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Inclusionary Zoning and Linkage: Land Use Planning Techniques in an Age of Scarce Public Resources

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INCLUSIONARY ZONING AND LINKAGE: LAND USE PLANNING TECHNIQUES IN AN AGE OF SCARCE PUBLIC RESOURCES

*Paul S. Quinn, Jr.**

I. INTRODUCTION

While the problem of affordable housing is not a recent development, the gravity and ramifications of the problem are crucial issues for the 1980's and beyond.[1] The housing affordability crisis is especially pronounced in Florida, where rapid population growth and high land

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*Associate, Gray, Harris & Robinson, P.A., Orlando, Florida. B.A., 1984, Duke University; J.D., 1987, University of Florida. This paper received the Attorneys' Title Insurance Fund award for the best legal paper related to the field of real property law, 1986-87.

1. No legal citation is necessary to confirm the gravity of the affordable housing problem in Florida and the nation. A quick glance at the parks and other public places in many of the larger metropolitan areas of Florida reveals the unfortunate plight of the homeless. While the problems of the homeless are probably systemic in nature, an ample supply of affordable housing would undoubtedly ameliorate the situations. *See* D. PORTER & S. COLE, AFFORDABLE HOUSING: TWENTY EXAMPLES FOR THE PRIVATE SECTOR 1 (1982). The authors state: "Only one-quarter of American households are now able to afford new, single-family homes, whereas ten years ago, half the households could afford them." *Id.*

costs adversely affect the availability of low income housing.[2] The Florida legislature responded to the housing problem by enacting the "Florida Affordable Housing Act of 1986."[3] The legislature found that decent low income housing was needed in Florida.[4] Furthermore, "new and rehabilitated housing must be provided at a cost affordable to such persons in order to alleviate this critical need."[5] Despite the legislature's lofty goals, the Act probably will not make a major impact on Florida's housing problem. The Act's narrow scope and limited funding will not solve the current and future housing crisis.

As federal and state funds for low income housing decline, many local governments have developed creative alternatives to shift the cost of such housing to the private sector.[6] One alternative is inclusionary zoning. Inclusionary zoning ordinances typically require a residential home developer to set aside a portion of the development for low and moderate income units.[7] Thus, before a building permit is issued, the developer must agree to build a certain percentage of low income houses or contribute money for the construction of such housing.[8] Inclusionary zoning, therefore, requires the private sector to provide affordable housing for lower income residents.

While some inclusionary zoning programs are successful, planners in a few larger cities have observed the trend of downtown commercial

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2. *See* FINAL REPORT OF THE GOVERNOR'S GROWTH MANAGEMENT ADVISORY COMMITTEE 52 (1986). According to the report, "the state of Florida is experiencing a housing affordability crisis which affects over 1.5 million homeowners and renters. The dimensions of the housing affordability crisis are predicted to be significantly greater in 1986 and beyond because of recent cutbacks in federal spending for housing, the anticipated adverse impact of federal tax reform measures on the housing market, and the continued rapid rate of population growth in Florida." *Id.*

3. FLA. STAT. § 420.601 (1986).

4. *Id.* § 420.6015 (legislative findings regarding the need for low and moderate income housing in Florida).

5. *Id.* § 420.6015(2).

6. *See* Hagman, *Taking Care of One's Own Through Inclusionary Zoning: Bootstrapping Low- and Moderate-Income Housing by Local Government*, 5 URB. L. & PUB. POL'Y 169 (1982). *See also* D. MERRIAM, D. BROWER, & P. TEGLER, INCLUSIONARY ZONING MOVES DOWNTOWN vii (1985).

7. *See generally* D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 304-06 (2d ed. 1986). The authors state: "The 'inclusionary' planning technique consists of requiring planning authorities to plan for low and moderate income housing and/or housing for specific disadvantaged groups. Inclusionary zoning consists of requiring residential developments of specified size, type or location to include low and moderate income housing." *Id.* at 304. *See also* Ellickson, *The Irony of Inclusionary Zoning*, 54 S. CAL. L. REV. 1167, 1169 (1981).

8. *See* Ellickson, *supra* note 7, at 1169.

developments displacing lower income residents from their housing.[9] New commercial developments exacerbate the housing crisis by attracting new workers to areas that lack affordable housing.[10] Many local governments are using linkage programs to force developers to bear the consequences of their projects.[11] Linkage, therefore, is a land use regulation which requires commercial developers to either construct housing for low and moderate income residents or contribute money to a housing trust fund, created to finance the construction of low income housing.[12] The commercial development is "linked" to the need for affordable housing for the workers employed or displaced by the development.[13] Thus, with linkage and other forms of inclusionary zoning, developers are forced to pay the way for the increased need for low and moderate income housing.[14]

This paper discusses the historical development of inclusionary zoning and linkage and the reasons why both techniques are important issues for land use planning.[15] Next, the paper examines current linkage programs in Boston and Miami, which have served as model programs throughout the nation.[16] The paper also addresses the constitutional challenges to linkage and the merits of each argument.[17] Finally, guidelines for a successful linkage program are explained with an analysis of ways to survive constitutional challenges.[18] The paper concludes that linkage programs are necessary if current economic trends continue and affordable housing becomes even more scarce in the future.[19]

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9. *See* Kleven, *Inclusionary Ordinances and the Nexus Issue*, in D. MERRIAM, *supra* note 6, at 110-11.

10. L. Dodd-Major, Simulation of Housing from Commercial Development: An Overview of Legal Mechanisms 4 (1986) (unpublished paper on file with Growth Management Studies, University of Florida College of Law).

11. *See* Kleven, *supra* note 9, at 110. In addition to affordable housing, some cities use linkage to require or encourage commercial developers to mitigate a project's impacts by providing several types of public benefits such as job training. San Francisco, for example, requires that commercial developers pay linkage fees for child care, downtown parks, mass transit, and affordable housing. Developers must also contribute one percent of construction costs to buy public art. The linkage fees are approximately $16.00 to $17.00 per square foot. *See* Netter, *Growth Management Goes Downtown*, URB. LAND, Nov. 1987, at 34.

12. *See* D. PORTER, DOWNTOWN LINKAGES, ULI: The Urban Land Institute 54 (1985) ("Linkage refers to the practice of requiring large office or retail developers to contribute, either in kind or by payment, to the construction elsewhere of low- or moderate-income housing.").

13. Kleven, *supra* note 9, at 111.

14. *See* Bosselman & Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA L.J. 381, 381 (1985). The authors refer to linkage as a "mandatory tithe" for land developers.

15. *See infra* § II.

16. *See infra* § III.

17. *See infra* § IV.

18. *See infra* § V.

19. *See infra* § VI.

II. HISTORICAL DEVELOPMENT OF INCLUSIONARY ZONING AND LINKAGE

A. *Exclusionary Zoning*

Inclusionary zoning techniques developed as a response to local governmental zoning measures which excluded low and moderate income residents from living in the community.[20] Some local governments have used their zoning powers to exclude particular groups, especially racial and economic minorities, from their communities.[21] Common exclusionary techniques involve large minimum lot size requirements or large minimum floor area requirements.[22] Other measures include limitations on multi-family dwellings and mobile homes, minimum yard and setback requirements, and growth management caps.[23] Beginning in the 1960's and 1970's, many state courts began to invalidate such provisions when they were used for exclusionary purposes.[24]

Exclusionary zoning ordinances came under increasing attack after a landmark New Jersey Supreme Court case, *Southern Burlington County NAACP v. Township of Mount Laurel*[25] (*Mount Laurel I*), found certain land use provisions invalid. The city of Mount Laurel enacted ordinances with large minimum lot sizes, large minimum square footage requirements, and restrictions on apartments and mobile homes.[26] The court found these ordinances to be exclusionary

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20. *See generally* D. HAGMAN & J. JUERGENSMEYER, *supra* note 7, at 305-06; Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 UCLA L. REV. 1432 (1974). *See also* Burch, *Land Use Controls: Public Use and Private Beneficiaries*, 16 URB. LAW. 713 (1984).

21. *See* D. CALLIES & R. FREILICH, CASES AND MATERIALS ON LAND USE 549 (1986).

22. *Id.*

23. *Id.*

24. *See, e.g.*, National Land & Investment Co. v. Kohn, 215 A.2d 597 (Penn. 1965) (Pennsylvania Supreme Court struck down a local government's four-acre minimum lot size requirement as unconstitutional. The court held: "A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid."); Appeal of Girsh, 263 A.2d 395 (Penn. 1970) (Pennsylvania Supreme Court struck down a zoning ordinance which made no provision for apartment buildings anywhere in the city); Surrick v. Zoning Hearings Board of Upper Providence Township, 382 A.2d 105 (Penn. 1977) (zoning ordinance held invalid since no land was set aside for multi-family dwellings). For a discussion of federal exclusionary zoning issues, see Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"); *see also* Suffolk Housing v. Town of Brookhaven, 109 A.D.2d 323, 491 N.Y.2d 396 (2d Dep't 1985), *appeal pending.*

25. 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975).

26. *Id. See* J. JUERGENSMEYER, ZONING: THE LAW IN FLORIDA 141 (1980) (discussing the background, facts, and importance of the *Mount Laurel I* decision).

and therefore invalid.[27] Mount Laurel and similar developing municipalities were required to eliminate exclusionary ordinances and to provide for their fair share of regional housing needs.[28] Additionally, such municipalities had an affirmative duty to give low and moderate income persons a realistic opportunity to live there.[29]

B. *Inclusionary Zoning*

Despite the strong language in *Mount Laurel I*, no low income dwellings were built. Eight years later, the New Jersey Supreme Court issued a stronger mandate in its *Mount Laurel II* opinion.[30] According to the court, municipalities, at the very least, were required to "remove all municipally created barriers to the construction of their fair share of lower income housing."[31] Two commentators noted: "Mount Laurel II approved the concept of requiring municipalities to take affirmative inclusionary action such as mandatory provision of low income housing in residential developments as well as measures designed to facilitate the use of tax breaks and subsidies for low income housing."[32] Thus, the court specifically upheld the constitutionality of inclusionary devices such as density bonuses and mandatory set-asides which facilitated the construction of low income housing.[33]

Some states have not been as hospitable to inclusionary zoning as New Jersey. For example, in *Board of Supervisors of Fairfax County*

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27. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975).

28. *Id.* For a recent assessment of *Mount Laurel I*'s fair share requirements and New Jersey's subsequent solution to the problem of affordable housing, see Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20 (1987). Professor Payne proposes the following "fair share" approach to ameliorate the housing crisis:

> To be consistent with the general welfare, a municipality's land use regulations must provide that a fair share of each new development or construction project results in housing affordable to low and moderate income households, unless it can be demonstrated either (1) that there is no significant statewide need for additional units of such housing or (2) that equivalent housing units have been provided previously within the municipality in some other way.

Id. at 32.

29. *Id. See* Davidoff, *Zoning as a Class Act*, in D. MERRIAM, *supra* note 6, at 4-5. The author states that under *Mount Laurel I*, "Municipalities have an affirmative duty to provide housing opportunities for their indigenous poor, as well as to provide for their fair share of regional housing need." *Id.*

30. Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983), *on remand*, 207 N.J. Super. 169, 504 A.2d 66 (1984).

31. 92 N.J. 158, 258-59, 456 A.2d 390, 441 (1983).

32. D. HAGMAN & J. JUERGENSMEYER, *supra* note 7, at 305-06.

33. 92 N.J. 158, 266-68, 456 A.2d 390, 445 (1983).

v. DeGroff,[34] a developer challenged an amendment to a zoning ordinance which required some residential developers to build at least fifteen percent of low and moderate income units as part of their development.[35] While the Virginia Supreme Court conceded that providing low and moderate income housing served a legitimate public purpose, the court nevertheless struck down the amendment. The court held that "local governments have power to enact only traditional zoning ordinances directed to physical characteristics and having the purpose neither to include nor exclude any particular socio-economic group."[36] Furthermore, the amendment exceeded the local government's authority and constituted a taking of private property without just compensation.[37]

Recent courts have followed the *Mount Laurel* trend, rather than *DeGroff*, in upholding inclusionary ordinances.[38] Many inclusionary ordinances require mandatory set-asides where a developer of new housing units must build a certain fraction of the units at reduced prices for low income families.[39] Some ordinances offer density, area, or other land development bonuses for the construction of affordable housing or allow the payment of money in lieu of actually building the houses.[40]

While inclusionary zoning is widely used today in land use planning, the most recent and controversial[41] inclusionary technique is known as linkage. Linkage has been defined as "the practice of requiring large office or retail developers to contribute, either in kind or by payment, to the construction elsewhere of low- or moderate-income housing."[42] For example, if a developer wants to build a downtown

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34. 214 Va. 235, 198 S.E.2d 600 (1973).

35. *Id.* at 601.

36. *Id.* at 602.

37. *Id.*

38. *See, e.g.*, Berenson v. Town of New Castle, 341 N.E.2d 236 (N.Y. 1975); Associated Homebuilders v. City of Livermore, 557 P.2d 473 (Cal. 1976); and S.A.V.E. v. City of Bothell, 576 P.2d 401 (Wash. 1978).

39. *See* Ellickson, *supra* note 7, at 1169. *See also* Hill, *Government Manipulation of Land Values to Build Affordable Housing: The Issue of Compensating Benefits*, 13 REAL EST. L.J. 3 (1984).

40. *See* D. CALLIES & R. FREILICH, *supra* note 21, at 609 (listing inclusionary zoning devices).

41. *See* Wall St. J., Mar. 10, 1987 at p. 1 (describing recent linkage provisions in various cities around the country. The article states "city planners are linking more new building permits to commitments from developers and new businesses to provide jobs, open space, child-care facilities and other amenities.").

42. Griffin, *Inclusionary Zoning and Linkage in Boston and Cambridge, Massachusetts*, in D. PORTER, *supra* note 12, at 54. *See also* Note, *Zoning New York City to Provide Low and Moderate Income Housing: Can Commercial Developers be Made to Help?*, 12 FORDHAM URB. L.J. 491 (1984).

office building, he may do so only if he agrees to contribute to the construction of low cost housing.[43] Proponents of linkage offer three reasons for requiring commercial developers to build affordable housing.[44] First, new development creates jobs. New workers attracted to the new jobs obviously need affordable housing. Second, new projects may destroy existing low cost housing and physically displace persons living in a specific locale. Third, even if residents are not displaced directly, the availability of land for residential purposes is reduced by the area of the commercial development. Thus, the need for low cost housing can be causally connected, or linked, to the commercial development required to provide the affordable housing.[45]

III. Model Linkage Programs

A. *Boston*

Currently, at least nine cities have adopted linkage programs.[46] The linkage program in Boston has served as a model for many ordinances throughout the country. The Boston program, enacted in 1983, requires a five dollar per square foot housing exaction fee from any large commercial development which requires zoning relief for its completion.[47] The ordinance provides that any downtown project requiring a zoning action and involving new, substantially enlarged or rehabilitated office, hotel, retail, or institutional development must pay a fee of five dollars per square foot of floor space over 100,000 square feet.[48] The linkage program applies to projects in a new zoning classification known as Development Impact Districts, located in downtown Boston.[49] Developers may pay the fee over twelve years to the Neighborhood Housing Trust, a fund managed by the city for construction of low and moderate income housing, or the developers may construct the low income housing themselves.[50] As of 1985, at least thirty million dollars had been committed to either construction or rehabilitation of low income housing, or had been deposited in the housing trust fund.[51]

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43. *See* Bosselman & Stroud, *supra* note 14, at 381.

44. *See* L. Dodd-Major, *supra* note 10, at 4.

45. Kleven, *supra* note 9, at 110.

46. *See* D. Porter, *supra* note 12, at 4-12 (describing the current linkage programs in San Francisco, Boston, Santa Monica, Seattle, Miami, Hartford, Chicago, New York, and Cambridge).

47. *Id.* at 5.

48. *Id.*

49. *Id. See also* Griffin, *supra* note 42, at 53.

50. Griffin, *supra* note 42, at 53.

51. D. Porter, *supra* note 12, at 10.

Recently, the Boston linkage program has been challenged on several grounds. The ordinance was struck down by the Massachusetts Superior Court in *Seon P. Bonan v. The General Hospital Corporation.*[52] The court held that: 1) linkage was not a zoning power authorized in Boston's zoning enabling act, 2) linkage has the attributes of a tax rather than a regulatory fee, 3) express statutory authority was required to implement such a program, and 4) the expected receipt of linkage rendered such action void for improper inducement to governmental action.[53] On appeal, the Massachusetts Superior Judicial Court did not reach the merits of the case, but dismissed it because the plaintiffs lacked standing to challenge linkage.[54] Further developments concerning Boston's linkage program will affect existing programs and the future of linkage.

B. *Miami*

In 1983, Miami adopted a linkage ordinance for the Brickell area near downtown and Biscayne Bay.[55] The ordinance, entitled "SPI-5: Housing Bonus Over Base FAR 3.25," is designed to encourage commercial developers to finance low income housing near their developments.[56] The ordinance offers density bonuses to participating developers; in exchange for providing affordable housing, developers are allowed to increase the floor area ratio (FAR) of their projects.[57] The

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52. Suffolk Superior Court Civil Action No. 76438 (March 31, 1986).

53. *Id.*

54. Seon P. Bonan v. City of Boston, 398 Mass. 315 (1986).

55. D. PORTER, *supra* note 12, at 8.

56. *Id.*

57. Miami city ordinance § 1556.2.2, entitled: "SPI-5: Housing bonus over base FAR 3.25." The ordinance provides:

> With the approval of the Urban Development Review Board, the maximum floor area and/or floor area ratio shall be increased . . . provided, however, that the first 1.0 of floor area ratio increase over the maximum . . . shall be obtainable only upon compliance with the requirements of paragraph 1, Offsite Affordable Housing. . . .
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> 1. *Offsite Affordable Housing*: The floor area ratio may be increased . . . up to a total increase of FAR 1.0, provided that for every one (1) square foot of increase there shall be either: (a) a non-refundable developer contribution of four (4) dollars to the City of Miami affordable housing fund . . . or (b) developer-sponsored construction of 0.15 gross square foot of affordable housing. . . . Affordable housing shall be defined as sales housing with a retail sales price not in excess of 90% of current median Dade County new housing sales price, or rental housing rates . . . not in excess of 30% of the gross median Dade County monthly income.
>
> No building permit shall be issued for increased floor area until the City of Miami has certified compliance with the provisions of this section. The City of Miami shall certify compliance provided one of the following has occurred: (a)

ordinance sets a maximum, of right, floor area ratio of 3.25 for all new developments within the SPI-5 district boundaries.[58] If a developer wants to build in excess of the maximum, the Urban Development Review Board must approve the project.[59] To get approval, the developer must agree to provide affordable housing through a contribution of four dollars per square foot of added space to a city housing fund or through developer-sponsored construction of 0.15 gross square foot of affordable housing per square foot of added floor space.[60]

If the developer chooses to build affordable housing himself, the cost of housing must not exceed ninety percent of the current median price for new housing in Dade County.[61] If apartments are built, the rental rates cannot exceed thirty percent of the median monthly income for Dade County residents.[62] If the developer makes a cash contribution to the housing trust fund, the money must be received before a building permit is issued.[63] Finally, in order to link the commercial development to the affordable housing, all housing must be located within one mile of the district boundaries or within an adjacent community redevelopment area.[64]

Another zoning district, SPI-7, was enacted in May 1984. SPI-7 is similar to SPI-5 and encourages construction of residential units on the site or within the district.[65] According to a 1985 report, three projects have been approved resulting in the construction of almost 8000 square feet of low cost housing units or the contribution of $1.8 million to the housing trust fund.[66] While the linkage provisions in Miami have been labeled "revolutionary,"[67] city planners are convinced

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> construction of new affordable housing has begun, or (b) a certified check to the designated affordable housing fund has been deposited with the City of Miami.
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> All affordable housing units . . . must be located within one (1) mile of the SPI boundaries, or be located within the Southeast Overtown/Park West Community Redevelopment Area.

Id.

58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *See* D. PORTER, *supra* note 12, at 8.
66. D. O'Connell & B. Valla, Incentives in Planning and Regulation 4 (1986) (unpublished paper on file in Growth Management Studies, University of Florida College of Law).
67. *See* Marcus, *A New Era of Zoning Exaction?*, in D. MERRIAM, *supra* note 6, at 187. The author included the following story which appeared in the Miami Herald on June 16, 1983:

the ordinances are valid police power regulations.[68] Because the program is not mandatory, developers have control over whether they want to build affordable housing or keep their developments within the maximum as of right floor area ratio.[69] The Miami linkage program, therefore, is beneficial to both developers, who have the option of exceeding density requirements on their projects, and to the general public, who will receive an increase in the supply of affordable housing.

IV. CONSTITUTIONAL CHALLENGES TO LINKAGE

A. *Municipal Authority: Do Local Governments Have the Power to Adopt Linkage Programs?*

A basic challenge to linkage programs is whether local governments have the authority to enact such ordinances. While only the Boston ordinance has been challenged, the increasing popularity of linkage programs will probably result in legal challenges that assert such programs are *ultra vires*, or beyond the authority of a local government. In Florida, however, both counties[70] and municipalities[71] have broad home rule powers. Charter counties have "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors."[72] Non-charter counties have "such power of self-government as is provided by general or special law."[73]

Zoning lawyer Robert H. Traurig suffered a rare setback Wednesday evening as the Miami commission rejected his proposal for a 65 percent increase in the size of an office building along Brickell Avenue. The commission voted 3-1 to uphold the present policy of encouraging Brickell developers to build apartments as well as offices, in an effort to turn Brickell into a 24-hour urban center. Said a Miami planner of Wednesday's vote: "it means that there's a price to be paid [for higher density] and the cost must be shared by the private sector." The cost is measured in terms of building housing for downtown workers. Brickell developers prefer to build offices, claiming that there is no market for apartments on what has become Miami's banker boulevard. A developer had proposed that the city eliminate a "bonus" system that allowed developers to build bigger office buildings only if they provided apartments as well. The new bonus introduced by the city commission is considered somewhat revolutionary. To build more office space, a developer would have to build or finance housing in other parts of downtown. "That forces your client, in order to build what he wants, to build us some housing in Miami," said the Mayor.

68. Conversation with Jack Luft, Office of the Planning Director, City of Miami.

69. *See* D. PORTER, *supra* note 12, at 18.

70. FLA. CONST. art. VIII, § 1(f) (powers of non-charter counties); FLA. CONST. art. VIII, § 1(g) (powers of charter counties).

71. *Id.* art. VIII, § 2(b) (powers of municipalities).

72. *Id.* art. VIII, § 1(g).

73. *Id.* art. VIII, § 1(f).

In addition, Florida statutes give all counties the power to adopt comprehensive plans, establish zoning regulations, establish housing programs, and "perform any other acts not inconsistent with law."[74]

Municipal governments also have extremely broad powers authorized by Florida's constitution[75] and statutes[76]. These provisions give municipalities the power to conduct municipal government, which includes the authority to adopt land use measures.[77] Two land use commentators state that "the fact that home rule powers are granted local governments is indicative of state policies favoring flexibility and broad regulatory discretion in city and municipal self- government."[78] Arguably, therefore, Florida's strong home rule tradition supports the authority for local governments to enact linkage provisions. It is interesting to note that a related land use regulation, impact fees, has no specific enabling act in Florida's constitution or statutes, yet has been upheld by the courts.[79] Impact fees are imposed on developers to help finance the cost of essential public services, such as roads or sewers.[80] The rationale for impact fees is that new development should bear the costs of increased public services needed because of the development.[81] If courts analogize linkage programs to impact fees, then local governments will most likely have the authority to enact linkage ordinances without an enabling act or specific constitutional authority.

In addition to Florida's broad home rule powers, a Florida statute requires every local government to include a housing provision in its

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74. FLA. STAT. § 125.01(1) (1985).

75. FLA. CONST. art. VIII, § 2(b).

76. FLA. STAT. § 166.021 (1985) (Florida "Municipal Home Rule Powers Act").

77. *See* Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610 (Fla. 1967) (The Florida Supreme Court claimed that the power to enact zoning ordinances comes directly from the constitution.).

78. Juergensmeyer & Blake, *Impact Fees: An Answer To Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415, 426, n.61 (the authors cite Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), for support of their proposition).

79. *See* Home Builders & Contractors Ass'n of Palm Beach County v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140, 143 (Fla. 4th D.C.A. 1983) (upholding the county's authority to enact an impact fee ordinance, since the ordinance did not conflict with any general or special law); Hollywood, Inc. v. Broward County, 431 So. 2d 606, 614 (Fla. 4th D.C.A. 1983) (upholding an ordinance requiring a dedication of land or payment of a fee to be used in expanding a county park system). For an overview of impact fees, see *generally*, J. JUERGENSMEYER & J. WADLEY, FLORIDA LAND USE RESTRICTIONS, ch. 17, *Impact Fees* (1984).

80. *See* J. JUERGENSMEYER & J. WADLEY, *supra* note 79, at 1-6; Juergensmeyer & Blake, *supra* note 78, at 415-21.

81. *Id.*

comprehensive plan.[82] Florida Statutes section 163.3177(6)(f) mandates that local government comprehensive plans contain:

> A housing element consisting of standards, plans, and principles to be followed in:
> 1. The provision of housing for existing residents and the anticipated population growth of the area.
> 2. The elimination of substandard dwelling conditions . . .
> 3. The provision of adequate sites for future housing, including housing for low-income families, mobile homes . . . with supporting infrastructure and public facilities.
> 4. Provision for relocation housing . . . and other housing for purposes of conservation, rehabilitation, or replacement.
> 5. The formulation of housing implementation programs.[83]

Thus, local governments may not ignore the problem of affordable housing for low and moderate income families.[84] Rather, local governments have an affirmative duty, similar to a *Mount Laurel* obligation,[85] to provide for adequate affordable housing for their present and future residents. This statutory provision could be construed as giving local governments the power to adopt inclusionary programs and linkage ordinances.[86]

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82. FLA. STAT. § 163.3177(6)(f) (1985).

83. *Id.*

84. It is interesting to note that in addition to the provisions mandating local comprehensive planning contained in Florida Statutes section 163.3177 (1985), the Florida Legislature also decided to require state comprehensive planning. Florida Statutes section 187.101(1) (1985) states: "The State Comprehensive Plan shall provide long-range policy guidance for the orderly social, economic, and physical growth of the state." The State Comprehensive Plan must contain a housing element which is similar to the requirement for local comprehensive plans. According to Florida Statute section 187.201(5)(a): "The public and private sectors shall increase the affordability and availability of housing for low-income and moderate-income persons . . . ." The goal is to "increase the supply of safe, affordable, and sanitary housing for low-income and moderate-income persons and elderly persons by alleviating housing shortages, . . . providing incentives to the private sector to build affordable housing, [and] encouraging public-private partnerships to maximize the creation of affordable housing . . . ." FLA. STAT. § 187.201(5)(b) (1985). While this statute will probably not impact on the supply of affordable housing immediately, it may place the issue of affordable housing on the legislature's agenda in future years.

85. *See supra* note 29 and accompanying text.

86. *See* Ellickson, *supra* note 7, at 1210-11. Professor Ellickson discusses a California statute which requires every local government to include a housing element in its general plan to assist in the development of affordable housing for low and moderate income residents. Ellickson states: "This statutory provision could be construed as empowering local governments to adopt inclusionary programs." *Id.* at 1211.

To ensure that local governments comply with comprehensive plan requirements, the Florida legislature has adopted consistency requirements.[87] Florida's consistency requirements dictate that all land development regulations be consistent with the local government comprehensive plan and regional and state plans.[88] Finally, the recently enacted Growth Management Act[89] directs the state land planning agency to adopt a minimum criteria rule to be applied in reviewing local comprehensive plans.[90] Florida Administrative Code Rule 9J-5[91] also ensures compliance with state and regional policy goals.[92] If linkage were challenged as *ultra vires*, a court should consider these extensive statutes as encouraging local governments to provide for affordable housing in any creative manner. The manner chosen, however, must not constitute a taking of private property without just compensation.

B. *The Taking Issue*

Both the United States[93] and Florida Constitutions[94] provide that private property shall not be taken for public uses without just compensation.[95] One of the strongest arguments that could be made against linkage programs is that they violate either the federal or state eminent domain provisions.[96] Thus, developers could argue that requiring

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87. FLA. STAT. § 163.3194 (1985).

88. *Id. See also* D. HAGMAN & J. JUERGENSMEYER, *supra* note 7, at 305.

89. Ch. 85-55, 1985 Fla. Laws. The Growth Management Act was an omnibus act, codified at Florida Statutes chapters 161, 163, 186, 193, and 380 (1985).

90. FLA. STAT. § 163.3177(9) (1985) ("The state land planning agency shall . . . adopt by rule minimum criteria for the review and determination of compliance of the local government comprehensive plan elements required by this act.").

91. Florida Administrative Code Rule 9J-5 provides that a comprehensive plan complies with state requirements only if it meets the specific requirements of Rule 9J-5, Florida Statutes chapter 163, and is consistent with the State Comprehensive Plan and the appropriate regional plan.

92. Florida Administrative Code Rule 9J-5.010 requires local governments in Florida to 1) inventory the number of substandard dwellings in the locality, 2) estimate projected housing needs, 3) set long term goals, and 4) include specific policy statements. The purpose of the housing element is "to provide guidance to local governments to develop appropriate plans and policies to demonstrate their commitment to meet identified or projected deficits in the supply of housing." *Id.* For a general explanation of the Minimum Criteria Rule, see Growth Management Studies Newsletter, v. 1, no. 4, p. 2 (1986) (published at the University of Florida College of Law).

93. U.S. CONST. amend. V & XIV.

94. FLA. CONST. art. X, § 6.

95. *See* L. Dodd-Major, *supra* note 10, at 18, n.32.

96. *See* Griffin, *supra* note 42, at 60-62.

them to construct housing for others or pay money in lieu thereof is an unconstitutional taking of private property. Whether linkage constitutes a taking, however, depends on several factors articulated by the United States and Florida Supreme Courts.

According to Justice Holmes in *Pennsylvania Coal Co. v. Mahon*,[97] a regulation affecting an individual's use of land constitutes a taking when the regulation "goes too far."[98] While there is no settled formula for determining when a regulation goes too far, the United States Supreme Court shed some light on the matter in *Penn Central Transportation Co. v. City of New York*,[99] a leading historic preservation case. Relevant considerations in determining whether the regulation is a taking include: the economic impact on the landowner, the extent to which the regulation interferes with investment-backed expectations, and whether the government has physically invaded the property.[100] In *Penn Central*, the Court found that a law limiting the construction of an office building on the plaintiff's property was not an unconstitutional taking.[101] The landowner still had a viable economic use of the property and there was no physical invasion by the government.[102]

Florida's supreme court followed a similar analysis in *Graham v. Estuary Properties, Inc.*,[103] stating: "whether a regulation is a valid exercise of the police power or a taking depends on the circumstances of each case."[104] The court articulated six factors which should be considered in deciding whether a taking has occurred:

> 1. Whether there is a physical invasion of the property.
> 2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.
> 3. Whether the regulation confers a public benefit or prevents a public harm.
> 4. Whether the regulation promotes the health, safety, welfare, or morals of the public.
> 5. Whether the regulation is arbitrarily and capriciously applied.

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97. 260 U.S. 393 (1922).
98. *Id.*
99. 438 U.S. 104 (1978).
100. *Id.* at 125.
101. *Id.* at 138-39.
102. *See id.* at 138-39.
103. 399 So. 2d 1374 (Fla. 1981).
104. *Id.* at 1380-81.

6. The extent to which the regulation curtails investment-backed expectations.[105]

Applying these tests to linkage reveals that: 1) there is no physical invasion of the property, 2) the property is not diminished in value because of linkage requirements, 3) linkage confers a public benefit, 4) the regulation promotes the welfare of the public by increasing the supply of affordable housing, 5) if applied correctly, linkage is not arbitrary nor capricious, and 6) the linkage regulation does not interfere with the landowner's investment-backed expectations.

Specifically, before developing property subject to a linkage ordinance similar to Miami's, a landowner can calculate the costs of the regulation.[106] Thus, if it is not profitable to increase the density of the project, then the developer does not have to build the affordable housing. Conversely, if the developer feels that an increased density will be profitable, he can comply with the linkage requirements and calculate his development costs before construction begins. Also, since linkage ordinances are not retroactive (i.e. they apply only to new developments) landowners' investment-backed expectations should not be frustrated.[107]

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105. *Id.*

106. *See supra* note 57. Under SPI-5, any increase of floor area ratio (FAR) above 3.25 requires a developer to build a specified amount of affordable housing or make a contribution of four dollars for every square foot of increase to an affordable housing trust fund. One commentator notes that Miami's program, like Seattle's and Hartford's, allows developers an option to increase the density of development in return for housing contributions. D. PORTER, *supra* note 12, at 18. Porter states: "Developers . . . find this method quite palatable, not only because each party enjoys benefits but also because the process is predictable—the calculations can be factored into a project pro forma to yield definite choices." *Id.*

107. *See generally*, D. CALLIES & R. FREILICH, *supra* note 21, at 196-201. Courts disagree on when a developer's rights are vested. California, for example, follows a late vesting rule: "a developer's rights have not vested until a valid building permit has issued. Additionally, the developer must have exhibited substantial reliance to its detriment on the final approval. Thus under this approach, a developer may be required to put at risk large sums of money without being assured of protection from subsequent changes in legal requirements." *Id.* at 196-97. Merely purchasing land with a particular zoning classification does not vest a right in the owner for continuation of that zoning classification. *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915).

Florida courts often use a three-prong analysis to determine whether a developer's rights have vested or whether the doctrine of equitable estoppel should apply. A local government may not prohibit a particular use of land where a property owner: "(1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired." Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10, 15-16 (Fla. 1976). *Accord* Sakolsky v. City of Coral Gables, 151 So. 2d 433 (Fla. 1963); The Florida Companies v. Orange County, 411 So. 2d 1008 (Fla. 5th D.C.A. 1982); Jones

Perhaps a landowner would have a stronger taking claim if the linkage ordinance contained a very low maximum density provision. Thus, if a landowner had no reasonable economic use of the property unless he received a linkage density bonus, a taking claim might prevail.[108] If, however, a court examines the use of the property as a whole and concludes that a reasonably viable economic use of the property can be obtained without an increase in density, then the linkage ordinance should not constitute a taking.[109]

Such an analysis was adopted in a recent United States Supreme Court case, *First English Evangelistic Lutheran Church of Glendale v. County of Los Angeles, Calif.*,[110] which has been heralded as the most significant land use case decided by the Court since its 1926 decision in *Village of Euclid v. Ambler Realty, Co.*[111] In the *First English* case, Los Angeles County adopted an ordinance prohibiting the construction of any building in a designated flood protection area in the county. First English Evangelistic Lutheran Church operated

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v. First Virginia Mortgage and Real Estate Investment Trust, 399 So. 2d 1068 (Fla. 2d D.C.A. 1981); Town of Largo v. Imperial Homes Corp., 309 So. 2d 571 (Fla. 2d D.C.A. 1975).

In Florida Companies v. Orange County, 411 So. 2d 1008 (Fla. 5th D.C.A. 1982) a mortgage lender sued Orange County for failure to approve a subdivision plat, after the developer had obtained preliminary approval a few years earlier. The court held for the landowner, asserting that "the county is equitably estopped from denying approval of the subdivision plan after the developer made substantial expenditures in reliance upon the county's preliminary approval of the project." *Id.* at 1012. Thus, since rights in property generally will not vest until some type of permit is issued or approval is given by the local government, linkage should not interfere with landowners' investment backed expectations. That is, investment backed expectations do not accrue until a land owner applies for permission to begin building on his property.

108. *See* Fred F. French Investing Co., Inc. v. City of New York, 350 N.E.2d 381 (N.Y. 1976) (Here, New York City rezoned plaintiff's land in Manhattan for park purposes only. Plaintiff argued that the classification deprived him of all reasonable income and private use of the property. The court agreed with the landowner, and held, "a zoning ordinance is unreasonable if it frustrates the owner in the use of his property, that is, if it renders the property unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value.").

109. Although not involving linkage, this was the approach taken in Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981); Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). In *Estuary Properties*, the landowner was deprived of development rights for almost one-third of his property, which was covered with mangroves. The landowner argued that a third of his land had been taken without just compensation. The Florida Supreme Court held that the property must be viewed as a whole to determine whether a taking has occurred. When viewed as such, there was still an economically viable use for the property. Therefore, no taking had occurred. Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1382-83 (Fla. 1981).

110. 107 U.S. 2378 (1987).

111. 272 U.S. 365 (1926).

a campground in a flood protection area. After the ordinance was enacted, First English sued the county in inverse condemnation, claiming the ordinance denied the church all use of the property. The Supreme Court agreed and held that when a governmental regulation denies a landowner all the use of his property, the Fifth Amendment requires that the government pay compensation.[112] Thus, landowners challenging confiscatory ordinances may now recover damages from the time the land use regulation was enacted until the ordinance is invalidated, or the property is condemned.[113]

This "temporary taking" analysis could inhibit local governments from enacting innovative land use techniques such as linkage. Because of the *First English* case, any time a land use regulation is determined to be a taking of property, local governments must compensate landowners for the temporary deprivation of their property. In the past, local governments could cure onerous land use regulations by merely invalidating them. Now, invalidation of the ordinance is not a sufficient remedy.

The Supreme Court admitted this case will have a harsh impact on local governments. The Court, speaking through Chief Justice Rehnquist, claimed:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations . . . . As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[114]

While the decision creates liability for local governments when their land use regulations constitute temporary takings, the Court failed to address the question of whether regulating the use of property, short of a total deprivation, constitutes a taking. To circumvent a temporary taking argument, local governments should make inclusionary techniques such as linkage either optional or provide a reasonable economical use of the property without having to comply with the regulations.

C. *Rational Nexus Test*

One corollary to the taking issue is whether the linkage requirement is rationally related to the new development. Developers who

112. 107 S.Ct. at 2389.

113. *Id.*

114. *Id.* at 2393, citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

choose to build affordable housing or pay money to a housing trust fund may argue that their development is not linked to the increased need for low cost housing which they are required to provide. When linkage is challenged, therefore, courts are likely to use a "rational nexus" test[115] to evaluate the validity of the ordinance. The rational nexus test ensures that costs of government are not imposed unfairly or arbitrarily.[116] Thus, if the money collected from developers benefits the development and not the public at large, the first requirement is met.[117]

As applied to impact fees, the rational nexus test used by Florida courts involves a two-step analysis.[118] First, the fee requirements are permissible if they offset needs created by the new development.[119]

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115. The rational nexus test is set forth in Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611-12 (Fla. 4th D.C.A. 1983). A recent United States Supreme Court case seems to require a rational nexus when governmental permits are conditioned upon the landowner's providing some benefit to the public. In Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987), a landowner applied for a development permit to build a beach house along the California coast. The California Coastal Commission would not issue the permit unless the landowner agreed to grant an easement allowing the public to pass across the property, which was located between two public beaches. The Court found that the condition of providing an easement was not related to the issuance of the development permit to build the house. Since there was no nexus between the condition and the permit, the Court found that the land use regulation was a taking of private property in violation of the Fifth Amendment. *Id.* at 3150. According to the Court:

> [H]ere the lack of nexus between the condition and the original purpose of the building restriction converts that purpose of something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

Id. at 3148.

116. *See* Kleven, *supra* note 9, at 123. Kleven states:

> The nexus test is designed to get at the taking issue by asking whether the need for low-cost housing can fairly be attributed to new development, and if so whether new development is being asked to bear more than its fair share of the cost of providing such housing.

Id.

117. *See* Home Builders & Contractors Ass'n of Palm Beach County v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140 (Fla. 4th D.C.A. 1983).

118. *See, e.g., id.*; Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611-12 (Fla. 4th D.C.A. 1983); Home Builders & Contractors Ass'n of Palm Beach County v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140 (Fla. 4th D.C.A. 1983); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. 2d D.C.A. 1983). For a thorough discussion of the rational nexus test, see Bosselman & Stroud, *supra* note 14, at 397-404.

119. *See* Bosselman & Stroud, *supra* note 14, at 397-98.

Second, the government must show a reasonable connection between the expenditure of the funds and the benefits accruing to the development.[120] In addition, the ordinance must specifically earmark the funds collected for use in providing public services which benefit the new developments.[121] Thus, under the dual rational nexus test: 1) linkage requirements must offset housing needs created by the commercial development, and 2) funds collected from developers must actually benefit the development.

Proponents of linkage argue there is a rational nexus between a commercial development and the need for low and moderate income housing.[122] They claim that downtown office developments attract workers to the area who are unable to find affordable housing.[123] Also, developers are benefitted by the construction of affordable housing because an increase in the supply of low cost housing gives new workers a place to live.[124]

Opponents argue that linkage provides a benefit to the general public and new developers are required to bear more than their fair share of the cost of providing such housing.[125] While linkage obviously benefits the entire community, courts have held in exaction cases that some spillover effects are inevitable and permissible.[126] In fact, drafting a linkage ordinance that benefitted the new development exclusively would be impossible. While the rational nexus may be somewhat attenuated, it is not unreasonable to require developers to provide housing for workers attracted to the area because of the new development.[127]

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120. *Id.* at 398.

121. *See* Hollywood, Inc. v. Broward County, 431 So. 2d 606, 612 (Fla. 4th D.C.A. 1983).

122. *See* D. PORTER, *supra* note 12, at 12.

123. *Id.*

124. *Id.*

125. *See* Kleven, *supra* note 9, at 123.

126. *See* Home Builders & Contractors Ass'n of Palm Beach County v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140 (Fla. 4th D.C.A. 1983). In *Home Builders*, plaintiffs sued the county to invalidate an impact fee ordinance which helped fund the construction of new roads attributable to the development. The plaintiffs argued that the ordinance was invalid because of the disparity between the persons who paid the fees and persons who would benefit from the new roads. The Fourth District Court of Appeal upheld the ordinance, claiming that externalities are inevitable when new improvements, such as roads, are built with the money collected from impact fees. The court stated: "It is difficult to envision any capital improvement for parks, sewers, drainage, roads, or whatever, which would not in some measure benefit members of the community who do not reside in or utilize the new development." *Id.* at 143.

127. *See* Bosselman, *Downtown Linkage: Legal Issues*, in D. PORTER, *supra* note 12, at 32 ("since a developer can be required to provide streets and sewers and other facilities needed to service a project, so also can a developer be required to provide housing for the workers who would be needed to operate those facilities and services.").

D. *The Tax Issue*

A final challenge that linkage requirements must overcome is the characterization of linkage as a tax rather than a land use regulation. If courts view linkage as a tax, linkage programs will be invalidated unless express and specific statutory authorization for the tax exists.[128] Developers who choose to pay money into a housing trust fund under a linkage requirement may claim the fees are taxes because the funds are not earmarked to benefit the development. Also, because the fees are redistributional in nature, they must be considered taxes and must be authorized by state legislation.[129]

Impact fees, when first challenged, also faced similar arguments.[130] To overcome the challenge, courts now require impact fees to be earmarked to benefit those persons or developments paying the fees.[131] Thus, if the money collected is set aside and is actually used to benefit the development, then the fee will be considered a valid land use regulation rather than a tax.

If this analysis is applied to linkage, money deposited into a housing trust fund should not be considered a tax if the money is properly earmarked and the funds collected are actually spent to build affordable housing.[132] Miami's linkage ordinance was carefully drafted to meet these two criteria. First, the money collected from each linkage district is deposited in a separate trust fund.[133] Also, the development is benefitted because the housing must be built within the linkage district or within one mile.[134] Miami's ordinances, therefore, appear to be land use regulations rather than redistributional taxes.

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128. FLA. CONST. art. VII, § 1(a) provides: "No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law." *See also* FLA. CONST. art. VII, § 2: "All ad valorem taxation shall be at a uniform rate within each taxing unit . . . ." For further explanation of the taxation argument, see Home Builders & Contractors Ass'n of Palm Beach County v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140, 144-45 (Fla. 4th D.C.A. 1983) (holding that an impact fee ordinance imposes a regulatory fee and not a prohibited tax).

129. *See* Ellickson, *Inclusionary Housing Programs: Yet Another Misguided Urban Policy?*, in D. MERRIAM, *supra* note 6, at 84-88 (claiming that inclusionary zoning programs are the taxation of new development to raise revenue for municipal purposes); *see also* Ellickson, *supra* note 7, at 1188.

130. *See, e.g.*, Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976).

131. *See* Hollywood, Inc. v. Broward County, 431 So. 2d 606, 612 (Fla. 4th D.C.A. 1983).

132. *See* Juergensmeyer & Blake, *supra* note 78, at 438-441 (discussing the tax versus regulation problem as it relates to impact fees).

133. *See supra* note 57.

134. *Id.*

V. ANALYSIS

While linkage appears constitutional at first glance, a local government pondering a linkage ordinance should follow Miami's lead to ensure the program's validity. Before enacting a linkage program, a municipality should critically study the housing problem and should conclude that low and moderate income housing is needed.[135] In Florida, all local governments are required to include in their comprehensive plans a housing provision for existing and future residents, taking into account the anticipated population growth of the area.[136] In addition, the plan must provide adequate sites for future housing, including housing for low and moderate income families.[137] To comply with these requirements, the minimum criteria rule requires local governments to inventory existing housing and estimate projected housing needs.[138] Thus, if a municipality determines that an affordable housing problem exists, it should be within its police power to take reasonable and necessary steps to ameliorate the problem.[139]

If the linkage ordinance requires commercial developers to provide the affordable housing, the community should be prepared to show that the commercial development is responsible for the increased need for low and moderate income housing.[140] The local government, therefore, must actually prove that a linkage exists. The government should conclude that the construction of retail, office, or other commercial buildings actually destroys existing low cost housing or attracts employees to the area who would need such housing.[141] If this can be shown, then the linkage requirement should be roughly proportional

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135. *See* comments of Bruce Gelber, printed in D. MERRIAM, *supra* note 6, at 49 (claiming that in order to survive a constitutional challenge to inclusionary zoning, a local government should make findings that specifically refer to a housing crisis and the past or ongoing exclusion or displacement of low and moderate income persons).

136. FLA. STAT. § 163.3177(6)(f) (1985).

137. *Id.*

138. FLA. ADMIN. CODE Rule 9J-5.010.

139. *See supra* notes 82-92 and accompanying text.

140. *See* D. PORTER, *supra* note 12, at 21. The author concludes: "a community that adopts a linkage program should be prepared to demonstrate that a linkage actually exists, including quantifying need, calculating the proportion of need attributable to the development, and evaluating impacts of the development on other revenue sources." *Id.*

141. *See* Bosselman & Stroud, *supra* note 14, at 406-07. The authors conclude that: "the extent to which exactions may be imposed for housing-related linkage programs should depend on the local government's ability to show (1) that there is a need for housing, (2) that the need is caused by new development, (3) that the exaction is proportional to the need caused, (4) that the exaction will be used to remedy the need, and (5) that the remedy will benefit the occupants of the new development." *Id.* at 407.

to the housing need caused by the project.[142] Finally, the linkage funds or housing built by developers should remedy the affordable housing problem generated by the development. Miami's program is commendable because the funds collected are earmarked to provide affordable housing near the project.[143] Also, if the developer chooses to build the housing himself, the ordinance ensures that affordable housing is built by placing maximum limits on the sale and rental prices of the new units.

To avoid a taking argument, local governments should give landowners the option of choosing whether to comply with linkage or not; mandatory programs should be avoided. Thus, linkage provisions should offer density bonuses or other land use incentives to developers in exchange for building affordable houses. Landowners, however, should have a reasonable economic use of their property without resorting to linkage.[144] Density bonuses, therefore, should give those developers who choose to increase the size of their buildings the option of doing so. In return, they should be required to contribute to the construction of affordable housing, the need for which is causally linked to the development.[145]

VI. CONCLUSION

Linkage programs have the potential to make a significant contribution to the supply of low and moderate income housing in an age of declining state and federal funding for such programs.[146] As more communities adopt inclusionary zoning measures and linkage ordinances, court disputes are inevitable. Linkage will likely be required to meet the rational nexus test used to measure the validity of other forms of development exactions.[147] If this test is applied to linkage, the critical question becomes whether an increase in the supply of affordable housing benefits the landowner who pays the linkage fee

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142. *See* D. PORTER, *supra* note 12, at 21.

143. *See supra* note 57.

144. *See* Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981). The Florida Supreme Court noted in *Estuary Properties* that "the owner of private property is not entitled to the highest and best use of his property if that use will create a public harm." *Id.* at 1382.

145. *See* Kleven, *supra* note 9, at 110.

146. *See* D. PORTER, *supra* note 12, at 15-18.

147. *See* Bosselman & Stroud, *supra* note 14, at 411 (claiming that "linkage programs should be required to meet the same tests that have evolved for measuring the validity of other forms of development exaction. Under those tests a housing program would probably be a legally acceptable candidate for an exaction process."). *Cf.* Mandelker, *The Constitutionality of Inclusionary Zoning: An Overview*, in D. MERRIAM, *supra* note 6, at 35 (claiming that exaction doctrine should not apply to inclusionary zoning).

or builds the housing. As with impact fees, courts should recognize that most exactions produce some externalities, and linkage is no exception.[148] Developments, however, which create an increased demand for low income housing should be forced to pay for the costs of such housing.[149]

Florida is an ideal place to enact linkage provisions. In fact, the Governor's Growth Management Advisory Committee recommended linkage ordinances as one method of alleviating the current housing crisis.[150] The committee concluded that "local governments [should] consider enacting ordinance provisions which offer density bonuses to developers in exchange for either contributions to a Housing Trust Fund or the construction or rehabilitation of low income housing."[151] As Florida's population grows and low income persons are excluded from many locales, inclusionary zoning and linkage ordinances should be enacted. Despite their controversy, inclusionary zoning and linkage are valuable land use planning tools for solving local housing needs in an age of scarce public resources.[152]

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148. *See* Home Builders & Contractors Ass'n of Palm Beach County v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140 (Fla. 4th D.C.A. 1983).

149. *See* Kayden & Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The* Connection Between Office Development and Housing, 50 LAW & CONTEMP. PROBS. 127 (1987).

150. FINAL REPORT OF THE GOVERNOR'S GROWTH MANAGEMENT ADVISORY COMMITTEE 66-67 (1986).

151. *Id.* at 67.

152. *See* Tegler & Achtenberg, *Postscript: Recent Legislative Developments*, in D. MERRIAM, *supra* note 6, at 211. For a review of linkage and other exaction tools that local governments use, see Conners & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69 (1987).