

**ASSESSING THE VALIDITY OF LINKING PROGRAMS:
A CASE STUDY OF DESTIN, FLORIDA'S INNOVATIVE
ATTAINABLE WORKFORCE HOUSING PROGRAM**

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I.	INTRODUCTION	337
II.	HISTORY OF IMPACT FEES AND AFFORDABLE HOUSING ..	342
	A. <i>Financing Infrastructure</i>	342
	B. <i>Inclusionary Zoning and Linkage Programs</i>	344
	C. <i>Linkage Programs in New Jersey, Massachusetts, and California</i>	346
III.	DESTIN: A CASE STUDY	348
IV.	CHALLENGES	350
	A. <i>Authority: Police Power, Home Rule, and Enabling Legislation</i>	351
	B. <i>Constitutional Grounds</i>	352
	1. Equal Protection.....	352
	2. Due Process	356
	3. Takings.....	358
	a. <i>Penn Central Approach</i>	359
	b. <i>Nollan/Dolan Standard</i>	361
	c. <i>Dual Rational Nexus Approach</i>	365
V.	CONCLUSION.....	367

I. INTRODUCTION

Housing is the largest expense for most Americans.¹ While most allocate 25% to 30% of their budget to housing, the poorest often spend closer to 50% of their income.² In fact, approximately ninety-five million Americans either live in sub-standard properties or spend more than 30% of their income on housing.³ These figures show that an increase in housing or rent prices can have a serious impact on people's lives.⁴ Unfortunately, due mainly to

* J.D., Florida State University College of Law, 2009. I would like to thank Professor J. B. Ruhl for his guidance.

1. John M. Quigly & Steven Raphael, *Is Housing Unaffordable? Why Isn't It More Affordable?*, 18 J. ECON. PERSP. 191, 191 (2004).

2. *Id.*; Larkin M. Moore, Comment, *Stranded Again: The Inadequacy of Federal Plans to Rebuild an Affordable New Orleans After Hurricane Katrina*, 27 B.C. THIRD WORLD L.J. 227, 231 (2007).

3. Moore, *supra* note 2, at 231.

4. See Quigly & Raphael, *supra* note 1, at 192. The increase in property and rent prices also impacts the economy because when people spend more money on housing, they have less money to spend elsewhere.

stagnant or declining wages accompanied by increasing housing prices,⁵ America's affordable housing problem worsened during the first half of this decade despite a period of moderate growth.⁶ Low-income Americans are also more commonly the victims of predatory lending.⁷ The poorest pay the highest fees to borrow money and are more likely to foreclose.⁸ In fact, in recent years, over two million sub-prime loans have already failed or will end in foreclosure.⁹ Additionally, the United States has suffered the consequences of numerous natural disasters, particularly the 2005 hurricanes that displaced hundreds of thousands of people.¹⁰ The poorest of these evacuees lack the means to return and rebuild,¹¹ and it appears that government recovery efforts do not include sufficient plans to that end.¹²

A lack of affordable housing also affects children. Children who do not have access to safe and affordable housing are more likely to have health problems.¹³ For example,

[a]bout 21,000 children have stunted growth attributable to the lack of stable housing; 10,000 children between the ages of 4 and 9 are hospitalized for asthma attacks each year because of cockroach infestation at home; and more than 180 children die each year in house fires attributable to faulty electrical heating and electrical equipment.¹⁴

These children are also more prone to illness, including mental illness as adults, regardless of living conditions in later years.¹⁵ Conversely, children who have access to proper affordable housing are more likely to stay in school, get better grades, and find gainful employment when they become older.¹⁶ Also, girls are less likely to have children before the age of majority.¹⁷

5. See DANILO PELLETIERE & KEITH E. WARDRIP, NAT'L LOW INCOME HOUS. COAL., HOUSING AT THE HALF: A MID-DECADE PROGRESS REPORT FROM THE 2005 AMERICAN COMMUNITY SURVEY 4-5 (2008), available at http://www.nlihc.org/doc/Mid-DecadeReport_2-19-08.pdf.

6. *Id.* at 2.

7. *Id.*

8. See Habitat for Humanity, U.S. Statistics and Research, http://www.habitat.org/how/why/us_stats_research.aspx (last visited June 13, 2009).

9. *Id.*

10. PELLETIERE & WARDRIP, *supra* note 5, at 1.

11. SUSAN J. POPKIN, MARGERY A. TURNER & MARTHA BURT, REBUILDING AFFORDABLE HOUSING IN NEW ORLEANS: THE CHALLENGE OF CREATING INCLUSIVE COMMUNITIES 1 (2006), available at http://www.urban.org/UploadedPDF/900914_affordable_housing.pdf.

12. See Moore, *supra* note 2, at 230.

13. Habitat for Humanity, *supra* note 8.

14. *Id.*

15. *Id.*

16. See *id.*

17. *Id.*

Across the country, the problem is the same. Even if employment is readily available, affordable housing may not be. For example, in the City of Destin (“Destin”), Florida, housing prices have stabilized, but they are still beyond the reach of many.¹⁸ As a result, workers either live in overcrowded conditions or put up with lengthy commutes.¹⁹ Not only do these undesirable living conditions increase traffic congestion and pollution,²⁰ they also lead to “labor shortages and absenteeism.”²¹ It is projected that such labor shortages will lessen the city’s economic attractiveness to businesses and developers.²² Tourist development is also suffering because it is dependent on a workforce that cannot afford Destin housing.²³ Continued development is partially responsible for the problem since workers are first needed to build and then to maintain and operate.²⁴

In Florida, the median income is \$54,445²⁵ per year, and the median resale price of a single family residence is \$248,400.²⁶ The national averages are slightly lower than Florida. The national median income is \$48,201,²⁷ and resale prices hover around \$225,000.²⁸ As of March 2007, the area median income (AMI) for Okaloosa County, which includes the City of Destin, was \$62,600.²⁹ The median single family resale price in Okaloosa County is \$241,100,³⁰ which appears to be in line with the rest of Florida and the country. However, the same is not true of the City of Destin. In Destin, the median price for a single family resale is \$526,803.³¹

18. See JAMES C. NICHOLAS, CITY OF DESTIN ATTAINABLE WORKFORCE HOUSING STUDY 3 (2007), available at http://www.cityofdestin.com/clientuploads/Documents/commdev/Impact_Linkage_Fees/3Destin_AFReport3.pdf.

19. *Id.* at 4. “16% of Destin employees [commute] into the county and 31% of all workers [travel] 30 minutes or more to get to work.” *Id.* at 7 (footnote omitted).

20. See Home Builders Ass’n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 62 (Ct. App. 2001).

21. NICHOLAS, *supra* note 18, at 4-5.

22. *Id.* at 3.

23. See *id.* at 5.

24. *Id.* at 3. The study shows there are also employees in Destin who produce goods and services that have housing needs. *Id.* at 20.

25. U.S. Census Bureau, Median Family Income in the Past 12 Months by Family Size, <http://www.census.gov/hhes/www/income/medincsizeandstate.html> (last visited June 13, 2009).

26. NICHOLAS, *supra* note 18, at 7 tbl.4 (citations omitted).

27. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA SMITH, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2006, at 12 (2007), available at <http://www.census.gov/prod/2007pubs/p60-233.pdf>.

28. NICHOLAS, *supra* note 18, at 7 tbl.4 (citations omitted).

29. Gerald Mucci, Toward Attainable Workforce Housing Through Legislative Incentives and Flexibility: Options and Recommendations 4 (2007) (unpublished report prepared for the City of Destin, Florida) (on file with author) (noting that according to the U.S. Department of Housing and Urban Development, the AMI had previously been \$57,800).

30. NICHOLAS, *supra* note 18, at 7 tbl.4.

31. *Id.*

This price is more than double the Florida, national, and Okaloosa County numbers. In fact, “for market forces to reinstitute affordability of the median home to the median household income, median prices would have to fall by 62%, from \$526,803 to \$198,222. Such a decline is not foreseen.”³² Adding insult to injury, much of the Destin workforce earns significantly less than the Okaloosa County AMI. For example, the annual household income of construction employees is \$45,739, which is 79% of the median.³³ Operational and maintenance workers earn slightly more with an average annual household income of \$51,937, or 83% of the Destin median.³⁴

The City of Destin, like numerous other cities in the United States, has been trying to rectify the disparity. Destin’s Community Development Director, Gerald Mucci, has suggested that Destin begin by offering developer incentives only if they will lead to sustainable, affordable housing for the workforce.³⁵ Mucci’s study shows that those with a household income between 50% and 140% of the \$62,600 median, or \$31,300 and \$87,640 respectively, will find it challenging to purchase a home in Destin without assistance.³⁶ Those in this income range can afford to pay between \$682 and \$1,990 per month in rent or purchase a primary residence between \$92,000 and \$235,000.³⁷ While there are a limited number of units below \$800 per month, rent in Destin can exceed \$2,000 per month.³⁸ Sales prices begin around \$160,000.³⁹ But similar to the rental rates, lower-priced units are in short supply with most homes priced well above \$300,000.⁴⁰ As the numbers suggest, an affordable-housing program is needed to close the difference be-

32. *Id.* at 11. While the State of Florida saw single family home values decline slightly over 3% between April 2006 and 2007, Destin’s values appear to remain steady. Florida Sales Report—April 2007, Single Family, Existing Homes, http://media.living.net/statistics/2007/April_07_Sin_Fam_Ex_Chart.pdf (last visited June 13, 2009).

33. *Id.* at 21.

34. *Id.* at 24.

35. Mucci, *supra* note 29, at 1.

36. *Id.* at 4.

37. *Id.* at 5. The rent figures do not include non-elective utilities. *Id.* at 5 n.2. With regard to the home purchase price, the study employs a 30% front-end debt-to-income (DTI) ratio, which includes non-elective utilities. *See id.* at 5. This is lower than the current permissible Federal Housing Administration (FHA) DTI ratio of 31/43. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HUD-FHA SINGLE FAMILY HOUSING, HOMEOWNERSHIP CENTER REFERENCE GUIDE 2-12 (2005), available at <http://www.hud.gov/offices/hsg/sfh/ref/sfhp2-12.cfm>. Usually, FHA ratios are higher than the ratios of conforming conventional loans, which tend to be around 28/36. Mortgage Bankers Association, Qualifying for a Mortgage, <http://www.homeloanlearningcenter.com/MortgageBasics/QualifyingforaMortgage.htm> (last visited June 13, 2009); *see also* Mucci, *supra* note 29, at 5 n.3 (discussing the program’s mortgage assumptions).

38. Mucci, *supra* note 29, at 5.

39. *Id.*

40. *Id.*

tween what the workforce can afford—based on program guidelines—and the market price.⁴¹ This contribution is called a “buy-down” and would allow the workforce the ability to live where it works.⁴² The “buy-down” may be achieved in one of two ways: direct subsidies from third party organizations created by the legislature⁴³ or through Community Land Trusts, which receive funding from a variety of sources including contributions from state and private parties.⁴⁴

Since a lack of affordable housing impacts adults, children, the economy, and the environment, this Article seeks to show that local governments can take the necessary steps to rectify the shortage without fear of legal ramifications.

Part II explores the emergence of linkage programs as a method of financing workforce housing. It explains that this type of program is gaining increased support due to tax cuts, lack of federal funding, and high home prices. This section also provides examples of various linkage programs from around the country as proof of their effectiveness.

Part III details the linkage ordinance currently pending in Destin, Florida and explains that the ordinance is suitable for a case study because of its comprehensive and flexible nature. These qualities make it more likely that the regulation will survive a challenge, because if a court is unhappy with a particular provision it may simply sever it without disturbing the rest.

Part IV uses the pending Destin ordinance to determine whether such programs are valid. It first concludes that local governments have the authority to enact linkage programs. It then argues that this type of ordinance can withstand the rational basis standard of review when challenged on equal protection and due process grounds. Next, it determines that the ordinance survives a constitutional takings analysis. Finally, it examines the applicability of the *Nollan/Dolan* standard and its consequences.

This Article concludes that if municipalities follow Destin’s example in implementing linkage programs of their own the programs will likely come out of a challenge more or less unscathed. Therefore, local governments should create these programs without fear that their efforts will be in vain.

41. *Id.* at 6, 6 n.6.

42. *Id.* at 5. On a monthly basis, it is less expensive to buy-down rent than to buy-down a mortgage. *Id.* at 6 n.5; *see also id.* at 6 (comparing rental and mortgage buy-downs).

43. Mucci, *supra* note 29, at 6.

44. *Id.* at 7. This option will better assure the sustainability of affordable housing.

II. HISTORY OF IMPACT FEES AND AFFORDABLE HOUSING

The popularity of government use of development exactions⁴⁵ to finance infrastructure is partially due to tax cuts and a reduction in federal funding. Increasing property values have further pushed municipalities to impose similar exactions to mitigate the social and environmental impacts of new development. These programs, commonly called linkage fees, come in many different forms. Several are currently in place around the country and are proving to be quite successful in mitigating the shortage of workforce housing.

A. Financing Infrastructure

Since 1926, local planning and land use regulations have been recognized as a valid use of the police power.⁴⁶ Zoning ordinances are the most common planning tool because they are likely to have an immediate effect on the community.⁴⁷ However, “zoning without planning lacks coherence and discipline in the pursuit of goals of public welfare which the whole municipal regulatory process is supposed to serve.”⁴⁸ For this reason, many jurisdictions require a comprehensive plan and believe that it is crucial to successful planning and zoning because it acts as a roadmap for local officials⁴⁹ and ensures a more controlled and consistent use of the police power.⁵⁰

Nevertheless, despite all the planning and regulation, land use is far from static. As Richard Babcock once pronounced, “The name of the zoning game is change.”⁵¹ “Change” in this context is used broadly and is meant to include everything from applications to change the zoning of a particular property to applications for the subdivision of a particular parcel in order to build. With every applicant that seeks change, the government must ensure that the request is consistent with the comprehensive plan, but also that the change is in the community’s best interest.⁵²

The financing of infrastructure, generally through development exactions, is one of the things for which local governments must plan. While there is evidence that development exactions existed

45. See *infra* p. 343 and note 61.

46. Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1154 (1955) (citing *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926)).

47. *Id.*

48. *Id.*

49. *Id.* at 1155.

50. See *id.*; *Udell v. Haas*, 235 N.E.2d 897, 900-901(N.Y. 1968).

51. DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, *CASES AND MATERIALS ON LAND USE* 83 (4th ed. 2004).

52. *Id.* at 83-84.

in colonial times,⁵³ the 1980s brought their increased use.⁵⁴ Local governments ordinarily financed infrastructure “through general revenues and the issuance of general obligation bonds that [were] pledged against local property tax collections.”⁵⁵ However, tax cuts and reductions in federal funding left municipalities in financial trouble.⁵⁶ Local governments had no choice but to find a creative way to finance infrastructure.⁵⁷ At their core, development exactions, such as in-lieu fees and impact fees,⁵⁸ are conditions that local governments impose on the parties that seek change.⁵⁹ They force developers to internalize the negative externalities that they impose on the community through their development.⁶⁰ Initially, this practice was reserved for financing schools, streets, parks, museums, and the like.⁶¹ However, exactions soon branched out to include linkage fees.⁶² While traditional exactions, such as impact fees, help mitigate infrastructure shortages that come with new development, linkage fees address social concerns that arise out of the new development.⁶³ Linkage fees have helped municipalities

53. Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51, 51 n.1 (1987).

54. See Robert Collin & Michael Lytton, *Linkage: An Evaluation and Exploration*, 21 URB. LAW. 413, 428 (1989); Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69, 69 (1987).

55. Bauman & Ethier, *supra* note 53, at 51.

56. Connors & High, *supra* note 54, at 69. At the time, taxpayers wanted to stop paying for these types of services through their ad valorem taxes because the tax increases were not proportional to the increase in services. See Bauman & Ethier, *supra* note 53, at 52.

57. Connors & High, *supra* note 54, at 69.

58. Impact fees are development exactions charged by municipalities to mitigate the effect the development has on infrastructure. See James A. Kushner, *Property and Mysticism: The Legality of Exactions as a Condition for Public Development Approval in the Time of the Rehnquist Court*, 8 J. LAND USE & ENVTL. L. 53, 131-32 (1992). Likewise, municipalities may ask that new developments dedicate land for things such as parks or open spaces. *Id.* at 128. However, when a dedication is impossible or unnecessary, the local government may impose a fee instead of dedication. *Id.* This fee is commonly referred to as an “in-lieu” fee. *Id.*

59. Connors & High, *supra* note 54, at 70. Exactions are “condition[s] precedent to the issuance of a special permit, a conditional use permit, a subdivision approval, or an amendment to a zoning map.” *Id.* at 70. Those who work in the field of land use define development exaction as “a governmental requirement that a developer dedicate or reserve land for public use or improvements, or pay a fee in lieu of dedication, which is used to purchase land or construct public improvements.” Bauman & Ethier, *supra* note 53, at 56. This effectively transfers the burden of supplying infrastructure from local government and the taxpayers to the private sector. *Id.* at 52.

60. Collin & Lytton, *supra* note 54, at 428; Connors & High, *supra* note 54, at 69. “An externality arises when the producer of a good imposes a cost on third parties, which he does not pay—that is, which is ‘nonpriced.’” John A. Henning, Jr., Comment, *Mitigating Price Effects with a Housing Linkage Fee*, 78 CAL. L. REV. 721, 731 (1990).

61. Deborah Rhoads, Comment, *Developer Exactions and Public Decision Making in the United States and England*, 11 ARIZ. J. INT’L & COMP. L. 469, 474 (1994).

62. See *id.*

63. Michael T. Kersten, Comment, *Exactions, Severability and Takings: When Courts Should Sever Unconstitutional Conditions from Development Permits*, 27 B.C. ENVTL. AFF. L. REV. 279, 287(2000). Linkage programs are specifically “designed to raise capital funds

get developers involved in financing things such as public transportation, day care, and even affordable housing.⁶⁴ In return for their contribution, developers are granted permission to proceed with their development.⁶⁵

B. Inclusionary Zoning and Linkage Programs

The history of a planned affordable housing initiative in the United States began in the early twentieth century and was influenced by the co-operatives that existed in England in the late nineteenth century.⁶⁶ In the early 1920s, labor unions were largely responsible for sponsoring these affordable residences.⁶⁷ In 1927, the New York State Limited Dividend Housing Companies Act lent support to the development of affordable housing.⁶⁸ However, it was not until 1971 that the United States began using inclusionary zoning “as a viable land use control.”⁶⁹ A recent increase in property values has fueled the movement supporting such regulations.⁷⁰ Additionally, the branching out of so-called “traditional” exactions was justified by the reasoning that taxpayers should not have to pay for the social burdens imposed by developers while the developers profit without consequence.⁷¹ In the 1980s, office developments were the primary targets of linkage fee ordinances, and the collected funds were used to address the shortage of affordable

for the ‘soft’ or ‘social’ infrastructure items . . . and are viewed as the latest form of developer funding requirement.” Julian Conrad Juergensmeyer, Impact Fee Legal Review Memorandum 12 (Sept. 17, 2007) (unpublished report prepared for the City of Destin, Florida) (on file with author).

64. Rhoads, *supra* note 61, at 474.

65. Juergensmeyer, *supra* note 63, at 12 n.44 (quoting Christine Andrews & Dwight Merriam, *Defensible Linkage*, in DEVELOPMENT IMPACT FEES 227 (Arthur C. Nelson ed., 1988)).

66. Gerald W. Sazama, *Lessons from the History of Affordable Housing Cooperatives in the United States: A Case Study in American Affordable Housing Policy*, 59 AM. J. OF ECON. & SOC. 573, 576-77 (2003). The author notes that the first housing co-operative in England was created in Rochdale in 1884 by a group of workers and also explains that in housing cooperatives, residents jointly own the building. *Id.* at 575-76.

67. *Id.* at 578.

68. *Id.* The Limited Dividend Housing Companies Act was a government “subsidy through [a] tax abatement.” Curtis Berger, Eli Goldston & Guido A. Rothrauff Jr., *Slum Area Rehabilitation by Private Enterprise*, 69 COLUM. L. REV. 739, 752 n.63 (1969).

69. Brian R. Lerman, Note, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 386 (2006); see also Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 977 (2002) (explaining that the first ordinance was in Fairfax County, Virginia). While most zoning ordinances address like use and space, inclusionary zoning also considers affordability. Lerman, *supra*, at 385.

70. See Lerman, *supra* note 69, at 386 (citing Douglas R. Porter, *The Promise and Practice of Inclusionary Zoning*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? 212, 213 (Anthony Downs ed., 2004)).

71. Collin & Lytton, *supra* note 54, at 428-29; Kersten, *supra* note 63, at 287.

housing.⁷² This was because new office developments attracted workers to move to the area and created or aggravated the lack of affordable housing.⁷³ The situation was worsened when the new residents came and the short supply of homes drove up prices.⁷⁴ Additionally, “[c]ommercial development[s] . . . [often] displace residents, either directly, by building on their housing sites, or indirectly, by reducing the land available for potential residential development.”⁷⁵

To ensure that its citizens do not run out of affordable housing alternatives, it is crucial that a local government have a proper plan.⁷⁶ In fact, without proper planning, existing zoning regulations and standards are often an impediment to affordable housing.⁷⁷ “Zoning is fundamentally exclusionary by the nature of its separation of land uses and the fact that if no specific provision for a land use is made, that use is generally excluded from a jurisdiction.”⁷⁸ When affordable housing goals are included in the planning process, it “can prevent or reduce the opportunities for opponents . . . to block, delay, and impose additional costs on development proposals because fewer discretionary land-use approvals are needed and zoning/planning standards are likely to be more accommodating.”⁷⁹ Many states have found that a good way to plan for affordable housing is to incorporate related goals into their statutes, leaving local governments with no other choice but to plan accordingly.⁸⁰

There is a variety of ways to plan for inclusionary housing. Mandatory set-asides allow money to accumulate by setting aside a portion of local taxes.⁸¹ Land transfer programs allow the trans-

72. Collin & Lytton, *supra* note 54, at 427, 430.

73. *Id.* at 427.

74. *Id.*

75. *Id.*

76. SECTION OF STATE AND LOCAL GOV'T LAW, AM. BAR ASS'N., *THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 4* (Tim Iglesias & Rochelle E. Lento eds., 2005) [hereinafter ABA].

77. *See id.* Through a creative use of common land use regulations such as “minimum lot area requirements, minimum floor area requirements, limitations on multifamily dwellings and manufactured housing, minimum yard, setback and other extraordinary bulk requirements, and growth management caps,” local governments successfully exclude on the basis of race, religion, and socio-economic status. CALLIES, FREILICH & ROBERTS, *supra* note 51, at 535.

78. Collin & Lytton, *supra* note 54, at 430. Many communities justify the use of zoning to exclude by claiming that it helps maintain the community's character. Lerman, *supra* note 69, at 386.

79. ABA, *supra* note 76, at 4.

80. *Id.* at 7.

81. *Id.* at 290-91. The ability to choose this option rests on some type of enabling legislation that allows the set-aside. *Id.* at 291. Pennsylvania; St. Louis, Missouri; Seattle, Washington; New Orleans, Louisiana; and Massachusetts also use set-asides. *Id.* at 291-96.

fer of land for affordable housing.⁸² Some municipalities choose to issue bonds and use that money for workforce housing.⁸³ Others waive a variety of development fees for the construction of affordable housing.⁸⁴ Tax increment financing is another method to set money aside.⁸⁵ Finally, the city may choose to impose a linkage fee.⁸⁶ It is important to note that if the plan includes a linkage fee, the government must have a nexus study, which is “an economic report establishing how much housing demand is created by each square foot of non-residential space.”⁸⁷

*C. Linkage Programs in New Jersey,
Massachusetts, and California*

Examples of successful linkage programs can be found in New Jersey, Massachusetts, and California. These linkage programs use various methods to achieve their goals.

New Jersey takes a sort of “fair share” approach, whereby municipalities are allocated their “proportional obligation of low and moderate-income housing.”⁸⁸ However, due to criticism, New Jersey modified its rigid approach to a more flexible one that is consistent with smart growth called “growth share.”⁸⁹ Nevertheless, local governments must take affirmative steps to provide affordable housing.⁹⁰ The Council on Affordable Housing (COAH) establishes New Jersey’s inclusionary policies and authorizes the use of development fees.⁹¹ At first, local governments used the mandatory

82. *Id.* at 314. Land transfers are used in Detroit, Michigan; New York, New York; and New Orleans, Louisiana. *Id.* at 314-18.

83. *Id.* at 318. Polk County, Iowa; San Francisco, California; and Charlotte, North Carolina all use bond financing. *Id.* at 318-21.

84. *Id.* at 321. Both Fort Lauderdale and Tallahassee, Florida and Salt Lake City, Utah use these types of programs. *Id.* at 321-23.

85. ABA, *supra* note 76, at 323. When a city designates an area as a redevelopment area, the existing assessed value for tax purposes of properties within that zone becomes the “base.” CALLIES, FREILICH & ROBERTS, *supra* note 51, at 634. In other words, the assessed value is “frozen” so that the property owners do not pay more taxes while redevelopment occurs. However, as property values increase with redevelopment, so do the assessed values. Once that happens, the property owner pays taxes on the new assessed value, but the city puts the difference between the taxes collected under the new assessed value and the base assessed value into a special fund to pay for redevelopment. Despite having to pay more taxes, property owners benefit because, presumably, their property values have increased as a result of the neighborhood improvements. *See id.* at 634-647 (explaining and evaluating the pros and cons of tax increment financing). Tax Increment Financing is used in California; Oregon; Chicago, Illinois; and Minneapolis, Minnesota. ABA, *supra* note 76, at 323-28.

86. ABA, *supra* note 76, at 296.

87. *Id.* at 297.

88. *Id.* at 12-13 (citing N.J. STAT ANN. §§ 52:27D-307c(1) (West 2003)).

89. *Id.* at 15.

90. *Id.* at 310.

91. *Id.*

set-aside as their primary tool.⁹² But the trend has shifted to fees imposed on new construction.⁹³

Massachusetts has enabling legislation that allows voters to approve “a surcharge of not more than 3% of real property levies,”⁹⁴ a percentage of which is allocated to workforce housing.⁹⁵ However, Boston takes a different approach. The city has had its own inclusionary program in place for over twenty years.⁹⁶ Based on the results of a 1986 study,⁹⁷ Boston began a linkage program that applies to large commercial developments and gives developers the option to pay a per-square-foot fee or build workforce housing.⁹⁸ The Neighborhood Housing Trust (NHT) collects the money generated by the fee and has the discretion to choose which projects to finance.⁹⁹ “Since 1985, the NHT has spent more than \$80 million in linkage fees (more than \$4 million per year) and created or preserved 6166 affordable housing units.”¹⁰⁰ The program requires that owner-occupied affordable units remain so for fifty years, whereas rental units must be affordable forever.¹⁰¹

In California, state law specifies how local officials can “address the housing needs of all economic segments of the community” in the comprehensive plan.¹⁰² Additionally, each jurisdiction’s “fair share” of housing is determined, assigned, and incorporated into the local plan.¹⁰³ Like Boston, following a study in 1989, the City of Sacramento decided to impose a per-square-foot linkage fee on all new commercial development, additions, and possibly even other improvements.¹⁰⁴ Developers have the option of only paying 20% of the fee if they choose to build housing themselves.¹⁰⁵ However, unlike the Boston program, the type of housing developers build to take advantage of the reduced fee does not have to be af-

92. *Id.*

93. *Id.* The fee applies to both residential and commercial construction. *Id.*

94. *Id.* at 296.

95. *Id.* (citing MASS. GEN. LAWS, ch. 44B, § 6 (West 2003)).

96. *Id.* at 302.

97. *Id.* at 303.

98. *Id.* at 302. The fee of \$7.18 per square foot is imposed only on projects with over 100,000 square feet. *Id.*

99. *Id.* at 303.

100. *Id.*

101. *Id.*

102. *Id.* at 8; CAL. GOV'T CODE § 65580(a) (2008) (“The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian, including farmworkers, is a priority of the highest order.”).

103. ABA, *supra* note 76, at 8 (citing CAL. GOV'T CODE § 65584 (2004)).

104. *Id.* at 304. In 2004, the fees ranged from \$0.39 per square foot to \$1.56 per square foot, depending on the type of commercial use. *Id.* However, this fee was based on the 1989 study, and a new study showed that the subsidy cost had increased. *Id.* at 305. As a result, the city increased its fees between 10% and 30% of the maximum the original study allowed. *Id.*

105. *Id.* at 304.

fordable.¹⁰⁶ The collected fees are placed in a trust, and the Sacramento Housing and Redevelopment Agency is responsible for their allocation.¹⁰⁷ Since 1989, the city has spent over \$14.6 million on over 1,600 residences, including 1,200 for households with low to very low income.¹⁰⁸

New Jersey, Massachusetts, and California show us that these linkage programs are effective at reducing the low-income housing shortage. Therefore, the determination of whether linkage programs can withstand challenges at every level is crucial.

III. DESTIN: A CASE STUDY

The preceding examples show that linkage programs help increase affordable housing when local governments properly plan. Thus, to formalize a workforce housing program, a city must define the program in a way that takes income and home prices into consideration and also spells out qualification criteria.¹⁰⁹ The city must then build this standard into its Comprehensive Plan or Land Development Code provisions that deal with any incentives to build workforce housing.¹¹⁰ For example, one of the goals included in the Destin Comprehensive Plan is the “[maintenance of] a balanced and sustainable local economy” through the “availability of a stable and qualified workforce” to ensure the continuation of the community’s character.¹¹¹

Destin officials fear that the lack of workforce housing will lead to the deterioration of the local economy.¹¹² To remedy the situation, the city has proposed the addition of an attainable workforce housing linkage fee to its Land Development Code.¹¹³ The proposed Destin ordinance offers a menu of options to those seeking to develop¹¹⁴ or redevelop.¹¹⁵ The party seeking the change must submit

106. *Id.*

107. *Id.*

108. *Id.*

109. *See* Mucci, *supra* note 29, at 7.

110. *See id.*

111. Destin, Fla., Attainable Workforce Housing Linkage Fee, Ordinance 07-26-LC, § 19.05.01(A)-(B) (2007) (becoming effective ninety days after passage by the Destin City Council and signature by the Mayor). The City attributes its character to its workforce working, playing, studying, and voting in the area. *Id.* §§ 19.05.01(B), (H).

112. *Id.* § 19.05.01(G).

113. *See id.* §§ 19.05.00-19.05.16. The ordinance’s state purpose is to “ensure there is an attainable supply of housing for fifty percent (50%) of the City’s workforce, and their families.” *Id.* § 19.05.02.

114. *Id.* § 19.05.05; *see also* § 19.05.06. Development is defined as the “carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels.” FLA. STAT. § 380.04 (2008).

115. Destin, Fla., Attainable Workforce Housing Linkage Fee, Ordinance 07-26-LC, § 19.05.05. While the ordinance does not describe redevelopment in its definitional section,

a Plan to the City Manager.¹¹⁶ Based on the specifications in the ordinance, the Plan must include a calculation of the amount of affordable housing needed by the development, as well as the method chosen to accomplish the statutory requirement.¹¹⁷ The methods made available by the ordinance are “on-site or off-site construction of units, conversion of free market units, payment of a fee in-lieu, conveyance of land for attainable housing, or a combination” of these methods.¹¹⁸ The developer may also assign its responsibility to a government-approved, non-profit affordable housing provider.¹¹⁹ The method chosen by the party seeking change must be justified¹²⁰ and may require additional information before it can be approved.¹²¹

From the ordinance, it appears that on-site construction is preferred unless the City Manager deems it impracticable.¹²² To be impracticable, the on-site construction must be inconsistent with the comprehensive plan, far from existing or planned infrastructure, contrary to the development code, in violation of state or federal law, or incompatible with surrounding uses.¹²³ Impracticability may also be found if the affordable housing project could be joined to another off-site project or if there is less than one unit needed.¹²⁴ If on-site construction is impracticable, the applicant may build off-site or convert a free-market unit.¹²⁵ For the City Manager to approve either method, the proposal must be consistent with the comprehensive plan, close to services and infrastructure, consistent with state and federal law, and compatible with surrounding land uses.¹²⁶ The applicant may also choose to convey land, but it must be proportional in size to the housing need resulting from the

it does specify that “redevelopment, remodeling or expansion of a legally preexisting residential use of land” that is less than “100 square feet of heated or air-conditioned area floor area” is exempt from the inclusionary housing requirements. *Id.* § 19.05.07(C). Likewise, mitigation is not required for the construction of a unit with deed restrictions ensuring it remain affordable; the construction of units smaller than 1,000 heated and air-conditioned square feet to be used for full time residency; certain non-residential redevelopments; remodels or expansions; the construction of buildings for temporary use; or for the construction of workforce housing. *Id.* §§ 19.05.07(A)-(B), (D)-(F).

116. *Id.* § 19.05.08(A).

117. *Id.* § 19.05.08(B)(1)-(2).

118. *Id.* § 19.05.08(B)(2).

119. *Id.* § 19.05.09(G).

120. *Id.* § 19.05.08(B)(2).

121. *Id.* § 19.05.08(B)(3)-(6). For example, if a developer or redeveloper chooses to build attainable workforce units, the Plan must include a site plan, “[a] summary of the number of . . . units, the number and size of bedrooms of each unit, the rental/sale mix, and the sales price or rent for each unit” and, finally, any restrictions that will allow the units to remain affordable. *Id.* § 19.05.08(B)(3)(a)-(e).

122. *Id.* § 19.05.09(B).

123. *Id.* § 19.05.09(B)(1)-(7).

124. *Id.* §§ 19.05.09(B)(5), (B)(7).

125. *Id.* § 19.05.09(C)-(D).

126. *Id.*

development.¹²⁷ As with the on- and off-site construction and the market conversion options, the land being conveyed must be consistent with the comprehensive plan and near infrastructure and services.¹²⁸ It must comply with the Land Development Code.¹²⁹ The land must have a fair market value “comparable to the cost to mitigate the need for attainable workforce housing attributable to the development.”¹³⁰ Once the land is conveyed, the city may only use the land for workforce housing development.¹³¹ However, the city council may sell the property and place the proceeds in a trust account established solely to further workforce housing goals.¹³² The final option for the applicant is to pay an in-lieu fee based on the schedules set forth in the ordinance when the building permits are issued.¹³³ Lastly, the subsidy and fee schedules are updated annually on September 1st.¹³⁴

Despite the existence of linkage programs, the comprehensive nature of the Destin ordinance makes it a good candidate for a case study. The ordinance not only offers a menu of available options, but may also allow the party seeking change to make an independent calculation according to the parameters set out in the regulation.¹³⁵ This level of flexibility will likely improve the ordinance’s ability to withstand judicial scrutiny,¹³⁶ especially since courts can simply sever the parts they disagree with rather than striking down the entire regulation.¹³⁷

IV. CHALLENGES

There are several grounds on which to challenge the linkage program in Destin. Challenges to the government’s authority are common because if successful they obviate the need to litigate on any other matters. Nevertheless, the failure of this argument does not mean all is lost for the challenger. Other arguments against

127. *Id.* § 13, 19.05.09(E)(1).

128. *Id.* § 19.05.09(E)(1)(a)(1)-(2).

129. *Id.* § 19.05.09(E)(1)(a)(3).

130. *Id.* § 19.05.09(E)(1)(b). Fair market value is initially determined at the time the Plan is reviewed and is confirmed along with the approval of the site plan or plat. *Id.* § 19.05.09(E)(1)(b)(1)-(2). A real estate commission is not included in the amount. *Id.* § 19.05.09(E)(1)(b)(3).

131. *Id.* § 19.05.09(E)(1).

132. *Id.* § 19.05.09(E)(2)(a)-(b).

133. *Id.* § 19.05.09(F); *see also id.* § 19.05.12(A)-(B) (detailing residential and non-residential in-lieu fee schedules).

134. *Id.* § 19.05.09(F)(2).

135. Juergensmeyer, *supra* note 63, at 15-16.

136. *Id.* at 15.

137. *Id.* at 16.

harmful land use regulations may be based in equal protection, substantive due process, and takings jurisprudence.¹³⁸

A. Authority: Police Power, Home Rule, and Enabling Legislation

Challenges to land use regulations often begin with a claim that the local government did not have the authority to impose them.¹³⁹ If the court does not find that such power lies with the government, it may invalidate the ordinance that imposes development exactions as being *ultra vires*.¹⁴⁰ Therefore, since a linkage ordinance is a land use regulation, the first argument likely to be made is that the government did not have the right to regulate in the first place. For this reason, it is important to examine the potential sources of authority for enacting such fees.

Courts have long held that the police power is the basis for the local government's authority to enact zoning laws.¹⁴¹ It follows that imposing exactions is part of the police power, which allows local governments to protect the health, safety, and general welfare of its people.¹⁴² Courts reason that this power derives from the "state constitutional guarantees of municipal home rule,"¹⁴³ which is a concept that began in the late 1800s when states began to amend their constitutions to allow localities to create charters and govern themselves with regard to local matters.¹⁴⁴

Sometimes, the law specifically authorizes the linkage program. For example, the City of Boston ("Boston") has the express authority to regulate affordable housing.¹⁴⁵ However, if the court cannot find legislation that grants the municipality the power to specifically impose the exaction, the court may find that the power to impose the exaction is derived from the state's regulations pertaining to land use and zoning.¹⁴⁶

Along the same lines, it is possible for the court to infer the power to impose linkage fees from affordable housing laws. Many states have inclusionary zoning statutes. For example, Arizona, Rhode Island, and Vermont specifically require authorities to in-

138. Lerman, *supra* note 69, at 394 nn.97-98.

139. Rhoads, *supra* note 61, at 478.

140. *Id.* at 479.

141. *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); Kautz, *supra* note 69, at 989-90 (stating that to be upheld, it must be "fairly debatable that an ordinance [is] reasonably related to the general welfare").

142. Rhoads, *supra* note 61, at 479.

143. *Id.*

144. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10 (1990).

145. 1956 Mass. Acts 665, § 16.

146. Rhoads, *supra* note 61, at 478.

clude affordable housing in the comprehensive plan.¹⁴⁷ Oregon also acknowledges the importance of planning for affordable housing.¹⁴⁸ Likewise, the Florida legislature expressly grants local governments the authority to “adopt and maintain in effect *any* law, ordinance, rule, or other measure . . . for the purpose of increasing the supply of affordable housing using land use mechanisms such as inclusionary housing ordinances.”¹⁴⁹ Like other states, local governments in Florida *must* include affordable housing in their comprehensive plans.¹⁵⁰

Therefore, an ordinance like the one in Destin, Florida will likely withstand a challenge that the local government does not have the authority to regulate affordable housing.

B. Constitutional Grounds

Inclusionary zoning ordinances may be challenged on three constitutional grounds: (1) that the different treatment of properties subject to the ordinance violates the Equal Protection Clause; (2) that substantive due process prevents the government from interfering with the challenger’s property rights; or (3) that the ordinance constitutes a taking.¹⁵¹

1. Equal Protection

The Equal Protection Clause provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁵² The Clause is primarily concerned with unfair classifications. However, courts recognize that all laws classify to some extent,¹⁵³ and the mere fact that a law classifies does not necessarily render it invalid.¹⁵⁴ Based on the type of classification, courts first determine the level of scrutiny applicable to the law being challenged.¹⁵⁵ Strict scrutiny is a “harsh standard [that] imposes a heavy burden of justification upon the state and should be applied only to those actions by the state which abridge some fundamental right or affect adversely upon some suspect class of per-

147. ARIZ. REV. STAT. ANN. § 9-461.05(E)(6) (2007); R.I. GEN. LAWS § 45-22.2-6 (2007); VT. STAT. ANN. tit. 24 § 4382 (2007).

148. OR. REV. STAT. § 197.307 (2008).

149. FLA. STAT. § 166.04151 (2008) (emphasis added).

150. FLA. STAT. § 163.3177(6)(f)(1)(d) (2008).

151. Lerman, *supra* note 69, at 394, 394 n.97.

152. U.S. CONST. amend. XIV, § 1.

153. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

154. *Markham v. Fogg*, 458 So. 2d 1122, 1127 (Fla. 1984) (discussing *In re Estate of Greenberg*, 390 So. 2d 40, 42 (Fla. 1980)).

155. *Fla. High Sch. Activities Ass’n v. Thomas*, 434 So. 2d 306, 308 (Fla. 1983).

sons.”¹⁵⁶ As a general matter, classifications based on race, ethnicity, religion, and other such characteristics are considered suspect.¹⁵⁷ Under this standard of review, the challenger will likely prevail;¹⁵⁸ strict scrutiny, however, is not the applicable standard to land use regulations.¹⁵⁹ The rationale is that states should have discretion when it comes to regulating social or economic issues because the democratic process will act as a check and ensure that the government does not overstep its bounds.¹⁶⁰

If the classification is not suspect, the court applies rational basis review and presumes that the law is constitutional.¹⁶¹ It is up to the challenger to prove the state had no legitimate interest in enacting the law, and even if the state had a legitimate interest, the classification is not reasonably related to it.¹⁶² The rational basis standard is difficult for challengers to overcome.¹⁶³ Courts are not in the business of criticizing a legislature’s policies¹⁶⁴ and will only strike down a law if there is evidence that the legislature’s sole motivation was a “bare . . . desire to harm a politically unpopular group.”¹⁶⁵ Likewise, a court will not hesitate to invalidate legislation that is either arbitrary¹⁶⁶ or based on a pretext.¹⁶⁷ It should be noted that the government does not need to achieve its legitimate objectives all at once; there “is no requirement of equal protection that all evils of the same genus be eradicated or none at all.”¹⁶⁸

156. *Id.*; see also *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (discussing the factors to be considered in determining whether heightened scrutiny is appropriate); Laura Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 HOFSTRA L. REV. 539, 612 (1995) (explaining that under strict scrutiny, the government must prove that it has a compelling interest and the regulation is narrowly tailored to that end).

157. *Romer*, 517 U.S. at 633 (citing *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 31, 37-8 (1928)); *Carolene Prod.*, 304 U.S. at 152-53, 153 n.4; Michael S. Giaimo, *Challenging Improper Land Use Decision-Making Under the Equal Protection Clause*, 15 FORDHAM ENVTL. L. REV. 335, 335 (2004); see generally *Castaneda v. Partida*, 430 U.S. 482 (1977) (finding strict scrutiny appropriate for a racially discriminatory jury selection process).

158. Padilla, *supra* note 156, at 612.

159. *Id.*

160. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

161. *Thomas*, 434 So. 2d at 308.

162. *Id.* “The burden is upon the party challenging the statute or regulation to show that there is *no* conceivable factual predicate which would rationally support the classification under attack.” *Id.* (emphasis in original).

163. See, e.g., *id.*

164. See, e.g., *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949) (refusing to consider the wisdom or propriety of the particular regulation).

165. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (invalidating the Food Stamp Act because the legislative history showed that the only reason for its enactment was to prevent hippies and hippie communes from receiving social assistance).

166. *Markham v. Fogg*, 458 So. 2d 1122, 1127 (Fla. 1984).

167. *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 671-72 (1981).

168. *Ry. Express Agency*, 336 U.S. at 110.

Historically, equal protection claims have been related to laws that classify and treat *groups* in a disparate manner.¹⁶⁹ Recently the U.S. Supreme Court faced the question of whether there can be an equal protection claim where the plaintiff does not belong to a class or a group but is a “class of one.”¹⁷⁰ The Court explained that the Equal Protection Clause serves to protect against “intentional and arbitrary discrimination” whether that discrimination stems directly from the statute or from governmental interpretation of the statute.¹⁷¹ It held that the size of the class or group is irrelevant to an equal protection claim.¹⁷² A plaintiff may successfully bring an equal protection claim as “a ‘class of one’ where [she] alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”¹⁷³

Therefore, in *Village of Willowbrook v. Olech*,¹⁷⁴ the Olechs succeeded in bringing an equal protection claim when the Village of Willowbrook (“Village”) conditioned their connection to the municipal water supply on the granting of a thirty-three foot easement, whereas their neighbors were only required to grant fifteen feet.¹⁷⁵ As a result, the Olechs were deprived of water for three months.¹⁷⁶ The Olechs argued that when the government treats someone differently because of “reasons wholly unrelated to any legitimate state objective,” the government violates the Equal Protection Clause.¹⁷⁷ Here, the Olechs claimed local officials were reacting to a lawsuit the couple had previously filed against the Village.¹⁷⁸ The Court concluded that the allegation that the Village’s demand was “irrational and wholly arbitrary” was sufficient for an equal protection claim.¹⁷⁹ In his concurrence, Justice Breyer echoed Judge Posner by expressing concern that the so-called added factor of “ill will” was necessary for the claim so that an ordinary zoning decision does not become a constitutional case.¹⁸⁰

169. Giaimo, *supra* note 157, at 335.

170. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam).

171. *Id.*

172. *Id.*

173. *Id.* (citing *Allegheny Pittsburgh Coal Co. v. Comm’n of Webster County*, 488 U.S. 336 (1989); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923)).

174. *Id.*

175. *Id.* at 563.

176. *Id.* The Olechs needed to connect to the municipal water supply because their well had broken down. *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 387(7th Cir. 1998).

177. Brief of Respondent at 18, *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (No. 98-1288).

178. *Willowbrook*, 528 U.S. at 563.

179. *Id.* at 565 (internal quotation marks omitted).

180. *Id.* at 565-66 (Breyer, J., concurring); *Olech v. Vill. of Willowbrook*, 160 F.3d at 388; Giaimo, *supra* note 157, at 339.

Since it is generally accepted that assisting the less fortunate with housing is a legitimate governmental purpose,¹⁸¹ challenging an ordinance like the one in Destin would require a showing that the classification is not reasonably related to the legitimate government end of providing affordable housing. Depending on the circumstances, challengers to this type of linkage ordinance may include those who live in the inclusionary units and those who live in the market-rate units.¹⁸² However, developers are the most likely to object.

Developers may argue that the classification is not rationally related to the government's end because the conditions the city seeks to impose are to correct a general wrong—a wrong not entirely caused by the use of the particular parcel to be developed.¹⁸³ However, this argument is easily refuted if a city, like Destin, presents evidence that development causes a shortage in affordable housing. Such a deficiency does not occur over night, nor is it the result of any single development; it is a consequence of ongoing construction over an extended period. Therefore, all developers must contribute to resolving the problem they create because no one developer is capable of doing it alone. Under this rational basis review, an incidental public benefit is enough to sustain the regulation.¹⁸⁴

For the same reason, no developer will be able to successfully argue that the classification is not rationally related to the government end because it singles the applicant out as a “class of one” to bear the cost of solving a community-wide problem. Additionally, an ordinance like the one pending in Destin is so comprehensive that it applies to a wide variety of development, redevelopment, and remodeling.¹⁸⁵ Such an ordinance contains detailed tables indicating the amount that each developer must contribute.¹⁸⁶ Different requirements for different uses are also included,¹⁸⁷ as are standards for independent calculation in case a developer disagrees with the statutory requirement.¹⁸⁸ In other words, not only is the ordinance generally applicable, but it is also specific enough to

181. *Home Builders Ass'n of N. Cal. v. City of Napa*, 108 Cal. Rptr. 2d 60, 64 (Ct. App. 2001); *see also* *S. Burlington County NAACP v. Mt. Laurel*, 456 A.2d 390, 415 (N.J. 1983) (“[R]egulations that do not provide the requisite opportunity for a fair share of the region's need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection.”).

182. *See* Padilla, *supra* note 156, at 615-25 (discussing the effects of restraints on alienation).

183. *Id.* at 614.

184. *Id.*

185. Destin, Fla., *Attainable Workforce Housing Linkage Fee, Ordinance 07-26-LC*, §§ 19.05.05, 19.05.07(C) (2007).

186. *Id.* §§ 19.05.09, 19.05.12.

187. *Id.*

188. *Id.* §19.05.10.

be tailored to each type of development, thus reducing the chance of singling out one developer to carry the burden.

Therefore, a city with an ordinance like the one pending in Destin will likely withstand a challenge by developers because the ordinance is rationally related to the government's legitimate purpose of providing affordable housing.

2. Due Process

Due process has two components: procedural and substantive. Procedural due process requires notice and a hearing before the state deprives someone of a life, liberty, or property interest.¹⁸⁹ However, we are most concerned in this scenario with substantive due process.

Substantive due process protects a wide range of individual rights against unjustifiable government conduct.¹⁹⁰ The generally applicable level of scrutiny is rational basis and, like equal protection, requires that the government regulation be rationally or reasonably related to a legitimate governmental interest.¹⁹¹ Again, this standard is not difficult for state actors to overcome because all they need is a legitimate reason for depriving the right; the presumption of constitutionality remains.¹⁹² The challenger may only prevail by showing that the government's conduct was truly irrational, such as a "decision made by flipping a coin."¹⁹³

In a due process challenge, strict scrutiny is only triggered when a fundamental right—one "implicit in the concept of ordered liberty"—is at stake.¹⁹⁴ Since this language is ambiguous, precedent is the key to determining whether the state regulation has deprived the challenger of a fundamental right. As a general matter, history shows that fundamental rights include a married couple's right to privacy,¹⁹⁵ a woman's right to have an abortion,¹⁹⁶

189. CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 431-432 (2d ed. 2005).

190. *Haire v. Fla. Dep't. of Agric. & Consumer Servs.*, 870 So. 2d 774, 781 (Fla. 2004) (citing *Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 960 (Fla. 1991)).

191. Lerman, *supra* note 69, at 394. "[T]here must be a rational or reasonable relationship between the government's ends and its means." Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 1006 (2000) (quoting Richard A. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 310 (1993)).

192. Lerman, *supra* note 69, at 394.

193. CALLIES, FREILICH & ROBERTS, *supra* note 51, at 403 (citing *Lemke v. Cass County*, 846 F.2d 469, 472 (8th Cir. 1987)).

194. *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

195. *Griswold*, 381 U.S. at 485-86.

196. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

the right to use contraception,¹⁹⁷ the right to live with extended family,¹⁹⁸ and the right to make child-rearing choices.¹⁹⁹ There is no precedent to suggest that strict scrutiny should apply to an inclusionary housing ordinance like the one in Destin.

Before proceeding with the analysis, it is important to note that there has been some confusion in land use jurisprudence with regard to due process and takings.²⁰⁰ The Fifth Amendment states that “[n]o person shall . . . be deprived of life, liberty, or property without due process of law;²⁰¹ nor shall private property be taken for public use, without just compensation.”²⁰² This passage indicates two ways in which the government may abuse its power.²⁰³ The main reason for the jurisprudential confusion is the courts’ use of similar verbiage to describe both types of abuses in the past.²⁰⁴ Fortunately, the Supreme Court clarified the distinction in *Lingle v. Chevron*.²⁰⁵ It is important to keep substantive due process and takings separate because of the different remedies available for their violation.²⁰⁶ A substantive due process violation leads to an invalidation of the government action.²⁰⁷ In contrast, when there is a Takings Clause violation, the government may either allow the landowner to keep her property or pay her just compensation and continue exercising its power of eminent domain.²⁰⁸

A challenge to an ordinance like the one in Destin on substantive due process grounds will require a showing that the city does not have a legitimate interest in providing workforce housing²⁰⁹ and, if it does, that the regulation does not “bear[] a rational relation to a legitimate legislative purpose . . . and [is] not discriminatory, arbitrary, or oppressive.”²¹⁰ Courts remain deferential to the legislature in their analysis.²¹¹

197. *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972).

198. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977).

199. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925).

200. CALLIES, FREILICH & ROBERTS, *supra* note 51, at 397; Eagle, *supra* note 191, *passim*.

201. U.S. CONST. amend. V. This is known as the “police power.” *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 57 (Fla. 1994).

202. U.S. CONST. amend. V. This is known as “the power of eminent domain.” *A.G.W.S.*, 640 So. 2d at 57.

203. *A.G.W.S.*, 640 So. 2d at 57.

204. CALLIES, FREILICH & ROBERTS, *supra* note 51, at 397.

205. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-41 (2005).

206. *A.G.W.S.*, 640 So. 2d at 57; CALLIES, FREILICH & ROBERTS, *supra* note 51, at 397.

207. *A.G.W.S.*, 640 So. 2d at 57.

208. *Id.*

209. “The first step in determining whether legislation survives the rational basis test is identifying a legitimate government purpose which the governing body could have been pursuing.” *WCI Cmty. v. City of Coral Springs*, 885 So. 2d 912, 914 (Fla. 4th DCA 2004).

210. *Haire v. Fla. Dep’t of Agric. & Consumer Servs.*, 870 So.2d 774, 782 (Fla. 2004) (quoting *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210, 1215 (Fla. 2000)); *accord WCI Cmty.*, 885 So. 2d at 914. “The second step of the rational basis test asks whether a rational

Government has the discretion to impose social and economic legislation.²¹² Furthermore, affordable housing is commonly considered a legitimate governmental purpose.²¹³ An ordinance like the one in Destin is undoubtedly within the scope of the government's police power, which requires government to protect the health, safety, and welfare of its people. One can hardly say that protecting its citizens from economic collapse is not within the scope of the government's power or in the community's best interest. Therefore, the challenger will likely fail to prove that the regulation is not a legitimate government interest.

Likewise, a challenger will likely fail to prove that a linkage ordinance like the one proposed in Destin is not a rational or reasonable way of achieving the goal of increasing low-income housing. Aside from the fact that a challenger faces an uphill battle under rational basis review,²¹⁴ the ordinance clearly achieves what it sets out to do. Furthermore, the City of Destin extensively studied the issue²¹⁵ before assessing that if it does not take action there will be serious economic implications in the future. A city wishing to follow in Destin's footsteps should do the same to prevent an allegation of carelessness and arbitrariness.

Since the government has a legitimate interest in providing affordable housing and a linkage ordinance is a rational way of achieving that goal, it therefore follows that a challenger will likely lose on substantive due process grounds.

3. Takings

Developers may challenge an ordinance by claiming it amounts to a taking under the Fifth Amendment.²¹⁶ Courts use different approaches depending on the nature of the government action. Exactions, particularly land dedications, receive a level of higher scrutiny, which is known as the *Nollan/Dolan* standard.²¹⁷

basis exists for the enacting government body to believe that the legislation would further the hypothesized purpose." *Id.*

211. *Haire*, 870 So. 2d at 782 (citing *Horsemen's Benevolent & Protective Ass'n v. Div. of Pari-Mutuel Wagering*, 397 So. 2d 692, 695 (Fla. 1981)); *see also* *Orange County v. Costco Wholesale Corp.*, 823 So. 2d 732, 736 (Fla. 2002) (explaining that courts must remain deferential to the legislature when the regulation is not arbitrary or discriminatory).

212. *WCI Cmty.*, 885 So. 2d at 914.

213. Lerman, *supra* note 69, at 394.

214. "The question is only whether a rational relationship exists between the ordinance and a conceivable legitimate governmental objective. If the question is at least debatable, there is no substantive due process violation." *WCI Cmty.*, 885 So. 2d at 914 (citation omitted).

215. *See supra* Part II; *see generally* Juergensmeyer, *supra* note 63, *passim*; Mucci, *supra* note 29, *passim*; NICHOLAS, *supra* note 18, *passim*.

216. Lerman, *supra* note 69, at 394-95.

217. *See infra* Part IV.B.3.b.

However, since the Supreme Court has never decided on whether a linkage fee is the type of exaction to receive such scrutiny,²¹⁸ an analysis under both the traditional and the *Nollan/Dolan* approach is necessary to determine whether a linkage program in support of workforce housing is constitutionally valid.

a. Penn Central Approach

Courts have struggled to determine exactly what constitutes a taking for the purposes of the Fifth Amendment.²¹⁹ Generally, there is a taking when the government deprives a landowner of the physical use of the property.²²⁰ This permanent physical occupation of the property is a taking per se,²²¹ and it is fairly easy to recognize.²²² A taking per se automatically entitles the owner to just compensation regardless of the extent of the invasion.²²³ Likewise, a government regulation that in essence deprives a property owner of all economic use constitutes a taking per se.²²⁴ In other words, “[t]he state must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property, thereby unfairly imposing the burden of providing for the public welfare upon the affected owner.”²²⁵

The problem is that most takings cases cannot be organized into such neat categories. When a court finds itself in this gray zone, it may be inclined to find that a regulation effects a taking if it goes “too far.”²²⁶ The court focuses “upon the ‘severity of the burden’ that government imposes upon private property rights”²²⁷ and

218. Some people argue that a linkage fee, like an impact fee, is an exaction because they both provide a public benefit. James E. Holloway & Donald C. Guy, *A Limitation on Development Impact Exactions to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities*, 9 DICK. J. ENVTL. L. & POL’Y. 1, 20 (2000). But it may also be argued that linkage fees are not the same as traditional exactions, which are ordinarily used to provide more tangible things like sewers and schools.

219. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

220. *Id.* at 124. When the government physically invades property, the ad hoc factual analysis is unnecessary because it is automatically a taking. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *Penn Cent.*, 428 U.S. at 124.

221. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exaction and the Consequences of Clarity*, 92 CAL L. REV. 609, 618-19 (2004).

222. Fenster, *supra* note 221, at 618-19.

223. *Chevron*, 544 U.S. 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

224. *Id.*; *Lucas*, 505 U.S. at 1015.

225. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994).

226. *Chevron*, 544 U.S. at 537 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)); *Lucas*, 505 U.S. at 1014.

227. *Chevron*, 544 U.S. at 539.

decides whether it is the functional equivalent of a per se taking.²²⁸ There is no magic formula.²²⁹ Instead, a fact-intensive inquiry must be undertaken.²³⁰ To guide them, courts use the factors set forth in *Penn Central*:²³¹ the regulation's economic impact on the property owner, the nature of the government action, and the regulation's effect on the owner's investment-backed expectations.²³² It is important to note that while the analysis begins with the presumption that the government taking is for a public purpose, if the government conduct is found to violate due process, "[n]o amount of compensation can authorize [the] action."²³³

A linkage program like the one in Destin falls in the gray zone of takings law. Therefore, to determine whether the regulation effects a taking, we must consider the *Penn Central* ad-hoc balancing test. Regardless of the option the challenger chooses, the regulation is likely to have minimal economic impact. Often, these types of programs involve developer incentives such as density bonuses or expedited review.²³⁴ While the Destin ordinance does not specify these benefits, the city's Community Development Director has mentioned the importance of these incentives to the process.²³⁵ Additionally, the Destin ordinance contains a provision allowing an applicant to make an independent calculation of what it would take to mitigate the impact of the development.²³⁶ Furthermore, an ordinance that allows options is more likely to be upheld because it allows the property owner to choose the option that best serves the needs of the development.²³⁷

The Court in *Penn Central* explicitly stated that a taking is less likely to occur when the government action is for the greater good.²³⁸ When the workforce cannot afford to live near its place of employment, it has two options. Workers can either live in overcrowded conditions near where they work or they can live further and commute. While both are undesirable, the second option harms the environment by increasing traffic congestion and pollution.²³⁹ It also leads to "labor shortages and absenteeism,"²⁴⁰ which

228. *Id.*

229. *Penn Cent.*, 438 U.S. at 124.

230. *Id.*

231. *Id.* at 104; *Chevron*, 544 U.S. at 539.

232. *Penn Cent.*, 438 U.S. at 124.

233. *Chevron*, 544 U.S. at 543.

234. *See, e.g.*, Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 64 (Ct. App. 2001) (noting that the inclusionary zoning ordinance provided for developer incentives).

235. *See supra* note 29.

236. *See Napa*, 108 Cal. Rptr. 2d at 64 (describing an ordinance like the one in Destin).

237. *See, e.g., id.* at 67 (discussing the impact of available alternatives on the decision).

238. *Penn Central*, 438 U.S. at 124.

239. *Napa*, 108 Cal. Rptr. 2d at 62.

240. NICHOLAS, *supra* note 18, at 5.

can be devastating to a local economy. For example, in Destin, Florida, the workforce is needed to keep the city's tourist industry thriving, while in Napa, California the workforce is a crucial part of the wine industry.²⁴¹

Developers will also have a difficult time satisfying the final *Penn Central* prong. With an ordinance like the one pending in Destin, developers understand what the government is going to charge them because the ordinance specifies the fees.²⁴² Thus, developers can consider the fees and profit expectations in their planning process before beginning a project. After all, the government is not forcing anyone's hand. While all developers must contribute to the mitigation, the ordinance's flexibility allows them to choose the best method for their goals. For example, they can remain in control and consider the fees when determining what they expect to gain from the project. Furthermore, with the Destin ordinance, developers have the option to make an independent calculation if they feel the economic impact of the statutory requirement is too burdensome.

The *Penn Central* analysis is a balancing test; there is no outcome-determinative factor. Based on this analysis, it is unlikely that a court will hold that the Destin constitutes a taking under the Fifth Amendment, especially since courts are less likely to find a taking "when interference [with an owner's property rights] arises from some public program adjusting the benefits and burdens of economic life to promote the common good."²⁴³

b. Nollan/Dolan Standard

A different standard, generally known as the *Nollan/Dolan* test, applies to exactions on development projects.²⁴⁴ This standard departs from a basic takings analysis since it imposes a higher level of scrutiny, requiring courts to judge the soundness of the government's action.²⁴⁵

The Nollans purchased a beachfront house.²⁴⁶ Pursuant to a California law that required rebuilding when a house falls into disrepair, they applied to the California Coastal Commission

241. See *Napa*, 108 Cal. Rptr. 2d at 62 (explaining the consequences of a shortage of workforce housing).

242. Destin, Fla., Attainable Workforce Housing Linkage Fee, Ordinance No. 07-26-LC § 19.05.12 (2007).

243. *Penn Central*, 428 U.S. at 124.

244. Kautz, *supra* note 69, at 991.

245. Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 731-32 (2007) (suggesting that the same level of scrutiny should consistently apply to all takings analyses in order to prevent confusion).

246. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827 (1987).

("Commission") for a permit to rebuild it.²⁴⁷ The Commission agreed to grant the permit if the Nollans agreed to grant a public beach access easement access across their property.²⁴⁸ The justification for the demand was that the easement would mitigate the public backlash that would arise due to the visual obstructions on the coastline.²⁴⁹ The Court held that the condition was a taking under the Fifth Amendment unless there was a nexus between the imposed condition and the prevention of harm from development.²⁵⁰ The Court ruled in the Nollan's favor and found no nexus between the condition and the development's impact.²⁵¹

A few years after the *Nollan* decision, Ms. Dolan, a property owner, applied for a permit to expand the existing building and parking lot on her property.²⁵² The city conditioned the permit issuance on the dedication of the floodplain portion of her property for drainage purposes and another portion for use by pedestrians and bicyclists.²⁵³ The Court followed *Nollan* and stated that the first step in deciding whether there is a Fifth Amendment taking is to determine whether there is a nexus between the imposed governmental condition and the asserted legitimate state interest.²⁵⁴ Once a nexus is established, the analysis then requires an examination of the degree of that connection.²⁵⁵ Specifically, the connection must be roughly proportional.²⁵⁶ While there is "[n]o precise mathematical calculation[,] . . . the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."²⁵⁷ Indeed, the reason for ruling in Dolan's favor was that the city was not able to show rough proportionality between the conditions it imposed and the project's expected impact.²⁵⁸

The concepts from the *Nollan* and *Dolan* cases were combined to form the standard we know today. When the government has a legitimate purpose under its police power, it has the right to impose conditions on a developer.²⁵⁹ However, there must be an essential nexus between the condition and the purported harm

247. *Id.* at 828.

248. *Id.*

249. *Id.* at 828-29.

250. *Id.* at 837.

251. *Id.* at 837, 839.

252. *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994).

253. *Id.* at 380.

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

255. *Id.*

256. *Id.* at 391.

257. *Id.*; see also Kautz, *supra* note 69, at 992 (stating that the city has the burden to prove that the conditions are closely related to the specific impact of the project).

258. Kautz, *supra* note 69, at 992.

259. *Paradyne Corp. v. State*, 528 So. 2d 921, 927 (Fla. 4th DCA 1988).

against which the condition is trying to protect.²⁶⁰ Furthermore, a local government is “required to make an individualized determination that there exists a ‘rough proportionality’ between the dedication and the nature and extent of the impact of the proposed development.”²⁶¹ When either the essential nexus or rough proportionality requirements are absent, the property owner is entitled to just compensation because the exaction results in a taking.²⁶² The standard “requires cities to ‘provide greater policy justifications to landowners and developers,’ ”²⁶³ and this increased burden is the reason developers prefer this standard.²⁶⁴ Interestingly, agreeing to a local government’s conditions does not constitute a waiver of constitutional rights.²⁶⁵

After *Nollan* and *Dolan*, it was still unclear as to when the standard is required. Most relevantly, it is also unclear whether the standard applies to linkage programs.²⁶⁶ In 1999, the U.S. Supreme Court attempted to clarify the applicability of *Nollan/Dolan* and explained in dicta that it has “not extended the rough-proportionality test of *Dolan* beyond the special context of exactions-land-use decisions conditioning approval of development on the dedication of property to public use.”²⁶⁷ Therefore, the standard would likely apply, at the very least, to the land dedication provision of the pending Destin ordinance.

However, there is still inconsistency in its application. For example, in *Home Builders Ass’n of Northern California v. City of Napa*, a California appellate court refused to apply the standard to Napa’s linkage program.²⁶⁸ It reasoned that heightened scrutiny is only necessary where an applicant negotiates with the government because such a scenario creates the risk of government abuse.²⁶⁹

260. *Id.* “[T]he access-easement condition in *Nollan* could not be treated as an exercise of land use regulation power since the condition did not serve the public purposes related to the permit requirement.” *Id.*

261. *Sarasota County v. Taylor Woodrow Homes Ltd.*, 652 So. 2d 1247, 1251 (Fla. 2d DCA 1995) (quoting *Dolan*, 512 U.S. at 374) (applying the standard to permits conditioned on the dedication of property).

262. Fenster, *supra* note 221, at 613.

263. Kautz, *supra* note 69, at 991.

264. *Id.* at 992.

265. *Taylor Woodrow Homes*, 652 So. 2d at 1251-52.

266. See Fenster, *supra* note 245, at 744-45 (discussing the questions the Court has left unresolved).

267. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999); Kautz, *supra* note 69, at 993; see also *Monterey*, 526 U.S. at 703 (reasoning that the *Dolan* standard applies when the city imposes conditions on development and the landowner challenges the conditions as excessive but that the standard does not apply when the challenge is based on a flat-out denial of development).

268. *Home Builders Ass’n of N. Cal. v. City of Napa*, 108 Cal. Rptr. 2d 60, 65 (Ct. App. 2001).

269. See Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 695-96 (Colo. 2001) (distinguishing between legislative and adjudicative exactions and refusing to apply *Nollan/Dolan* to

This risk does not exist where, as in *Napa*, the statute generally applies to everyone.²⁷⁰ The following year, in *San Remo Hotel v. City and County of San Francisco*,²⁷¹ the California Supreme Court specifically faced the question of whether *Nollan/Dolan* applies to “exaction[s] imposed by legislation rather than by individualized adjudication,”²⁷² but it chose not to answer.²⁷³

If the pending Destin ordinance were challenged in a jurisdiction that makes the legislative/adjudicative distinction, it would likely survive because the traditional takings analysis would apply. In contrast, an ordinance of this nature would have a difficult time surviving in jurisdictions that do not make the distinction because those states apply a heightened standard to every exaction challenge. Nevertheless, all hope may not be lost for the government.

The first *Nollan* prong requires that there be a rational nexus between the imposed condition and the purported harm the condition is meant to protect against.²⁷⁴ This step is satisfied here because there is a rational connection between employing low-income workers, such as construction workers in a development project and the added need for workforce housing in the area close to the development.

The second prong requires that the condition be roughly proportional to the impact the development is causing.²⁷⁵ In *Dolan*, the local government was required to have individualized findings to support the condition.²⁷⁶ The government may not satisfy this requirement if the condition does not respond to the development’s specific impact on the community.²⁷⁷ Since it is difficult to measure a particular development’s social impact,²⁷⁸ such as the need for affordable housing, it is difficult to determine whether a workforce housing study like the one in Destin will be sufficient to sustain the land dedication option of the ordinance. The Destin study spe-

the former); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996) (explaining that *Nollan/Dolan* applies only to conditions imposed on an individualized basis); *Homebuilders Ass’n of Metro. Portland v. Tualatin Hills Park & Recreation Dist.*, 62 P.3d 404, 409 (Or. Ct. App. 2003) (following California and imposing the less stringent, more deferential reasonable relationship standard on legislatively imposed exactions); *Rogers Mach., Inc. v. Wash. County*, 45 P.3d 966, 982 (Or. Ct. App. 2002) (following California and explaining that lower scrutiny is appropriate when exactions are imposed through legislation because the political process acts as an adequate check).

270. *Napa*, 108 Cal. Rptr. 2d at 65.

271. *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87 (Cal. 2002).

272. Fenster, *supra* note 245, at 750.

273. *Id.* The California Supreme Court accepted the distinction and held that a lower scrutiny applied in cases where the exaction is imposed by legislation. *San Remo Hotel*, 41 P.3d at 105-11.

274. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

275. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

276. *Id.* at 395-96.

277. CALLIES, FREILICH & ROBERTS, *supra* note 51, at 253.

278. *Id.*

cifically includes the impact of new development in general on low-income workers, such as construction workers and workers who maintain the property after the completion of the project.²⁷⁹ However, it is unclear whether a court would agree that this type of general, city-wide finding is enough to show a particular development's impact on affordable housing. Regardless, one redeeming quality of an ordinance similar to the one in Destin may be the number of options available to a developer; if a court decides to sever the offending land dedication provision, the ordinance itself would still stand because the remaining options are all valid.

c. Dual Rational Nexus Approach

Some jurisdictions, such as Florida and Ohio, use a similar approach as *Nollan/Dolan*, applying a state law "dual rational nexus test" to determine the validity of land dedications.²⁸⁰ This test allows local governments to impose conditions as long as they "offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents."²⁸¹ The government bears the burden of showing two things: (1) that there is a rational nexus between the need and the increase in population attributable to the development and (2) that there is a rational nexus between the spending of funds and the benefit to residents of the development.²⁸² Earmarking the funds is sufficient to satisfy the second part of the test.²⁸³

The pending Destin ordinance will likely satisfy the first prong of this test because there is a rational connection between the need for increased affordable housing and new development. This is true regardless of whether the project is residential or commercial. In both cases, workers are needed to first build and later to maintain and operate the structures.²⁸⁴ In the residential context, once con-

279. See NICHOLAS, *supra* note 18, *passim*.

280. *Hollywood, Inc. v. Broward County*, 431 So. 2d 606, 611 (Fla. 4th DCA 1983) (applying the same standard to impact fees and legislative measures in Florida).

281. *Id.*; accord *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 875 P.2d 1310, 1314 (Ariz. Ct. App. 1993) (stating that a fee must "result in a beneficial use" and must "bear a reasonable relationship to the burden imposed upon the municipality"); see *St. Johns County v. N.E. Florida Builders Ass'n, Inc.*, 583 So. 2d 635, 637 (Fla. 1991) (stating that the test was explained in *Hollywood*); *Home Builders Ass'n of Dayton & Miami Valley v. City of Beaver Creek*, 729 N.E.2d 349, 354-55 (Ohio 2000) (explaining the requirements of the dual rational nexus test). *But see Greater Franklin Developers Ass'n, Inc. v. Town of Franklin*, No. 95-02608, 1997 WL 573211, at *12 (Mass. Super. Aug. 11, 1997) (rejecting the dual rational nexus test).

282. *Hollywood*, 431 So. 2d at 611-12.

283. *Id.* at 612.

284. NICHOLAS, *supra* note 18, at 3.

struction is complete, a variety of lower-income workers are needed to maintain and service those homes. These include house cleaners, landscapers, and other manual laborers. In the commercial context, new development attracts workers which either creates or aggravates the shortage of affordable housing because it drives up prices.²⁸⁵ Home prices are also impacted since commercial development reduces the quantity of land available for potential residential construction.²⁸⁶ Regardless of the type of development, a rational nexus exists between the need for increased housing and the development.²⁸⁷

An ordinance like the one in Destin easily satisfies the second prong of this test because it specifies that the funds will be held in escrow for the construction of affordable housing.²⁸⁸ There is a rational nexus between the spending of the funds and the benefit to the new development. This is true even if the low-income housing is off-site because the housing will still be in the same jurisdiction. As mentioned above, manual laborers help maintain residential properties after they are built. This helps keep homes and neighborhoods attractive, which benefits property values. In the commercial context, the benefit to the development is the consistent availability of employees. When employees live far from where they work, they have to commute. This not only increases traffic congestion and pollution, but it also leads to absenteeism.²⁸⁹ The availability of lower-income workers in our communities means that there are attendants in our gas stations, cashiers to check us out at supermarkets, and wait staff in restaurants where we eat. Their presence is a benefit to all in the community since our local economies could crumble without them.

The proposed Destin linkage program would likely withstand a dual rational nexus analysis because there is a rational connection between the need for increased affordable housing and development. Likewise, there is a rational nexus between the money spent and the benefit to the development. Since the workforce housing in our communities creates benefits ranging from a healthier environment to higher property values, complying with the require-

285. Collin & Lytton, *supra* note 54, at 427.

286. *Id.*

287. The Destin Linkage Program is distinguishable from *Volusia County v. Aberdeen at Ormond Beach*, which held that a public school impact fee was unconstitutional as applied to an adult community. 760 So. 2d 126, 128 (Fla. 2000). The Destin Linkage Program is different in that the availability of affordable housing has a direct effect on the economy, and the economy affects all residents, including those paying the fee.

288. Destin, Fla., Attainable Workforce Housing Linkage Fee, Ordinance 07-26-LC, § 19.05.11(A) (2007).

289. *Home Builders Ass'n of N. Cal. v. City of Napa*, 108 Cal. Rptr. 2d 60, 62 (Ct. App. 2001); NICHOLAS, *supra* note 18, at 4-5.

ments of a linkage program like the one in Destin is a small price to pay.

V. CONCLUSION

A linkage program meant to increase workforce housing is likely to withstand a legal challenge. A challenger will be unable to show that the local government does not have the authority to regulate affordable housing. If courts cannot find a statutory authority for such action, they traditionally hold that the zoning stems from the municipality's police power. Likewise, an ordinance like the one in Destin will likely withstand an equal protection challenge because the classification it creates is rationally related to the government's legitimate purpose of providing affordable housing. Based on similar reasoning, a challenger will also likely lose on substantive due process grounds. Finally, a court will likely find that an ordinance like the one in Destin does not constitute a Fifth Amendment taking. The linkage program will likely withstand the traditional *Penn Central* analysis since the test's factors are not outcome-determinative and courts are less likely to find a taking when the allegation arises out of a government program meant to advance the common good. Nor is it likely that a court will find a taking under *Nollan/Dolan* or a similar approach. While under this approach it is possible that the court may sever a provision it finds invalid, a linkage program like the one in Destin, Florida is likely to survive a legal challenge because other options provided to developers in the ordinance would remain valid. Thus, governments may enact linkage programs like one proposed in Destin with the confidence that their efforts will not be in vain.