 (1997); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 5 (2000); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 678-81 (2004).

198. Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1570-84 (2006).

199. One commentator describes this as "extra-legal bargaining" outside of the constitutional exactions parameters. Fenster, *supra* note 197, at 665.

200. See *Leroy Land Dev. v. Tahoe Reg'l Planning Agency*, 939 F.2d 696, 698-99 (9th Cir. 1991); Patricia Grace Hammes, *Development Agreements: The Intersection of Real Estate Finance and Land Use Controls*, 23 U. BAL. L. REV. 119, 158-59 (1993).

201. Reynolds & Ball, *supra* note 181, at 474.

conversation over the allocation of these burdens and benefits merely shifts from the “public planning process” to the “offices of the municipal planning staff.”<sup>202</sup>

Traditionally, infrastructure requirements were largely financed by local, state, or federal government sources.<sup>203</sup> Recently, the funding for this infrastructure has increasingly come from private sources.<sup>204</sup> Development agreements address a wide variety of infrastructure issues. Developers may provide streets, sewer systems, police stations, parks, schools, fire stations, affordable housing, and even access rights to private property for limited free speech activities.<sup>205</sup> Today, the infrastructure debate is couched in terms of “growth paying for growth.”<sup>206</sup> A widely held belief is that the negative effects of growth should be paid for by those developments contributing to it.<sup>207</sup> This perception has fueled the modern emphasis on developer exactions.

---

202. *Id.*

203. For a comprehensive discussion of the connection between infrastructure requirements and land use regulation techniques, see Alan A. Altshuler & Jose A. Gomez-Ibanez, *REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS* (1993). These local government bodies employ an array of strategies “almost dizzying in their complexity, their variety, and in their sheer volume.” Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay For” Model of Local Government*, 56 *FLA. L. REV.* 373, 378 (2004).

204. Reynolds & Ball, *supra* note 181, at 463. During the era of the urban reformers, the municipal provision of infrastructure was debated in terms of a struggle between private and public control of the city. Commentators who feared the privatization of the city fought for an urban vision rooted in “liberating the city from predatory commercial interests into its own social consciousness.” DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 113 (1998). Rodgers comments on the work of Henry George, who is well-known for his idea of a single tax on land. See HENRY GEORGE, *PROGRESS AND POVERTY* 412 (Robert Schalkenbach Found. 1962) (1879); see also Stewart E. Sterk, Nollan, *Henry George, and Exactions*, 88 *COLUM. L. REV.* 1731 (1988) (discussing the connections between Henry George’s ideas and exactions).

205. Catherine Lockard, Note, *Gaining Access to Private Property: The Zoning Process and Development Agreements*, 79 *NOTRE DAME L. REV.* 765, 782-85 (2004).

206. Laurie Reynolds cautions that a public finance scheme built on exactions and assessments encourages a consumer sentiment in residents in which they ought to pay only for those services they consume. This sentiment may subvert efforts to promote regionalism and similar communal perspectives. Reynolds, *supra* note 203, at 376-77.

207. See, e.g., Deborah Rhoads, *Developer Exactions and Public Decision Making in the United States and England*, 11 *ARIZ. J. INT’L & COMP. L.* 469, 473-74 (1994).

The “growth paying for growth” scheme affects communities. Funding public services and infrastructure through tax revenue “creates a sense of community responsibility for the provision of government services and ensures that all municipal services and amenities compete against each other in the local political process for their share of general tax revenues.”<sup>208</sup> On the other hand, infrastructure provided by private, non-tax revenues reinforces a connection between the utility of the infrastructure and the use of that infrastructure by those that are paying for it.<sup>209</sup> The developer of a new, high-end residential community may not feel obliged to provide such infrastructure for the rest of the community.

The disadvantage for affordable housing under the “growth paying for growth” scheme is that later developers do not feel responsible for existing affordable housing problems. A later developer’s chief concern under this scheme is to minimize the marginal cost of a new community to the existing community. When development agreements are viewed as a means of obtaining infrastructure otherwise secured and governed by exactions law, local governments, developers, and the public are conditioned to apply philosophical approaches and restraints related to the exactions context. Therefore, in each development agreement, each party is sensitive to the potential unfairness in forcing developers to bear more than their fair share of the community’s burdens.<sup>210</sup> In this case, the burden is affordable housing. To make matters worse, existing community residents often blame new, incoming residents for exacerbating problems of housing affordability.

One proposed solution treats affordable housing as a component of an “adequate public facility” statute.<sup>211</sup> New development would not be allowed unless infrastructure adequate to service the new community is available.<sup>212</sup> Affordable housing would be included within the definition of infrastructure and calculated according to regional needs.<sup>213</sup> Including affordable housing as infrastructure within development agreement terms is a similar approach. Developers and governments would be conditioned to address affordable housing in the same way they address adequate schools

---

208. Reynolds & Ball, *supra* note 181, at 453-54.

209. See Reynolds, *supra* note 203, at 379-83. Reynolds argues that these non-tax policies reinforce a “dues mentality” in citizens that frustrates efforts to apportion burdens more broadly. *Id.* at 376.

210. See, e.g., Callies & Suarez, *supra* note 191, at 504 (applying this reasoning to the exactions context).

211. *Id.* at 456.

212. *Id.*

213. *Id.*

or adequate recreation space.

#### IV. CONCLUSION

This Article proposes inclusionary housing provisions as a pragmatic approach acknowledging that jurisdictions and builders increasingly seek and expect flexibility in developing new communities. Countering a view of affordability requirements as rigid barriers to effective development, this reform incorporates affordable housing considerations within the inherently flexible development agreement process.

The challenge for cities across the country is to integrate affordable housing planning within discrete development decisions. It is relatively easy to assess the need for affordable housing. It is harder to build developments that begin to address the need. In an innovative city like Las Vegas with sophisticated planning laws, thousands of new, developed acres have been added to the urban footprint without a corresponding amount of affordable housing. The SNPLMA process offers the framework and opportunity for local governments and developers to plan for affordable housing within development agreements. Inclusionary housing provisions, triggered by the use of development agreements, provide the mechanism to compel these parties to do so.