The Supreme Court Revisits Regulatory Takings:

* The Parcel-As-A-Whole Rule in 2016

* Inclusionary Zoning in the Future?

Susan L. Trevarthen

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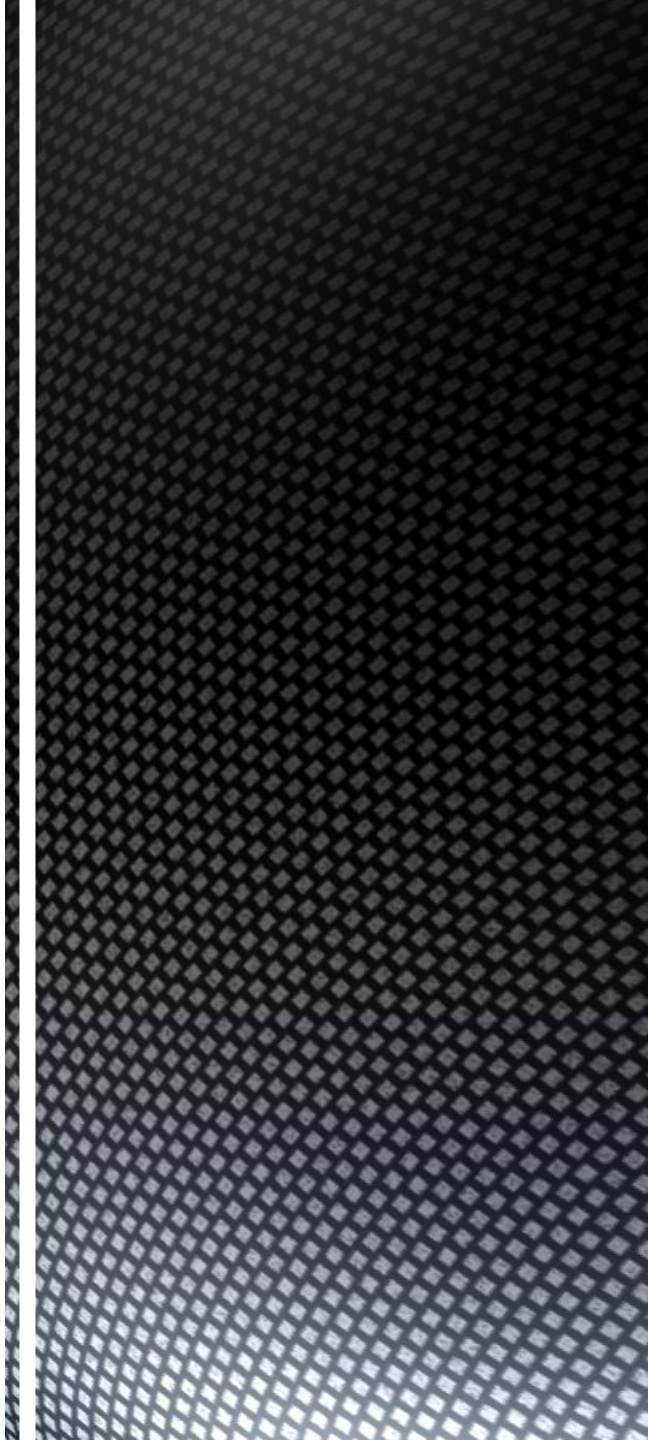
WEISS SEROTA HELFMAN COLE & BIERMAN

At the Crossroads of Business, Government & the Law



About the Speaker

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- AV-rated Member, Weiss Serota Helfman Cole & Bierman, PL in Fort Lauderdale, Florida and Chair, Municipal Land Use and Zoning Group; Town Attorney
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- Drafter and defender of numerous local government related to land uses protected by the First Amendment, and advice and defense of Harris Act and taking claims
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- Thanks to Trevor C. Jones, Esq. for his assistance with this powerpoint

Resources

- John D. Echeveria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, Georgetown Environmental Law & Policy Institute (2008).
- McQuillin: *The Law of Municipal Corporations* § 25:179.6 (3d ed. Westlaw)
- *Miller & Starr Cal. Real Estate*, 7 Cal. Real Est. § 20:44 (4th ed.).
- U.S. Department of Housing & Urban Development, *Inclusionary Zoning & Mixed-Income Communities* (Spring 2013), Evidence Matters; https://www.huduser.gov/portal/periodicals/em/spring13/highlight3.html

Overview

1. Traditional Fifth Amendment Regulatory Takings Analysis
2. The Parcel-as-a-Whole Rule is Revisited by the US Supreme Court in *Murr v. Wisconsin*
3. Inclusionary Zoning: Legislative Action or Exaction

http://deems.co.za/tag/blogosphere/

I want you . . .

to give me

your property

- **No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, *without just compensation.***

U.S. Constitution, Amendment V.

Takings clause plays a role in "barring Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005)

http://www.utb.edu/vpaa/cla/gov/Pages/default.aspx

TYPES OF TAKINGS

- **Physical taking**: Government directly appropriates or physically invades private property or an interest in property. Usually easy to identify.
- **Regulatory taking**: Government regulation is so onerous that it is tantamount to direct appropriation or ouster. But, how far is too far? Harder to judge.
  - Regulatory taking where government requires owner to suffer **permanent physical invasion** of property (even minor invasion), e.g., public easement (*Loretto* taking).
  - Regulatory taking where regulation **completely deprives landowner of *all* economically beneficial use** of property. (*Lucas* taking).
  - ***Penn Central* balancing** test for partial takings: (1) economic impact of regulation on claimant, (2) interference with investment-backed expectations; and (2) the character of the regulation (i.e., physical invasion or "some public program adjusting the benefits and burdens of economic life to promote the common good")
- **Land-use exaction**: Government demands dedication of private property for public use as condition of permit; analyzed as a violation of unconstitutional-conditions doctrine (*Nollan*, *Dolan*, *Koontz*).

http://archive.jsonline.com/news/wisconsin/familys-fight-over-vacation-land-goes-to-us-supreme-court-b99656139z1-366366571.html

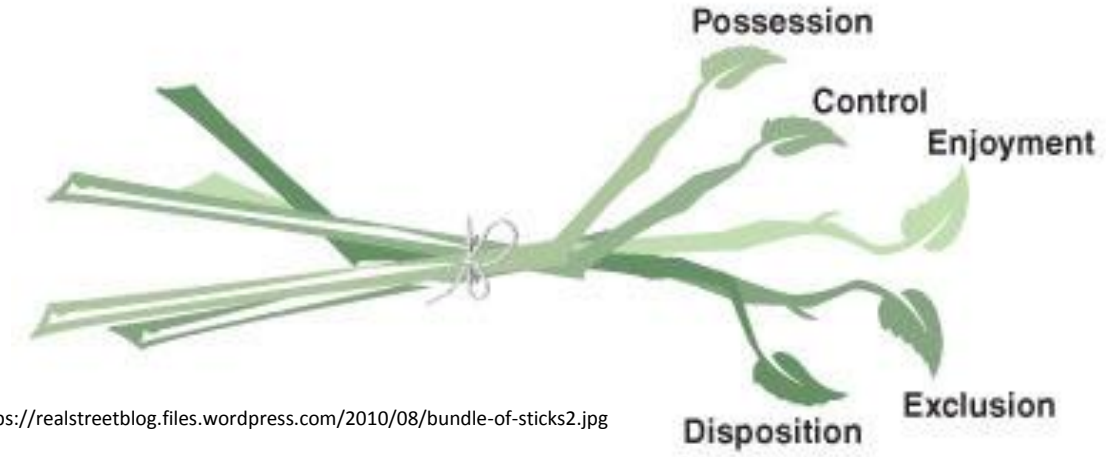
MURR v. WISCONSIN--- The Parcel-as-a-Whole Rule and Merger Ordinances

Parcel-as-a-Whole Rule

Penn Central regulatory takings analysis:

- "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."
- "In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the **parcel as a whole** . . . ."
- Why? Concerns over windfalls paid by taxpayer money. A different rule might reward those who manipulate the pattern of development so that they first recover their full investment-backed expectations for the property through development, and then turn around and sue the government for the total deprivation of use of the remaining wetland, buffer, open space, or other remnant property.

http://f.tqn.com/y/taoism/1/W/G/E/-/-/russian-dolls-nesting.jpeg



https://realstreetblog.files.wordpress.com/2010/08/bundle-of-sticks2.jpg

Substandard Lots

- When enacting zoning ordinances, local governments often create an amortization period that gives owners of nonconforming uses time to phase out their operations. If the amortization period is sufficiently long to permit the owner to recoup his investment, this method of balancing landowners' expectations and the public good is often approved, and avoids a taking.

- Many zoning ordinances require minimum **lot sizes**, to prevent the dangers of overdevelopment and avoid the creation of lots that cannot be developed, and to create or preserve the character of an area. However, the takings clause can prevent cities from wiping out substandard lots over time. If nonconforming lots remain exempt from the zoning restriction, the goals of the zoning restrictions are subverted.

Merger Ordinances: The Solution

http://www.adlibsoftware.com/blog/2013/December/merge-multiple-format-documents-into-single-document.aspx

- To address substandard lots, local governments have used "merger" provisions "designed to strike a balance between a municipality's interest in abolishing nonconformities and the interests of property owners in maintaining land uses that were allowed when they purchased their property." *Day v. Town of Phippsburg*, 110 A.3d 645, 649 (Me. 2015).

- "Merger": when a substandard lot is involuntarily merged by operation of law with a commonly owned, contiguous lot so as to make one full conforming lot. Miller & Starr Cal. Real Estate, 7 CAL REAL EST. § 20:44 (4th ed.)
  - HUNTSVILLE, ALA., CODE § 74.1.2 ("Where two or more contiguous lots under common ownership are sufficient to create one lot of dimensions conforming to the requirements for the district in which the lots are located but the lots are not sufficient for the creation of two or more fully conforming lots, then all of the said lots shall be deemed merged into one lot.").

The Use of Merger Ordinances

- For nearly a century, state governments have allowed, and local governments have created, "merger" regulations similar to the Ordinance at issue in *Murr* to curb over-development while balancing the countervailing rights of property owners. *See generally* McQuillin: *The Law of Municipal Corporations* § 25:179.6 (3d ed. Westlaw) ("Municipalities often have ordinances which treat commonly owned, contiguous lots, one or more of which are nonconforming, as one conforming lot.").

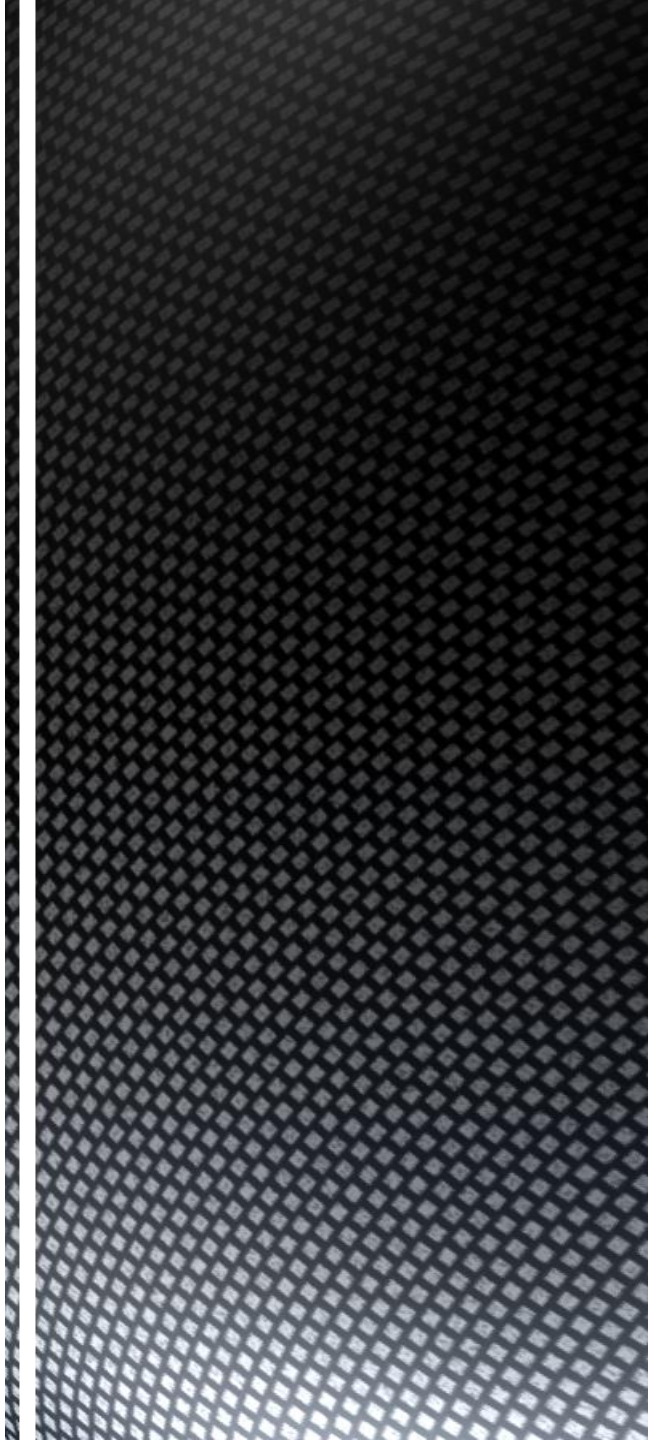
Merger Ordinances are Common Across the Country

- Whether it is approved by the state legislature:
  - Mass. Gen. Laws ch. 40A, § 6; R.I. GEN. LAWS § 45-24-38 ("Provisions may be made for the merger of contiguous unimproved, or improved and unimproved, substandard lots of record in the same ownership to create dimensionally conforming lots or to reduce the extent of dimensional nonconformance.");
  - N.M. STAT. ANN. § 47-6-9.1(B) ("Nothing in this section limits a board of county commissioners, pursuant to notice and public hearing, from requiring consolidation of contiguous parcels in common ownership for the purpose of enforcing minimum zoning or subdivision standards on the parcels.");

- Or, considered a recognized common-law doctrine:
  - *Timperio v. Zoning Bd. of Appeals*, 993 N.E.2d 1211, 1215 (Mass. App. Ct. 2013) (recognizing merger doctrine as common law principle);

- Local governments have repeatedly enacted merger ordinances and have enforced them for decades. *See generally Murr*, No. 15-214, Nat'l Ass'n of Counties Brief 14–31 (providing links to 131 merger regulations).

Murr v. Wisconsin, 859 N.W.2d 628, (Wisc. Ct. App. 2014), *review denied*, 366 Wis. 2d 59 (April 16, 2015), *cert. granted*, 136 S. Ct. 890 (Jan. 15, 2016).



The Murr Family Lake Home

- In 1960, the parents of the plaintiffs in *Murr* bought a riverfront parcel of land along the western border of Wisconsin, just east of Minneapolis in St. Croix County, "Lot F," and built a cabin.
- Three years later, the parents bought an adjacent parcel, "Lot E," which was and remains vacant.
- The lots are similar in characteristics, with each lot divided by a bluff. Combined, the lots equate to .98 acres of contiguous land.

http://www.co.saint-croix.wi.us/vertical/Sites/%7BBC2127FC-9D61-44F6-A557-17F280990A45%7D/uploads/%7B4E1630FD-40F8-4970-87EE-5AA259862FCC%7D.JPG

St. Croix County's Merger Ordinance

- In the mid-1970's, the County enacted an ordinance that prohibited the development or sale of contiguous, substandard lots that had common ownership. The relevant provision of the Ordinance provides as follows:

> SUBSTANDARD LOTS: a. Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
> 1) The lot is in separate ownership from abutting lands, or
> 2) The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. **Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area**.
> 3) All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with requirements of this subchapter and any underlying zoning or sanitary code requirements.

- In sum, "if abutting, commonly owned lots do not each contain the minimum net project area (1 acre), they together suffice as a single, buildable lot." *Murr*, 2014 WL 7271581 at *1.

- Furthermore, the Ordinance "prohibits the individual development or sale of adjacent, substandard lots under common ownership, unless an individual lot has at least one acre of net project area." Id.

The Parents Transfer Lots E & F their Children

- In 1994, the Murrs' parents transferred Lot F (cabin) to the Murrs. A year later, the Murrs' parents transferred Lot E (vacant) to the Murrs. So the merger ordinance was adopted shortly after their purchase, but 20 years prior to the attempt to separate the lots.

- Once Lot E was transferred to the Murrs, both parcels were under common ownership and were considered merged as an operation of law under the Ordinance to make one contiguous parcel.

- Years later, the Murrs sought to sell Lot E as a buildable lot and requested a variance from the County. The St. Croix Board of Adjustment denied the Murrs' application.

http://www.estudentloan.com/blog/wp-content/uploads/2014/04/denied.png

Lower Court Proceedings

http://www.veteranstoday.com/?attachment_id=217822

- After exhausting their administrative remedies against the Board's decision, the Murrs filed a complaint against St. Croix County and the State of Wisconsin challenging the application of the Ordinance as an uncompensated "taking" in violation of the Fifth Amendment. *Murr*, 2014 WL 7271581, at *2.

- The Murrs alleged that the Ordinance "deprived them of all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot." *Id.*

- The trial court entered summary judgment in favor of the State and County, in pertinent part, because governing law "required [the court] to analyze the effect of the Ordinance on the Murrs' **property as a whole**, not each lot individually." *Id.*

- Thus, because the entire contiguous property could still be used for residential and other purposes, the Ordinance did not create an uncompensated taking of the vacant Lot E. *Id.*

Lower Court Proceedings Cont'd

- On appeal, the Murrs maintained their argument that the Ordinance totally or substantially deprived them of the beneficial use of Lot E. *Murr*, 2014 WL 7271581, at *4

- The appellate court's analysis necessarily turned on what constituted the "property"—i.e., beneficial use of Lot E alone, or beneficial use of Lots E and F combined by the merger ordinance. Relying on the principles established in *Penn Central*, the court affirmed the judgment finding that the contiguous parcels must be considered as a whole. *Id.* at *4-5.

- In short the court held that "**the challenged regulatory action, an ordinance that effectively merged the Murrs' two adjacent, riparian lots for sale or development purposes, did not deprive the Murrs of all or substantially all practical use of their property**." *Id.* at *1.

- The Ordinance did not prevent the Murrs from building a "residence on top of the bluff, if they choose to raze their cabin located near the river. Notably, this use may include Lot E, as the new residence could be located entirely on Lot E, entirely on Lot F, or it could straddle both lots." *Id.* at *5.

- The court further opined that the Murrs improperly focused on what Lot E could *not* be used for, as opposed to what it *could* be used for. *Id.* at *6.

Supreme Court Grants Murrs' Petition for Writ of Certiorari

Question Presented

The Murrs' brief on the merits presents their question to the Court as follows:

> In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130–31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes? *Murr v. Wisconsin,* No. 15-214, Petitioners' Brief on the Merits, 2016 WL 1459199 (April 2016).

Murrs' Arguments

- The Murrs argue that the **parcel-as-a-whole rule "does not imply support for the very different theory that commonly owned parcels must be aggregated for takings analysis**—the theory adopted by the Wisconsin court." *Murr v. Wisconsin,* No. 15-214, Petitioners' Brief on the Merits, 2016 WL 1459199 (April 2016).
- The Murrs cite *Penn Central* and *Lucas* for the proposition that takings valuation must be limited to the parcel they choose to identify as the subject of the taking, and not include other property holdings of the parcel owner. *Id.*
- "For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333-334, 366 N.E.2d 1271, 1276-1277 (1977), *aff'd,* 428 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity." *Lucas*, 505 at 1016 n.7.

Murrs' Arguments

- The Murrs' brief also plays on what they call "traditional understandings of property law," but really seems to just be arguing that "this is not fair." Petitioners' Brief on the Merits, 2016 WL 1459199.

- It specifically cites that the Murrs were "flabbergasted" when they learned that they could not sell Lot E separate from Lot F due to the Ordinance, and asserts that "[m]ost Americans would probably react the same way . . . [b]ecause people understand the basic unfairness of what happened to the Murrs." *Id.*

State & County Arguments

- On the other hand, the State and County argue that the State's merger provisions legally define the property as merging with the contiguous lot so that the value of Lot E is preserved and it can be used in conjunction with Lot F. Stated differently, the two lots are really just one bigger lot now as a matter of state property law and thus, the **federal takings analysis turns on the value of the entire merged lot**. *Murr v. Wisconsin,* No. 15-214, Brief for Respondent St. Croix Cnty, at 20–25 (June 10, 2016); *see also id.*, Brief of Respondent State of Wisconsin, at 23–26 (June 10, 2016).

State & County Arguments

- Also argue that the long-established history of merger ordinances makes it part of "legal tradition upon which reasonable expectations must be understood in defining property rights in land." St. Croix Brief, at 21–22.
- Cite to *Lucas* for the proposition that the identity of a parcel "'may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimaint alleges a diminution in (or elimination of) value.'" *Id.* (quoting *Lucas*, 505 U.S. at 1035) (internal quotation marks omitted).
- County further argues that "lot lines" are not determinative of property rights for purposes of a takings claim and that the parcel-as-a-whole issue is simply a red herring because "no matter how one draws the lines, sufficient valuable use of [the Murrs'] land remains to warrant dismissal of [the Murrs'] complaint on summary judgment." *Id.* at 23-24.

Potential Fallout

- If SCOTUS agrees with the Wisconsin courts, the status quo will be preserved and local governments can feel comfortable with their merger ordinances and other regulations intended to prevent the negative impacts of overdevelopment—which includes overcrowding, depletion of natural resources, loss of community character, and diminishing property values.

http://pixdaus.com/peaceful-lake-cloud-sky-rock-reflection-tree-stump-tree/items/view/515477/

http://www.meetup.com/Mid-Atlantic-Hiking-Group/events/227222939/

Potential Fallout

- However, if the Court reaches the opposite result, local governments will need to readdress decades-old merger ordinances and potentially other land use regulations to avoid potential liability.
- Ultimately, the public welfare may be at risk if local governments are unable to properly regulate, or unwilling to expose themselves to lawsuits or claims by landowners alleging that the governments' lot-size restrictions constitute a taking without just compensation.
- Regulations might need to be revised to assure that variances can provide for some use of every existing lot, however substandard.
- Environmental protection regulations that call for preservation of some parcels while allowing development of other parcels might need to be updated, and owners of existing preservation parcels might try to pursue taking claims.

http://condo.ca/builders-metrolinx-at-odds-over-development-charges/

INCLUSIONARY ZONING ORDINANCES: THE NEXT REGULATORY TAKING ISSUE?

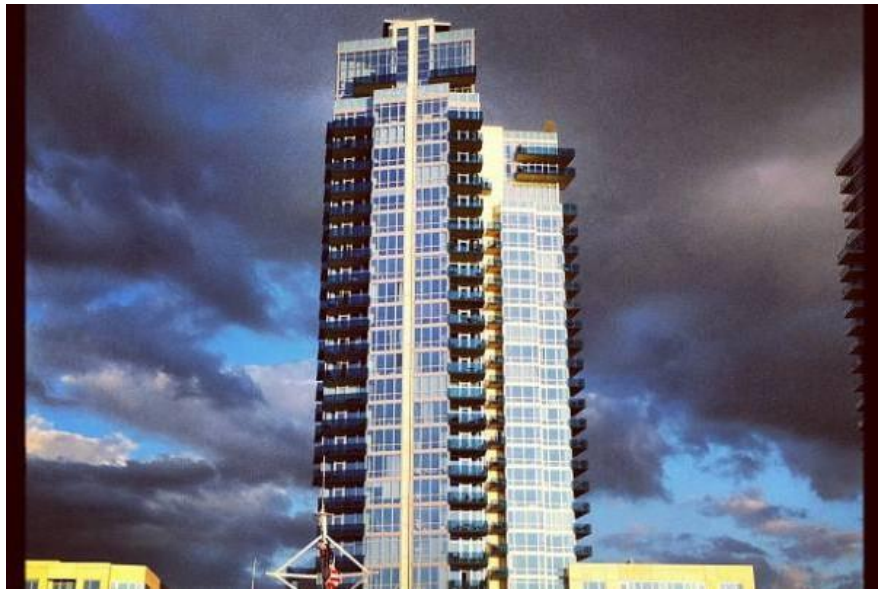
http://the305.com/blog/wp-content/uploads/2012/06/2004-downtown-miami-construction-boom-1.jpg

www.cacities.org

http://cdn.c.photoshelter.com/img-get/I0000vSVcH5PjKJ8/s/750/750/20141213-Seattle-6003.jpg

www.theepochtimes.com/n3/552225-affordable-housing-advocates-call-for-mandatory-inclusionary-zoning-in-nyc/

What is Inclusionary Zoning (IZ) and why is it used?



http://www.gothamgazette.com/index.php/housing/4700-de-blasio-pins-affordable-housing-hopes-on-mandatory-inclusionary-zoning

Income disparity, a steadily recovering housing market, and gentrification have led to increasing unavailability of housing affordable to lower/middle-income workers in the metropolitan communities in which they work.

https://griid.files.wordpress.com/2012/05/picture-34.png

http://atlantablackstar.com/wp-content/uploads/2015/02/gentrification.jpg

- Traditional housing efforts such as public housing, Section 8 vouchers, and tax credits have fallen short of the demand in many markets. And even median and above-median income families (sometimes referred to as workforce income) are feeling the pinch. In an effort to combat this issue, some states have allowed and local governments have implemented mandatory or voluntary incentive-based inclusionary zoning ("IZ") regulations.

- IZ regulations, in general, require developers to allocate a percentage of their units for affordable or workforce housing, provide such units nearby, or pay a fee in lieu

- The IZ incentives can include density bonuses, expedited approval, and fee waivers to offset some of the costs associated with providing the affordable units, and to increase the number of lower-cost units provided beyond any mandated number.

Examples: Inclusionary Zoning Allowed

FLA. STAT. § 166.04151 (2015):

"Notwithstanding any other provision of law, a municipality may adopt and maintain in effect any law, ordinance, rule, or other measure that is **adopted for the purpose of increasing the supply of affordable housing using land use mechanisms such as inclusionary housing ordinances**."

Examples: Voluntary Allowed, Mandatory Prohibited

TENN. CODE ANN. § 66-35-102 (2016):

. . .

(b) A local governmental unit **shall not** enact, maintain, or enforce any zoning regulation, requirement, or condition of development imposed by land use or zoning ordinances, resolutions, or regulations or pursuant to any special permit, special exception, or subdivision plan **that requires the direct or indirect allocation of a percentage of existing or newly constructed private residential or commercial rental units for long-term retention as affordable or workforce housing**. This subsection (b) shall apply to all current and future zoning regulations.

(c) This section **does not affect** any authority of a local governmental unit to create or implement **an incentive-based program designed to increase the construction and rehabilitation of moderate or lower-cost private residential or commercial rental units**.

Examples: Chicago Ch. 2-45-115 (2015) - Mandatory

Applicability; Minimum percentage of affordable units. . . .

(1) *Rezonings*. Whenever the city approves the **rezoning** of property, and such property is subsequently **developed with a residential housing project**, the developer shall be required to establish no less than ten percent **(10%) of the housing units in the residential housing project as affordable housing** or satisfy the requirements of this section through one of the **alternative methods** in subsection (F) . . . . **Developers shall not submit piecemeal applications for zoning approval to avoid compliance with this section**. . . .

(2) *City land sales*. Whenever the **city sells real property** to any developer and such property or any portion thereof is (a) subsequently **developed with a residential housing project**, or (b) **incorporated into a residential housing project** site in order to satisfy minimum off-street parking, minimum lot area, setback or other zoning or Municipal Code requirements or standards, the developer shall be required to establish no less than ten percent **(10%) of the housing units in the residential housing project as affordable housing** or satisfy the requirements of this section through one of the **alternative methods** in subsection (F); . . . .

(3) *Financial assistance.* Whenever the city **provides financial assistance** to any developer in connection with the development of a residential housing project, the developer shall be required to establish no less than twenty percent **(20%) of the housing units in the residential housing project as affordable housing** or satisfy the requirements of this section through one of the **alternative methods** in subsection (F).

Legislative Action Standard

- Is the legislation "clearly **arbitrary and unreasonable**, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co*., 272 U.S. 365 (1926); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978) (holding that regulation did not constitute taking because "[t]he restrictions imposed [were] substantially related to the promotion of the general welfare").

http://www.ncfop41.org/wp-content/uploads/2015/11/LegislativeAction-1.jpg

Is IZ Legislative Action or An Exaction?

Exaction Standard

- Governments cannot deny a benefit to a person just because he exercises a constitutional right. "[A] unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013) (involving choice of an offsite improvement or payment in lieu, and citing *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), both involving easements).

California Building Industry Ass'n v. City of San Jose, California, 61 Cal. 4th 435, 351 P.3d 974 (2015)

* California decides IZ is legislative action
* US Supreme Court is tempted to review

http://www.bestplaces.net/images/metro/41940.png

http://fbanc.org/wp-content/uploads/2010/07/Tani-Cantil-Sakauye1.jpg

Chief Judge of Supreme Court of California, Tani Cantil-Sakauye

"It will come as no surprise to anyone familiar with California's current housing market that the significant problems arising from a scarcity of affordable housing have not been solved over the past three decades. Rather, these problems have become more severe and have reached what might be described as epic proportions in many of the state's localities. All parties in this proceeding agree that the lack of affordable housing is a very significant problem in this state." *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 977 (Cal. 2015).

San Jose Inclusionary Zoning Ordinance

- compelled developers of new residential-development projects with 20 or more units to allocate a minimum of 15 percent of its units for low-income buyers;
- required the allocated units to be sold below market value without exceeding 30 percent of a buyer's median income; and
- required the allocations must remain in effect for 45 years.

Lower Court Proceedings

- California Building Industry Association ("CBIA") filed lawsuit against City of San Jose on the basis that the City's IZ ordinance was **facially invalid** because the city **failed to provide an adequate evidentiary basis** "to demonstrate a **reasonable relationship** between any adverse public impacts or needs for additional subsidized housing units in the City ostensibly **caused by or reasonably attributed to** the development of new residential developments of 20 units or more **and the new affordable housing exactions and conditions** imposed on residential development by the Ordinance."
- CBIA asked the **superior court to treat the ordinance as an exaction** and the superior court acquiesced and enjoined the city from enforcing the ordinance.
- California **Sixth District Court of Appeal** reversed injunction based on conclusion that the Ordinance **should be reviewed as an exercise of the City's police power that bears a substantial and reasonable relationship to the public welfare.**"

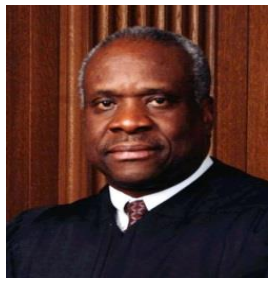
California Supreme Court Decision

- Agreed with appellate court's treating of IZ Ordinance as exercise of **legislative** police powers.

- "As a general matter, so long as a land use restriction or regulation **bears a reasonable relationship to the public welfare**, the restriction or regulation is constitutionally permissible."

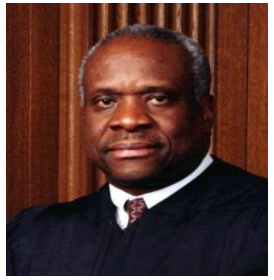
- The court further recognized that it reviews the legislative decisions with a **presumption of constitutionality** that "come before the court with every intendment in their favor."

- CBIA file petition for writ of certiorari with SCOTUS.



Supreme Court Denies Certiorari: Justice Clarence Thomas – maybe next time

- "Our precedents in *Nollan* [and] *Dolan* [ ] would have governed San Jose's actions had it imposed those conditions through administrative action."
- "For at least two decades . . . lower courts have divided over whether *Nollan*/*Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one."
- "I continue to doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking. . . . Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass must if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity."



San Jose Ordinance Challenge Was Not Proper Case To Resolve Conflict

- San Jose case was not reviewable because of issues with timing of petition for certiorari.
- CBIA disclaimed any reliance on *Nollan* and *Dolan* in the lower court proceedings.
- California Supreme Court decision did not rest on distinction between legislative and administrative action.

Effect of Uncertainty Over the Scope of Taking and Private Property Rights Statutes: Chilling Effects on Governmental Regulation

http://i1.wp.com/www.camelcitydispatch.com/wp-content/uploads/2014/03/IcebergQ1.jpg?fit=400%2C400

EXAMPLES OF CHILLING EFFECTS OF PROPERTY RIGHTS STATUTES

- Fort Lauderdale Commission decision overturning city's historic preservation board denial of building permit upon demand by developer for $120 million in compensation under Bert Harris Jr., Private Property Rights Protection Act
- City of West Palm Beach adopted referendum restricting building heights from 15 stories to 5 stories. Landowner intending to build 15 story buildings sued and trial court determined city was liable for the properties' diminution in value, forcing City to settle and allow buildings to be erected
- Collier County denied developer permission to construct golf course within 35 feet of bald eagle nest site. After suit was filed by developer seeking $285 million, the county was forced to settle and allow the development with minor concessions such as a commitment to build an artificial tree, off-site, for the bald eagles to use for nesting

The Track Record on Takings Legislation: Lessons from Democracy's Laboratories, John D. Echeverria & Thekla Hansen-Young, GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE, 19-20 (2008).

Government Exaction Statutes

Florida enacts section 70.45, Florida Statutes, in response to *Koontz*

- "In addition to other remedies available in law or equity, a property owner may bring an action . . . **to recover damages caused by a prohibited exaction**. Such action may not be brought until a prohibited exaction is actually imposed or required in writing as a final condition of approval for the requested use of real property. . . .

- "The court may award attorney fees and costs to the prevailing party; however, **if the court determines that the exaction which is the subject of the claim lacks an essential nexus to a legitimate public purpose, the court shall award attorney fees and costs** to the property owner."

Government Exaction Statutes

Virginia enacts section 15.2-2208.1, Virginia Code, with clear-and-convincing burden:

- "[A]ny applicant aggrieved by the grant or denial by a locality of any approval or permit, however described or delineated . . ., where such grant included, or denial was based upon, an unconstitutional condition pursuant to the . . .Constitution, shall be entitled to an award of compensatory damages and to an order remanding the matter to the locality with a direction to grant or issue such permits or approvals without the unconstitutional condition and may be entitled to reasonable attorney fees and court costs."
- "[O]nce an unconstitutional condition has been proven by the aggrieved applicant to have been a factor in the grant or denial of the approval or permit, the court shall presume, absent clear and convincing evidence to the contrary, that such applicant's acceptance of or refusal to accept the unconstitutional condition was the controlling basis for such impermissible grant or denial provided only that the applicant objected to the condition in writing prior to such grant or denial."

Government Exaction Statutes

Texas enacts section 212.904, Tex. Loc. Gov't Code, which applies only to conditions assessing the cost of municipal infrastructure improvements against a developer:

(a) If a municipality requires as a condition of approval for a property development project that the developer bear a portion of the costs of municipal infrastructure improvements by the making of dedications, the payment of fees, or the payment of construction costs, the developer's portion of the costs may not exceed the amount required for infrastructure improvements that are roughly proportionate to the proposed development as approved by a professional engineer who holds a license issued under Chapter 1001, Occupations Code, and is retained by the municipality.

(b) A developer who disputes the determination made under Subsection (a) may appeal to the governing body of the municipality. At the appeal, the developer may present evidence and testimony under procedures adopted by the governing body. After hearing any testimony and reviewing the evidence, the governing body shall make the applicable determination within 30 days following the final submission of any testimony or evidence by the developer.

(c) A developer may appeal the determination of the governing body to a county or district court of the county in which the development project is located within 30 days of the final determination by the governing body.

(d) A municipality may not require a developer to waive the right of appeal authorized by this section as a condition of approval for a development project.

(e) A developer who prevails in an appeal under this section is entitled to applicable costs and to reasonable attorney's fees, including expert witness fees. . . .

Koontz Statutes and Other Private Property Rights Statutes

- These statutes provide property owners with a cause of action for damages that were otherwise not recoverable under a Fifth Amendment challenge where there is no actual *taking* of property without just compensation.
- With a constant fear of being sued for an exaction under an untested statute or unclear taking doctrine, local governments may forego environmental-protection zoning and other regulations for fear of expensive litigation and liability for compensation to landowners.

Lessons Learned

- The Supreme Court may ultimately have the proper case to decide whether IZ regulations are to be considered exercises of legislative police powers or exactions.

- If IZ regulations are determined to be exactions, local governments' current regulations would be subject to stricter scrutiny and may not survive the *Nollan-Dolan* analysis, depending on how they are drafted and implemented.

- If IZ decisions are treated as exactions in jurisdictions other than California, there is likely to be a chilling effect on local governments' ability and desire to plan for its residents, for fear of expensive litigation and potential liability for compensation.

Questions?

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