

Washington Law Review

Volume 88
Number 2 *Symposium: The Disclosure Crisis*

6-1-2013

Making Room: Why Inclusionary Zoning Is Permissible under Washington's Tax Preemption Statute and Takings Framework

Josephine L. Ennis

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Josephine L. Ennis, Comment, *Making Room: Why Inclusionary Zoning Is Permissible under Washington's Tax Preemption Statute and Takings Framework*, 88 Wash. L. Rev. 591 (2013).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol88/iss2/10>

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

MAKING ROOM: WHY INCLUSIONARY ZONING IS PERMISSIBLE UNDER WASHINGTON'S TAX PREEMPTION STATUTE AND TAKINGS FRAMEWORK

Josephine L. Ennis

Abstract: Inclusionary zoning ordinances, which typically require developers to set aside a percentage of new residential units for low and moderate income households, are a popular mechanism for ensuring the development of affordable housing in many communities. Washington State jurisdictions have been slow to introduce inclusionary zoning—particularly mandatory set-asides—perhaps because of the legal battles they would face. The Washington State Supreme Court previously relied on RCW 82.02.020 (the “tax preemption statute”) to invalidate a low-income housing ordinance in *San Telmo Associates v. City of Seattle*¹ and in *R/L Associates, Inc. v. City of Seattle*.² Washington courts have also relied on a unique and complex takings analysis to invalidate low-income housing and manufactured housing laws on grounds that they constituted a “taking” of private property or a violation of substantive due process under the U.S. Constitution, or in some cases, under the Washington State Constitution.³ This Comment argues that inclusionary zoning is authorized by RCW 36.70A.540,³ the Affordable Housing Incentive Programs Act, which expressly amended the tax preemption statute and permits both voluntary and mandatory inclusionary zoning programs. This Comment explores the differences between the federal and Washington takings analyses and argues that the Washington State Supreme Court should abandon its unique tests in favor of the federal approach as articulated in *Lingle v. Chevron U.S.A., Inc.*⁴ Finally, this Comment explains why mandatory set-asides are constitutional under both federal and Washington takings law.

INTRODUCTION

Nationwide there is an acute shortage of affordable housing.⁵ A number of jurisdictions have responded to the problem by enacting inclusionary zoning ordinances, which require developers to set aside a percentage of housing units in new residential developments for low-income households.⁶ The two most popular inclusionary zoning models

1. 108 Wash. 2d 20, 735 P.2d 673 (1987).

2. 113 Wash. 2d 402, 780 P.2d 838 (1989).

3. Affordable Housing Incentive Programs Act, ch. 149, 2006 Wash. Sess. Laws 704 (codified at WASH. REV. CODE § 36.70A.540 (2012)).

4. 544 U.S. 528 (2005).

5. In 2009, more than half of American renters lived in unaffordable housing. *Most Renters Live in Unaffordable Housing, New Census Data Show*, NAT'L LOW INCOME HOUSING COALITION (Sept. 29, 2010), <http://nlihc.org/press/releases/2137>. “Unaffordable” is defined as spending more than 30% of household income on housing. *Id.*

6. See Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully*

are: (1) mandatory set-aside programs, in which a minimum percentage of units in new residential developments must be offered at affordable rates; and (2) voluntary incentive zoning programs, where developers are rewarded with extra density allowances (or other incentives) when they include affordable housing in developments.⁷ Many believe that inclusionary zoning programs are especially helpful for creating mixed-income neighborhoods in areas where rapid growth may drive out existing low-income tenants.⁸

Washington jurisdictions have been reluctant to adopt affordable housing programs, perhaps due to a number of successful legal challenges by developers.⁹ However, in 2006, the Washington State Legislature responded to the pressing housing needs of the state and passed legislation authorizing cities and counties to adopt “affordable housing incentive programs.”¹⁰ Under the Affordable Housing Incentive Program Act (AHIPA), local governments may incentivize low-income housing development by offering density bonuses, height and bulk bonuses, fee waivers or exemptions, parking reductions, expedited permitting, or other incentives.¹¹ As of May 2012, at least three Washington communities have adopted mandatory set-asides,¹² and

Creating Affordable Housing, 36 U.S.F. L. REV. 971, 977 (2002) (explaining that Fairfax County Virginia adopted the first inclusionary zoning program in 1971, followed shortly thereafter by Montgomery County, Maryland). Since the 1970s, California has taken the lead in implementing inclusionary zoning programs, with 170 Californian cities and counties—approximately one-third of California jurisdictions—adopting such ordinances as of 2006. NON-PROFIT HOUS. ASS’N OF N. CAL., AFFORDABLE BY CHOICE: TRENDS IN CALIFORNIA INCLUSIONARY HOUSING PROGRAMS (2007), available at <http://calruralhousing.org/drupal/sites/default/files/SampleIHRreport.pdf>.

7. TIM IGLESIAS & ROCHELLE E. LENTO, THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 99–101 (2d ed. 2011). See generally DOUGLAS R. PORTER, INCLUSIONARY ZONING FOR AFFORDABLE HOUSING (2004). See also Brian R. Lerman, Note, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383 (2006) (comparing East coast and West coast mandatory set-aside programs in the United States).

8. See, e.g., Kautz, *supra* note 6; Cecily T. Talbert & Nadia L. Costa, *Current Issues in Inclusionary Zoning*, 36 URB. LAW. 557 (2004).

9. See Cristina Jorgenson, Duncan Greene & Megan Nelson, *Affordable Housing Incentive Programs Under HB 2984: Bonus or Burden?*, REAL PROP. PROB. & TRUST (Wash. State Bar Ass’n, Wash.), Winter 2007–2008, at 2.

10. H.B. 2984, 59th Leg., Reg. Sess. (Wash. 2006) (codified at WASH. REV. CODE § 36.70A.540 (2012)).

11. Affordable Housing Incentive Programs Act, ch. 149, 2006 Wash. Sess. Laws 704 (codified at WASH. REV. CODE §§ 36.70A.540(1)(a)(i)–(vi) (2012)).

12. See FEDERAL WAY, WASH., ZONING CODE § 19.110.010 (2013) (multifamily projects over 25 units must provide affordable units, and may then build bonus units); KIRKLAND, WASH., MUN. CODE § 23.112 (2013) (all developments with over four units and located in certain zones must provide some affordable units); REDMOND, WASH., ZONING CODE § 21.20 (2013) (developments of over 10 units in specified zones must provide affordable units, and may then build bonus units).

another nine have adopted some form of voluntary incentive zoning program.¹³

The City of Seattle enacted its own voluntary incentive zoning program in 2008,¹⁴ but because incentive zoning has produced far fewer affordable units than hoped for, housing advocates have called for a mandatory program that applies to all new residential developments.¹⁵ In negotiations over the rezone of the rapidly developing South Lake Union neighborhood, Seattle City Council members have explored the idea of revising the City's incentive zoning policy to produce more affordable housing.¹⁶ If the City of Seattle adopts a mandatory set-aside program, it is very likely to face a legal challenge from the local real estate community.¹⁷ This Comment reviews the legal framework that a Washington court would use when considering such a challenge and argues that mandatory set-asides are permissible on both statutory and constitutional grounds.

Washington courts have relied on RCW 82.02.020¹⁸ (the "tax preemption statute") to strike down land set-aside mandates and previous low-income housing ordinances promulgated by county and city governments.¹⁹ The tax preemption statute prohibits local governments from imposing certain types of development conditions or

13. *Affordable Housing Ordinances/Flexible Provisions*, MUN. RES. & SERVICES CENTER WASH., www.mrsc.org/subjects/planning/housing/ords.aspx (last updated May 2012) (cities with voluntary programs include Marysville, Poulsbo, Shoreline, Snohomish, and Woodinville; counties include King, Pierce, and San Juan).

14. Seattle, Wash., Ordinance 122882 (Dec. 15, 2008) (codified at SEATTLE, WASH., SEATTLE MUN. CODE § 23.58A (2013)).

15. See, e.g., Emily Alvarado, *Zoning Matters*, HOUSING DEV. CONSORTIUM (Jan. 30, 2013, 2:48 PM) <http://wliha.org/blog/zoning-matters>.

16. See Richard Conlin, *Affordable Housing in South Lake Union: Careful Work Needed*, SEATTLE.GOV (Mar. 1, 2013), <http://conlin.seattle.gov/2013/03/01/affordable-housing-in-south-lake-union-careful-work-needed/>; Bob Young, *Council Signals 24-Story Towers by South Lake Union Won't Fly*, SEATTLE TIMES, Apr. 2, 2013, at B1.

17. Washington State developers have successfully defeated efforts to impose housing-related requirements on developers and landlords on a number of occasions. See, e.g., *Manufactured Hous. Cmty. of Wash. v. State*, 142 Wash. 2d 347, 13 P.3d 183 (2000); *Guimont v. Clarke*, 121 Wash. 2d 586, 854 P.2d 1 (1993); *Robinson v. City of Seattle*, 119 Wash. 2d 34, 830 P.2d 318 (1992); *Sintra, Inc. v. City of Seattle (Sintra I)*, 119 Wash. 2d 1, 829 P.2d 765 (1992); *R/L Assocs., Inc. v. City of Seattle*, 113 Wash. 2d 402, 780 P.2d 838 (1989); *San Telmo Assocs. v. City of Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (1987).

18. WASH. REV. CODE § 82.02.020 (2012).

19. See *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wash. 2d 740, 49 P.3d 867 (2002) (30% open-space set-aside for proposed subdivisions); *R/L Assocs., Inc.*, 113 Wash. 2d 402, 780 P.2d 838 (tenant relocation assistance); *San Telmo Assocs.*, 108 Wash. 2d 20, 735 P.2d 673 (required replacement housing or payments into fund for demolition of existing low-income units).

charges on landowners.²⁰ Because Washington courts have expressed a preference for invalidating housing ordinances under RCW 82.02.020 rather than on constitutional grounds,²¹ the tax preemption statute is the logical starting point for a court considering the validity of a mandatory set-aside ordinance in Washington. Part I of this Comment discusses how RCW 82.02.020 has been used to invalidate previous ordinances and also introduces the AHIPA,²² which explicitly amended the tax preemption statute to allow for “affordable housing incentive programs.”²³ Part II argues that AHIPA authorizes both mandatory and optional inclusionary zoning programs. It further argues that because AHIPA amended RCW 82.02.020, a mandatory set-aside program that otherwise conforms to AHIPA is statutorily permissible in Washington.

In addition to a tax preemption challenge, a mandatory set-aside program may be challenged on both state and federal constitutional grounds. Nationally, inclusionary zoning ordinances have been attacked as unconstitutional takings, or as violations of due process, with divergent results in state courts.²⁴ Federal courts have yet to engage in a rigorous and comprehensive review of inclusionary zoning,²⁵ although some have applied elements of the takings analysis to inclusionary zoning policies.²⁶ Because a plaintiff in Washington could raise a federal takings claim to challenge mandatory set-asides, Part III of this

20. See, e.g., *R/L Assocs., Inc.*, 113 Wash. 2d at 407, 780 P.2d at 841.

21. See, e.g., *Isla Verde Int'l Holdings, Inc.*, 146 Wash. 2d at 752, 49 P.3d at 874.

22. Affordable Housing Incentive Programs Act, ch. 149, 2006 Wash. Sess. Laws 704 (codified at WASH. REV. CODE § 36.70A.540 (2012)).

23. *Id.*

24. Compare *Homebuilders Ass'n of N. Cal. v. City of Napa*, 108 Cal. Rptr. 2d 60 (Cal. Ct. App. 2001) (rejecting developer's takings and due process claims because ordinance advanced a legitimate state interest, provided ample economic benefits to developers, and provided administrative relief to those who demonstrated a lack of nexus or of a reasonable relationship under the development exactions tests), and *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel (Mt. Laurel II)*, 456 A.2d 390 (N.J. 1983) (holding that inclusionary zoning properly falls within the police power and is neither a taking nor a substantive due process violation), with *Bldg. Indus. Ass'n of San Diego Cnty., Inc. v. City of San Diego*, No. GIC817064, 2006 WL 1666822 (Cal. Super. Ct. May 24, 2006) (finding ordinance facially unconstitutional because it did not provide for a waiver if a developer could show an absence of a nexus or reasonable relationship between development and need for low-income housing), and *Bd. of Supervisors of Fairfax Cnty. v. DeGross Enter., Inc.*, 198 S.E.2d 600 (Va. 1973) (ruling that inclusionary zoning violated the takings clause of the Virginia Constitution and exceeded the authority granted by state enabling legislation).

25. Jerold S. Kayden, *Inclusionary Zoning and the Constitution*, NHC AFFORDABLE HOUSING POL'Y REV., Jan. 2002, at 10.

26. See, e.g., *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) (examining whether requiring commercial developers to pay into a low-income housing trust fund was an unconstitutional exaction).

Comment reviews the current state of federal takings law and briefly explores how courts nationwide have applied federal takings law to inclusionary zoning challenges. Additionally, in order to contrast Washington's approach, Part III describes how the U.S. Supreme Court has abandoned its substantive due process approach in the land use context.

The Washington State Supreme Court has provided heightened protections to landowners by engaging in an idiosyncratic takings analysis based on the Washington State Constitution²⁷ and a unique application of federal takings law.²⁸ For this reason, an inclusionary zoning ordinance in Washington may be subject to even greater scrutiny than elsewhere in the country.²⁹ Part IV of this Comment provides an overview of Washington's takings jurisprudence, while Part V discusses the ongoing application of substantive due process law to land use claims in Washington. Part VI argues that such an ordinance can survive a takings challenge under the federal takings analysis so long as the program requirements are not overly burdensome to landowners and still allow developers a reasonable return on their investment. Additionally, mandatory set-asides satisfy the development exactions criteria of *Nollan v. California Coastal Commission*³⁰ and *Dolan v. City of Tigard*³¹ so long as the implementing jurisdiction provides proper evidence linking the construction of new residential development to the need for additional low-income housing units. Finally, Part VII argues that a mandatory set-aside ordinance should pass the takings and substantive due process protections of Washington's constitutional framework. However, this Comment further argues that the Washington State Supreme Court should abandon its unique analysis—particularly its reliance on substantive due process—in favor of the federal takings analysis articulated by the U.S. Supreme Court in *Lingle v. Chevron*

27. See *Manufactured Hous. Cmty's of Wash. v. State*, 142 Wash. 2d 347, 359–60, 13 P.3d 183, 189–90 (2000).

28. See Roger D. Wynne, *The Path Out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis*, 86 WASH. L. REV. 125, 151–52 (2011) (explaining differences between the Washington and the federal analysis).

29. See *id.*

30. 483 U.S. 825 (1987) (holding land-use exaction a taking when government conditioned permit to build a larger residence on beachfront property on the dedication of an easement for public beach access).

31. 512 U.S. 374 (1994) (holding exaction a taking when government required dedication of portion of property for a bicycle and pedestrian "greenway" before granting store a development permit).

*U.S.A., Inc.*³²

I. WASHINGTON COURTS HAVE RELIED ON
WASHINGTON'S TAX PREEMPTION STATUTE TO
INVALIDATE HOUSING PRESERVATION AND LAND SET-
ASIDE ORDINANCES

RCW 82.02.020 protects developers from making payments as a condition for development unless those payments are directly related to impacts of the development or are otherwise authorized by the statute.³³ In *San Telmo Associates v. City of Seattle*,³⁴ and in *R/L Associates, Inc. v. City of Seattle*,³⁵ the Washington State Supreme Court invalidated a low-income housing ordinance on the basis that the ordinance constituted an impermissible tax.³⁶ Subsequently, Washington courts have adopted a strict interpretation of the tax preemption statute and have invalidated even indirect charges on developments when the charges do not explicitly fall within one of RCW 82.02.020's exceptions.³⁷ As the cases below highlight, without an explicit amendment to RCW 82.02.020, an inclusionary zoning ordinance would be vulnerable to a tax preemption challenge.³⁸ However, in 2006, the drafters of the Affordable Housing Incentives Program Act (AHIPA) explicitly amended RCW 82.02.020 to accommodate "incentive zoning" programs.³⁹ As discussed further in Part II, whether mandatory set-asides are permissible under RCW 82.02.020 rests largely on the question of whether AHIPA authorizes mandatory incentive zoning in addition to purely voluntary programs.⁴⁰

32. 544 U.S. 528 (2005).

33. WASH. REV. CODE § 82.02.020 (2012).

34. 108 Wash. 2d 20, 735 P.2d 673 (1987).

35. 113 Wash. 2d 402, 780 P.2d 838 (1989).

36. See *R/L Assocs., Inc.*, 113 Wash. 2d at 409, 780 P.2d at 842; *San Telmo Assocs.*, 108 Wash. 2d at 24, 735 P.2d at 675.

37. See, e.g., *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wash. 2d 740, 49 P.3d 867 (2002); *Citizens' Alliance for Prop. Rights v. Sims*, 145 Wash. App. 649, 187 P.3d 786 (2008), cert. denied, 165 Wash. 2d 1030, 203 P.3d 378 (2009).

38. See *infra* Part I.A–B.

39. See Affordable Housing Incentive Programs Act, ch. 149, 2006 Wash. Sess. Laws 704 (codified at WASH. REV. CODE § 36.70A.540 (2012)).

40. See *infra* Part V.

A. *The Washington State Supreme Court Relied on RCW 82.02.020 to Strike Down Former Low-Income Housing Ordinances*

Unless expressly provided elsewhere, RCW 82.02.020 preempts local governments from imposing direct or indirect taxes, fees, or charges on certain construction, development, and land division activities.⁴¹ RCW 82.02.020 permits local governments to require land dedications or easements in proposed developments when such requirements are “reasonably necessary as a direct result of [a] proposed development.”⁴² Finally, under RCW 82.02.050–.090, local governments may impose certain mitigation measures, including impact fees, to offset costs associated with a new development.⁴³ A tax, fee, or charge imposed on a development is invalid unless it falls within an exception specified in the statute.⁴⁴

The Washington State Supreme Court previously relied on the tax preemption statute to invalidate a low-income housing ordinance as an impermissible tax on landowners. In 1985, the City of Seattle enacted a Housing Preservation Ordinance (HPO) to mitigate the loss of affordable housing caused by redevelopment and changed use and to provide relocation assistance to displaced residents.⁴⁵ Under the HPO, landowners planning to demolish or convert low-income housing units were required to provide affected tenants with relocation assistance and replace a percentage of the low income housing with other suitable housing.⁴⁶ The Washington State Supreme Court first invalidated the HPO as an unauthorized tax in *San Telmo Associates v. City of Seattle*.⁴⁷ Two years later, the court reaffirmed its holding in *R/L Associates, Inc. v. City of Seattle*.⁴⁸

In *San Telmo*, the Washington State Supreme Court applied a test set

41. WASH. REV. CODE § 82.02.020 (2012).

42. *Id.*

43. *Id.* §§ 82.02.050–.090.

44. *R/L Assocs., Inc. v. City of Seattle*, 113 Wash. 2d 402, 409, 780 P.2d 838, 842 (1989).

45. *See San Telmo Assocs. v. City of Seattle*, 108 Wash. 2d 20, 22, 735 P.2d 673, 673–74 (1987) (citing SEATTLE, WASH., SEATTLE MUN. CODE § 22.210.020 (1985)). In 1980, the City enacted a Housing Preservation Ordinance that imposed a fee on low-income housing owners when they converted residential property to a nonresidential use, but the ordinance was invalidated as an impermissible tax in superior court in 1983. *San Telmo Assocs.*, 108 Wash. 2d at 21–22, 735 P.2d at 673.

46. *Id.* at 22, 735 P.2d at 673–74 (1987) (citing SEATTLE, WASH., SEATTLE MUN. CODE § 22.210.050 (1985)).

47. 108 Wash. 2d at 24, 735 P.2d at 675.

48. 113 Wash. 2d at 409, 780 P.2d at 842.

forth in *Hillis Homes, Inc. v. Snohomish County*⁴⁹ to determine if the HPO was an impermissible tax on development, or merely a permissible development regulation.⁵⁰ According to the *Hillis* test, “[if] the primary purpose [of an ordinance] is to accomplish desired public benefits which cost money,” it is a tax.⁵¹ On the other hand, “if the primary purpose of legislation is regulation rather than raising revenue,” then it is a regulation.⁵² After applying the *Hillis* test, the *San Telmo* court held that Seattle’s HPO required developers to make a large expenditure for the public good, and therefore imposed an unauthorized tax, ruling that “the municipal body cannot shift the social costs of development onto a developer under the guise of a regulation.”⁵³ According to the court, “[s]uch cost shifting is a tax, and absent specific legislative pronouncement, the tax is impermissible and invalid.”⁵⁴

After the *San Telmo* ruling, the City of Seattle continued to enforce the tenant relocation provisions of HPO.⁵⁵ The development company R/L Associates challenged the provisions, and on appeal the Washington State Supreme Court concluded that mandatory tenant assistance for displacement imposed an indirect charge on demolition and changes to land use.⁵⁶ According to the court, such charges easily qualified as a “tax, fee, or charge . . . on the construction or reconstruction of residential buildings,” which RCW 82.02.020 specifically forbids.⁵⁷ The *R/L Associates* court relied on the plain language of the statute and overruled *San Telmo*, declaring that the *Hillis* tax/regulation distinction was unnecessary because a payment for development rights is prohibited unless explicitly excepted by RCW 82.02.020.⁵⁸

49. 97 Wash. 2d 804, 650 P.2d 193 (1982).

50. *San Telmo Assocs.*, 108 Wash. 2d at 24, 735 P.2d at 674–75.

51. *Hillis Homes*, 97 Wash. 2d at 809, 650 P.2d at 195 (quoting *Haugen v. Gleason*, 359 P.2d 108, 111 (Or. 1961)).

52. *Id.* (quoting *Spokane v. Spokane Police Guild*, 87 Wash. 2d 457, 461, 553 P.2d 1316, 1319 (1976)). The *Hillis* court invalidated Snohomish County’s attempt to levy a \$250 per lot park fee as a condition for approving new plats because the fee’s purpose was simply to raise revenue, not to regulate residential developments. *Id.* at 810, 650 P.2d at 195–96.

53. *San Telmo Assocs.*, 108 Wash. 2d at 24, 735 P.2d at 675.

54. *Id.*

55. *R/L Assocs., Inc. v. City of Seattle*, 113 Wash. 2d 402, 405, 780 P.2d 838, 840 (1989).

56. *Id.* at 407, 780 P.2d at 841.

57. *Id.* at 406, 780 P.2d at 841 (quoting WASH. REV. CODE § 82.02.020 (1982)).

58. *Id.* at 409, 180 P.2d at 842. When the City argued that such a literal application would lead to invalidation of “all otherwise valid police power regulations . . . which incidentally impose an economic burden,” the court emphasized that the statute clearly outlined the scope of valid regulations, which include land dedications, easements, costs associated with the permitting process, charges for water, sewer, gas, and drainage system charges, and other payments to mitigate direct

B. *Washington Courts Subsequently Emphasized the Need for Strict Compliance with the Tax Preemption Statute's Terms*

Washington courts have applied the *R/L Associates* ruling to require strict and literal compliance with RCW 82.02.020. In *Isla Verde International Holdings, Inc. v. City of Camas*,⁵⁹ the Washington State Supreme Court struck down an open-space requirement that the City of Camas had imposed on developers as a condition of subdivision approval.⁶⁰ The ordinance required every proposed subdivision to set aside thirty percent of its area as open space in order to maintain an “open space network” that protected wildlife habitat and preserved wooded land.⁶¹ The court declared the open-space condition an indirect “tax, fee, or charge,” on new development and invalidated it under RCW 82.02.020.⁶² In doing so, the court stated that a violation under the statute need not be an explicit fee or tax, but may also be an indirect “in kind” tax.⁶³ The court pointed to *R/L Associates* when announcing that RCW 82.02.020 must be interpreted according to “its plain terms” and that the statute prohibits all charges, regardless of whether they are regulatory fees, regulatory charges, or explicit taxes.⁶⁴ The court required “strict compliance” with the statute and emphasized the need for any lawful charge to fall within one of the exceptions specified in the statute.⁶⁵ In determining whether the ordinance qualified under the statute’s exception for “land dedications,”⁶⁶ the court held that the city failed to show how a thirty percent set-aside was reasonably necessary to mitigate a direct impact of the proposed subdivision.⁶⁷

In *Citizens’ Alliance for Property Rights v. Sims*,⁶⁸ the Washington

consequences of a proposed development. *Id.* at 407–08, 180 P.2d at 841 (quoting Brief of Appellant at 25).

59. 146 Wash. 2d 740, 49 P.3d 867 (2002).

60. *Id.* at 745, 49 P.3d at 870.

61. *Id.* at 762, 49 P.3d at 879.

62. *Id.* at 759, 765, 49 P.3d at 878, 881.

63. *Id.* at 758, 49 P.3d at 877.

64. *Id.* at 753 n.8, 49 P.3d at 874 n.8.

65. *Id.* at 755, 49 P.3d at 875–76.

66. WASH. REV. CODE § 82.02.020 (2012) (allowing “dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply”).

67. *Isla Verde Int’l Holdings, Inc.*, 146 Wash. 2d at 759, 49 P.3d at 878.

68. 145 Wash. App. 649, 187 P.3d 786 (2008), *cert. denied*, 165 Wash. 2d 1030, 203 P.3d 378 (2009).

Court of Appeals applied the *Isla Verde* analysis and held that a King County clearing and grading regulation constituted an unlawful tax, fee, or charge on the development of land.⁶⁹ The court rejected the County's argument that the clearing limitations were immune from an RCW 82.02.020 claim because it furthered mandatory statewide Growth Management Act (GMA) requirements.⁷⁰ Following a close reading of *Isla Verde*, the court reasoned, "whether or not RCW 82.02.020 applies is not a question of whether another statute authorized the condition."⁷¹ Instead, the court held that conditions imposed by other statutes must fall in one of RCW 82.02.020's exceptions or they might be considered an impermissible tax, fee, or charge.⁷² Because the County did not base its clearing and grading restrictions on a site-specific evaluation of each affected plot of land, the court concluded that the regulation did not meet the statute's exception for a valid development impact mitigation.⁷³

C. *Washington's Affordable Housing Incentive Programs Act Amends RCW 82.02.020 to Permit Development Costs Imposed by "Incentive Zoning Programs"*

Since *San Telmo* and *R/L Associates*, the Washington State Legislature has twice amended RCW 82.02.020 so as not to frustrate the intent of ordinances that protect displaced tenants and achieve low-income housing development objectives.⁷⁴ First, in 1990, the legislature amended RCW 82.02.020 to allow for tenant relocation assistance ordinances.⁷⁵ More than a decade later, the legislature amended RCW 82.02.020 to protect programs implemented under AHIPA from a tax preemption challenge.⁷⁶ AHIPA provides that a "city or county may enact or expand such [incentive zoning] programs whether or not the

69. *Id.* at 664, 187 P.3d at 794.

70. *Id.* at 663–64, 187 P.3d at 793–94.

71. *Id.* at 664, 187 P.3d at 794.

72. *Id.* at 664–65, 187 P.3d at 794.

73. *Id.* at 665, 187 P.3d at 794.

74. *See* Act of Apr. 24, 1990, ch. 17, 1990 Wash. Sess. Laws 1996 (codified at WASH. REV. CODE § 82.02.020 (2012)); Affordable Housing Incentive Programs Act, ch. 149, 2006 Wash. Sess. Laws 704 (codified at WASH. REV. CODE §§ 36.70A.540; 82.02.020 (2012)).

75. Act of Apr. 24, 1990, ch. 17, 1990 Wash. Sess. Laws 1996 (codified at WASH. REV. CODE § 82.02.020 (2012)) (amending WASH. REV. CODE § 82.02.020 to include "Nothing in this section prohibits counties, cities, or towns from requiring property owners to provide relocation assistance to tenants under RCW 59.18.440 and 59.18.450").

76. *See* Affordable Housing Incentive Programs Act, ch. 149, 2006 Wash. Sess. Laws 704 (codified at WASH. REV. CODE §§ 36.70A.540; 82.02.020 (2012)).

programs may impose a tax, fee, or charge on the development or construction of property.”⁷⁷ It also amends RCW 82.02.020 to include, “Nothing in this section limits the authority of counties, cities, or towns to implement programs consistent with RCW 36.70A.540 [AHIPA], nor to enforce agreements made pursuant to such programs.”⁷⁸ AHIPA’s amendment to RCW 82.02.020 creates a new exception that unequivocally allows local jurisdictions to impose regulations under AHIPA without risking a tax preemption challenge.⁷⁹

II. AHIPA EXPRESSLY AUTHORIZES MANDATORY SET-ASIDE ORDINANCES AND SHIELDS MANDATORY SET-ASIDES FROM A CHALLENGE UNDER RCW 82.02.020

As the preceding section demonstrates, RCW 82.02.020 presents serious obstacles to any development regulation that imposes direct or indirect costs on development. Like the tenant relocation assistance in *San Telmo*, a court is likely to declare a mandatory set-aside program an indirect charge on the construction or reconstruction of residential buildings. Furthermore, as *Citizens’ Alliance for Property Rights v. Sims* demonstrates, simply furthering the goals of state legislation—the GMA, or AHIPA, for example—is insufficient to overcome a tax preemption challenge. Instead, an ordinance or development regulation must comply with the plain language of RCW 82.02.020 by fitting squarely into an existing exception. Because AHIPA expressly amended RCW 82.02.020, a program that complies with AHIPA’s terms is not an unlawful tax or fee. But while it is clear that AHIPA authorizes some form of inclusionary zoning, some still question whether AHIPA authorizes mandatory set-asides or limits jurisdictions to voluntary programs.⁸⁰ This Comment argues that the plain language of the Act, the legislative history, and the subsequent rules developed by Commerce all support a conclusion that AHIPA authorizes mandatory set-aside programs.

77. Affordable Housing Incentive Programs Act, ch. 149, 2006 Wash. Sess. Laws 704 (codified at WASH. REV. CODE § 36.70A.540(1)(b) (2012)).

78. Affordable Housing Incentive Programs Act, ch. 149, 2006 Wash. Sess. Laws 707 (codified at WASH. REV. CODE § 82.02.020 (2012)).

79. *See id.*

80. *See, e.g.,* Jorgenson, Greene & Nelson, *supra* note 9, at 3–4.

A. *Under Its Plain Language, RCW 36.70A.540 Authorizes Both Voluntary Incentive Zoning Programs and Mandatory Set-Aside Programs*

RCW 36.70A.540 (AHIPA) provides that jurisdictions adopting affordable housing incentive programs “may establish a minimum amount of affordable housing that *must* be provided by all residential developments being built under the revised regulations, consistent with the requirements of this section.”⁸¹ A plain reading of this provision suggests that a jurisdiction may implement a mandatory set-aside program so long as it complies with “the other requirements” of the statute.⁸² For example, a program still must meet the statute’s definition of “affordable,” respect payment-in-lieu-of-development provisions, include fifty-year affordability requirements, and abide by all other mandates.⁸³ Because AHIPA does not contain any requirements that are incompatible with a mandatory set-aside program, a local jurisdiction should be permitted to follow this plain reading and implement a mandatory set-aside program.

AHIPA also provides, “If a developer chooses not to participate in an *optional* affordable housing incentive program adopted and authorized under this section, a city, county, or town may not condition, deny, or delay the issuance of a permit or development approval . . . absent incentive provisions of this program.”⁸⁴ The word “optional” within AHIPA would be superfluous if jurisdictions were not also authorized to implement *mandatory* programs.⁸⁵ Read in conjunction with the clause permitting jurisdictions to establish a minimum amount of affordable housing that *must* be provided by *all* residential developments,⁸⁶ the plain language of RCW 36.70A.540 permits jurisdictions to adopt both mandatory and optional (i.e. voluntary) incentive zoning programs.

Some may argue that the mere presence of “incentive housing programs” in the title precludes a reading of AHIPA that permits mandatory set-aside programs. However, mandatory set-aside programs

81. WASH. REV. CODE § 36.70A.540(3)(d) (2012) (emphasis added). The entirety of § 36.70A.540 was included within one section of ESHB 2984, so a reference to “this section” includes all of § 36.70A.540.

82. *Id.*

83. *See supra* Part I.C (describing specific provisions of the statute).

84. WASH. REV. CODE § 36.70A.540(1)(c) (2012) (emphasis added).

85. *See Ford Motor Co. v. City of Seattle*, 160 Wash. 2d 32, 41, 156 P.3d 185, 189 (2007) (citing *State v. Keller*, 143 Wash. 2d 267, 277, 19 P.3d 1030, 1036 (2001)) (“Constructions that would render a portion of a statute ‘meaningless or superfluous’ should be avoided.”).

86. WASH. REV. CODE § 36.70A.540(3)(d) (2012) (emphasis added).

throughout the country require that cities offer incentives to developers in order to avoid constitutional takings challenges.⁸⁷ The emphasis on incentives in AHIPA does not, alone, mean that programs must be purely optional. The statute clarifies that programs may be modified to meet local needs and may include provisions not expressly provided in RCW 36.70A.540 or 82.02.020.⁸⁸ A jurisdiction with greater low-income housing needs, such as the City of Seattle, should be able to enact a mandatory set-aside program under this statute, if that is what local needs dictate.⁸⁹ The mere fact that the statute suggests *incentive* zoning options does not preclude cities from *requiring* residential developments of a certain size to participate in such a program.

B. Legislative History and Administrative Guidance Support a Finding that AHIPA Statute Permits Both Voluntary and Mandatory Inclusionary Zoning

When AHIPA was debated on the floor of the House of Representatives, there was testimony specifically on the point that the bill appeared to allow cities to permit mandatory inclusionary zoning.⁹⁰ The legislature was alerted to this reading of the statute and did not make any changes to clarify that affordable housing incentive programs must be strictly optional. The legislature's omission of language limiting the scope of AHIPA, as well as subsequent guidance from the Washington State Department of Commerce ("Commerce") providing for both optional and mandatory programs, strongly suggests that AHIPA condones mandatory set-aside programs.

In 2010, Commerce amended the Washington Administrative Code chapter 365-196 to add a new section on affordable housing incentives.⁹¹ Under the GMA, Commerce has the authority to interpret and administer GMA requirements.⁹² Administrative rules bind the court so long as they

87. See, e.g., IGLESIAS & LENTO, *supra* note 7, at 101–07 (citing programs in Maryland and California that impose mandatory set-asides but still provide incentives to participating developers).

88. WASH. REV. CODE § 36.70A.540(2)(f) (2012).

89. See Affordable Housing Incentive Programs Act, ch. 149, 2006 Wash. Sess. Laws 705 (codified at WASH. REV. CODE § 36.70A.540) (“While this act establishes minimum standards for those cities, towns, and counties choosing to implement or expand upon an affordable housing incentive program, cities, towns, and counties are encouraged to enact programs that address local circumstances and conditions while simultaneously contributing to the statewide need for additional low-income housing.”).

90. H. Rep., House Bill Report HB 2984, 59-2984, Reg. Sess., at 4 (2006).

91. See WASH. ADMIN. CODE § 365-196-870 (2010).

92. See WASH. REV. CODE § 36.70A.030 (2012).

are within an agency's delegated authority, are reasonable, and were adopted using the proper procedure.⁹³ Barring any additional proof that the agency did not follow proper rule-making procedures, or that its interpretation of RCW 36.70A.540 is unreasonable, Commerce's rules on affordable housing incentive programs are binding on the public and the courts. Even if a court classified Commerce's rules on AHIPA as a mere "interpretative statement," the agency's interpretation would be entitled to some deference.⁹⁴

In promulgating the AHIPA rules, Commerce primarily restated the text of the statute and reorganized some provisions.⁹⁵ The Commerce regulations explicitly state: "Counties and cities may establish an incentive program that is *either* required or optional."⁹⁶ The regulations continue with text from AHIPA concerning optional and mandatory programs:

(a) Counties and cities may establish an optional incentive program.⁹⁷ If a developer chooses not to participate in an optional incentive program, a county or city may not condition, deny or delay the issuance of a permit or development approval that is consistent with zoning and development standards on the subject property absent the optional incentive provisions of this program.

(b) Counties and cities may establish an incentive program that requires a minimum amount of affordable housing that must be provided by all residential developments built under the revised regulations. The minimum amount of affordable housing may be a percentage of the units or floor area in a development or of the

93. See *Weyerhaeuser Co. v. State, Dep't of Ecology*, 86 Wash. 2d 310, 314–15, 545 P.2d 5, 8–9 (1976). Commerce appeared to follow proper procedure: it published the proposed rules on incentive programs and provided an opportunity for public comment approximately three months prior to adopting final rules on November 2, 2010. See 10-17 Wash. Reg. 43 (Aug. 11, 2010) (codified at WASH. ADMIN. CODE § 365-196 (2010)); 10-22 Wash. Reg. 103 (Dec. 3, 2010) (codified at WASH. ADMIN. CODE §§ 365-190, 365-196 (2010)).

94. See *Simpson Inv. Co. v. State, Dep't of Revenue*, 141 Wash. 2d 139, 161–63, 3 P.3d 741, 752–53 (2000) (deference given to Department of Revenue's interpretation of Washington tax laws in an interpretative Tax Bulletin); *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wash. 2d 441, 448, 536 P.2d 157, 161 (1975) ("[W]hen a statute is ambiguous . . . the construction placed upon a statute by an administrative agency charged with its administration and enforcement . . . should be given great weight in determining legislative intent.").

95. Compare WASH. ADMIN. CODE § 365-196-870 (2012), with WASH. REV. CODE § 36.70A.540 (2012).

96. WASH. ADMIN. CODE § 365-196-870(2) (2012) (emphasis added).

97. This line is the only line that is not directly from the statute. Compare WASH. ADMIN. CODE § 365-196-870 (2012), with WASH. REV. CODE § 36.70A.540 (2012).

development capacity of the site under the revised regulations.⁹⁸

The regulations clarify what the plain language of the Statute already states and support the claim that AHIPA expressly authorizes mandatory set-aside programs in Washington State. The plain language of AHIPA, the legislative history of the statute, and administrative guidance from Commerce all support an interpretation that AHIPA authorizes both optional and mandatory set-aside programs. Because AHIPA created an exception to the tax preemption limitations of RCW 82.02.020, a mandatory set-aside program that complies with AHIPA should not be vulnerable to a tax preemption challenge.

III. THE U.S. SUPREME COURT HAS DECLARED TAKINGS— NOT SUBSTANTIVE DUE PROCESS—AS THE PROPER ANALYSIS FOR EVALUATING LAND USE REGULATIONS

In addition to the statutory protections offered by RCW 82.02.020, a landowner in Washington enjoys constitutional protections from both the federal and state constitutions. Federal takings law is derived from the Fifth and Fourteenth Amendments of the United States Constitution, which prohibit the government from depriving citizens of private property for public use without just compensation.⁹⁹ According to the recent U.S. Supreme Court case *Lingle v. Chevron U.S.A., Inc.*, a plaintiff challenging a government regulation as an uncompensated taking of private property may allege one of four types of takings.¹⁰⁰ First, a physical invasion of property by government constitutes a per se taking that requires compensation.¹⁰¹ Second, a regulation that denies a landowner of *all* economically viable use of the property is also a per se taking.¹⁰² Third, a regulation that is neither a physical invasion nor deprives a landowner of all economically beneficial use may be analyzed under the three-prong regulatory takings framework set forth in *Penn Central Transportation Co. v. New York City*.¹⁰³ And finally, a

98. WASH. ADMIN. CODE § 365-196-870(2)(a)-(b) (2012).

99. U.S. CONST. amend. V. The Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *See* *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

100. 544 U.S. 528, 548 (2005) (holding that a plaintiff may allege a physical invasion, a total taking, a regulatory taking, or an exaction).

101. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (“[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.”).

102. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

103. 438 U.S. 104 (1978).

development exaction—where a government places a condition on development before issuing a permit—is analyzed according to the standards set forth in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*.¹⁰⁴

Parts A through C of this Section summarize the four permissible takings tests under *Lingle* and provide illustrative examples of how a court might apply the federal takings framework to a mandatory set-aside ordinance. Part D of this Section explains the *Lingle* Court's elimination of substantive due process from its takings analysis.¹⁰⁵ It further emphasizes that *Lingle* abandoned substantive due process as an appropriate framework for evaluating land use regulations, except in circumstances where a regulation either serves no public purpose whatsoever or is arbitrary and capricious.¹⁰⁶

A. *A Regulation that Results in a Permanent Physical Occupation or a Deprivation of All Economically Beneficial Use Is a Per Se Taking*

A regulation that meets the per se taking criteria automatically requires just compensation regardless of its social utility.¹⁰⁷ Under *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁰⁸ a per se taking occurs when a statute or regulation results in a permanent physical occupation of private land.¹⁰⁹ However, not every physical intrusion is a taking: “The permanence and absolute exclusivity of a physical occupation distinguish[es] it from temporary limitations on the right to exclude.”¹¹⁰ Under *Lucas v. South Carolina Coastal Council*,¹¹¹ a per se taking also occurs when a regulation deprives an owner of *all* economically beneficial use.¹¹² Because the *Loretto* and *Lucas* standards are so high, a federal per se taking in the regulatory context is a rare

104. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005).

105. *Id.* at 540–45.

106. *Id.* at 543.

107. *Lucas*, 505 US at 1015. The Court did leave some room for deprivation of all economically beneficial use without compensation when the State's property and nuisance laws require it. *Id.* at 1029–30.

108. 458 U.S. 419 (1982) (holding a New York statute a taking because it required owners of apartment buildings to allow cable companies to place cable facilities in their buildings as part of a plan to offer citywide cable services).

109. *Id.* at 426.

110. *Id.* at 435 n.12.

111. 505 U.S. 1003 (1992).

112. *Id.* at 1015.

occurrence.¹¹³

B. Under the Penn Central Analysis, a Court Will Consider Economic Impact, Interference with Investment-backed Expectations, and Character of a Government Action

For a land use regulation that does not rise to a *per se* violation, a court must engage in a factual inquiry, guided by the balancing test prescribed in *Penn Central*.¹¹⁴ In *Penn Central*, the Supreme Court upheld a New York historic preservation law that restricted the development of office buildings over the Grand Central Terminal.¹¹⁵ The factors that a court must weigh include (1) the economic impact of the regulation, (2) the extent to which a regulation interferes with investment-backed expectations, and (3) the character of the government action.¹¹⁶ Under *Penn Central*, an ordinance that promotes the general welfare, is not of an overly invasive character,¹¹⁷ and still allows owners a reasonable rate of return should be safe from a takings challenge.¹¹⁸ This is true even when a regulation burdens some more than others.¹¹⁹ Finally, an ordinance will be further protected from a takings challenge if it gives developers an opportunity for additional economic gain in

113. *See* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002) (“Land-use regulations are ubiquitous and most of them impact property values in some tangential way Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford.”).

114. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005).

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

116. *Id.* at 124.

117. *See Lingle*, 544 U.S. at 539 (quoting *Penn Cent.*, 438 U.S. at 124) (“In addition, the ‘character of the governmental action’—for instance whether it amounts to a physical invasion or instead merely affects property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good’—may be relevant in discerning whether a taking has occurred.”).

118. *Penn Cent.*, 438 U.S. at 136–38.

119. *Id.* at 133–34:

Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck*, of the cedar trees in *Miller v. Schoene*, and of the gravel and sand mine in *Goldblatt v. Hempstead*, were uniquely burdened by the legislation sustained in those cases. Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences.

(citing *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590 (1962); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

exchange for the restrictions placed on the land.¹²⁰

The Ninth Circuit Court of Appeals recently applied the *Penn Central* factors when evaluating the constitutionality of “manufactured home park” (MHP) regulations in Tumwater, Washington.¹²¹ The City of Tumwater enacted two ordinances (“the ordinances”) to preserve existing manufactured home parks within the city by limiting the uses of particular properties.¹²² Three of the six affected property owners filed an action in federal district court, alleging both a federal and state takings claim.¹²³ The court began its federal takings analysis by noting that zoning laws do not constitute a taking unless they go “too far.”¹²⁴ Because *Laurel Park Community, L.L.C. v. City of Tumwater* provides an illustrative outline of how an inclusionary zoning regulation might be evaluated under a federal takings analysis, an analysis of the court’s assessment of each *Penn Central* factor is provided under each factor below.

1. *Economic Impact*

Under the *Penn Central* analysis, a court must consider the economic impact of a regulation on the affected landowner.¹²⁵ However, U.S. Supreme Court decisions “uniformly reject the proposition that diminution in property value, standing alone, can establish a ‘taking.’”¹²⁶ To their detriment, the *Laurel Park* plaintiffs offered minimal evidence of any economic effect resulting from the ordinances.¹²⁷ They presented information suggesting that one MHP *may* have experienced a loss of 15%, while the remaining MHP owners experienced no diminution in property value.¹²⁸ The court emphasized that Supreme Court cases have rejected takings claims where zoning laws caused property values to

120. *Id.* at 137–38. The City was helped by a provision of the law that allowed development rights to transfer to other properties in the area. The transferred development rights helped mitigate the economic impact of the regulation, as did the fact that appellants may have been able to develop a less intrusive structure in the space above the terminal. *Id.* at 136–37.

121. *See Laurel Park Cmty., L.L.C. v. City of Tumwater*, 698 F.3d 1180, 1188–91 (9th Cir. 2012).

122. *Id.* at 1186.

123. *Id.* at 1187–88. The property owners also alleged a substantive due process violation under the Washington Constitution, *id.* at 1188, and this claim will be considered in Part V.

124. *Id.* at 1188 (citing *Penn Cent.*, 438 U.S. at 124).

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

126. *Laurel Park*, 698 F.3d at 1189 (quoting *Penn Cent.*, 438 U.S. at 131).

127. *Id.*

128. *Id.*

drop by as much as 75% and 87.5%.¹²⁹ Consequently, the *Laurel Park* court held that the economic impact of the ordinances on plaintiffs' property did not support a takings claim.¹³⁰

2. *Distinct Investment-Backed Expectations*

After evaluating the economic impact of a regulation, a court will evaluate the extent to which the regulation disrupted any "distinct investment-backed expectations."¹³¹ The plaintiffs in *Laurel Park* argued that when they purchased the MHPs, they had an expectation that they would convert the land to more profitable use as allowed by the prior zoning laws when market conditions approved.¹³² But *Penn Central* provides, "the submission that [the plaintiffs] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."¹³³ The *Laurel Park* court relied on this principle to emphasize that the owners' "primary expectation" was the ability to continue operating their properties as MHPs and not the opportunity to change the use at some unspecified point in the future.¹³⁴ The court also provided the following explanation for measuring plaintiff's expectations: "Speculative possibilities of windfalls do not amount to 'distinct investment-backed expectations,' unless they are shown to be probable enough materially to affect the price."¹³⁵ Because the speculative possibility of converting MHPs into another use had little to no effect on the price of the plaintiffs' land, the court determined that the "distinct investment-backed expectations" factor did not support a takings claim.¹³⁶

3. *Character of the Government Action*

Finally, a court will balance the economic impact of a regulation and its interference with investment expectations with the "character of the

129. *Id.* (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (75% diminution); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (87.5% diminution)).

130. *Id.*

131. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

132. *Laurel Park*, 698 F.3d at 1189.

133. *Penn Cent.*, 438 U.S. at 130.

134. *Laurel Park*, 698 F.3d at 1189–90.

135. *Id.* at 1190 (quoting *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120–21 (9th Cir. 2010)).

136. *Id.*

governmental action.”¹³⁷ To evaluate the character of government action, a court will consider whether the government action amounts to a physical invasion or just affects property interests through some public program that “adjust[s] the benefits and burdens of economic life to promote the common good.”¹³⁸ Courts differ in their application of this test,¹³⁹ but the factors they may consider include whether a regulation resembles a direct appropriation of property,¹⁴⁰ whether a regulation interferes with legitimate property interests,¹⁴¹ and how severe of a burden a regulation imposes.¹⁴² Some courts may also consider whether a burden is spread widely across society;¹⁴³ however, the *Penn Central* court emphasized, “legislation designed to promote the general welfare commonly burdens some more than others.”¹⁴⁴ Thus, under *Penn Central*, the unavoidable imbalance that results from land use regulations is not a deciding factor in takings cases.¹⁴⁵

When considering the character of the government action, the *Laurel Park* court relied almost exclusively on language from *Armstrong v. United States*¹⁴⁶ stating that the government may not “forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁴⁷ The *Laurel Park* court then acknowledged that the MHP ordinances did require a small number of landowners—six in fact¹⁴⁸—to provide a public benefit that could have been distributed more widely across the community.¹⁴⁹ The court conceded that, while it was a “close call,” the burden-shifting character

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

138. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (quoting *Penn Cent.*, 438 U.S. at 124).

139. See 2 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 16.9 (5th ed. 2008).

140. See *Penn Cent.*, 438 U.S. at 124.

141. See, e.g., *Lingle*, 438 U.S. at 540.

142. *Id.* at 544.

143. See *Laurel Park Cmty., L.L.C. v. City of Tumwater*, 698 F.3d 1180, 1190 (9th Cir. 2012).

144. *Penn Cent.*, 438 U.S. at 133.

145. See *id.* (“The owners of the brickyard in *Hadacheck*, of the cedar trees in *Miller v. Schoene*, and of the gravel and sand mine in *Goldblatt v. Hempstead*, were uniquely burdened by the legislation sustained in those cases.”) (citing *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590 (1962)).

146. 364 U.S. 40 (1960).

147. *Laurel Park*, 698 F.3d at 1190 (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))).

148. *Id.* at 1187.

149. *Id.* at 1190.

of the MHP ordinances slightly favored Plaintiffs' takings claim.¹⁵⁰ However, the court's concern was mitigated by the fact that the ordinance did not force the plaintiffs to continue operating their properties as MHPs.¹⁵¹ Because the first two *Penn Central* factors weighed strongly against a takings claim and the third factor weighed only slightly in favor of a takings claim, the court concluded that the ordinances did not constitute a facial taking under the Fifth and Fourteenth Amendments.¹⁵²

In contrast to *Laurel Park*, the *Lingle* Court rejected the plaintiff's broad appeal to invalidate a statute based on the *Armstrong* burden-shifting language.¹⁵³ The *Lingle* court pointed out that, "[a] test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation."¹⁵⁴ Instead, the *Lingle* Court emphasized that the takings tests aim to identify regulatory actions that function like a "classic taking," where the government directly appropriates private property or removes an owner from his or her land.¹⁵⁵ Under *Lingle*, a court should look to the severity of the burden imposed on property rights and the extent to which the regulation interferes with legitimate property interests.¹⁵⁶

C. *Development Conditions Must Meet the Nexus and Proportionality Requirements of Nollan and Dolan*

Nollan and *Dolan* provide a final layer of constitutional protection for landowners when a government entity imposes conditions on land development.¹⁵⁷ In *Nollan*, the U.S. Supreme Court held that a condition on property development is a taking if the condition does not further the government's legitimate justification for regulating.¹⁵⁸ The Court struck down a regulation that required owners of beachfront property to grant a

150. *Id.*

151. *Id.* at 1190–91. Plaintiffs still had the freedom to sell the properties or convert them to another permitted MHP district use. *Id.*

152. *Id.* at 1191.

153. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542–43 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

154. *Id.* at 543.

155. *Id.* at 539.

156. *Id.* at 539–40.

157. *See id.* at 548.

158. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836–37 (1987).

public easement across the beach portion of their property in exchange for building permits.¹⁵⁹ A regulation that protected the beach from burdens created by the new building would have been permissible, but the Commission's plan lacked any "nexus" between the condition and the purpose, and thus amounted to an "out-and-out plan of extortion" rather than a valid regulation of land.¹⁶⁰

Dolan v. City of Tigard further clarified the requirements of *Nollan* by explaining the required *degree* of connection between an exaction and the impact of a proposed development.¹⁶¹ After finding a "nexus" between a legitimate state interest and a permit condition, a court must evaluate whether the exactions on development were "rough[ly] proportional[]" to the government's justification for regulating.¹⁶² To prove proportionality, a city must make an "individualized determination" that the required dedication is related to the impact of the proposed development both in nature and extent.¹⁶³ Finally, *Dolan* clarified that the burden of proof lies with the party challenging a generally applicable zoning regulation, but with the city when the city imposes a condition on an individual party.¹⁶⁴

Because mandatory set-aside ordinances condition development on developers renting units at below market rate or paying into a housing fund, they may need to be evaluated under the exactions framework.¹⁶⁵ The Ninth Circuit Court of Appeals has already applied *Nollan* to an inclusionary zoning ordinance that required commercial developers to pay a Housing Trust Fund fee prior to receiving a building permit.¹⁶⁶ In *Commercial Builders of Northern California v. City of Sacramento*,¹⁶⁷ the court held that the law met the *Nollan* standard for development conditions because the City demonstrated a sufficient nexus between

159. *Id.* at 841–42.

160. *Id.* at 837 (quoting *J. E. D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 14 (N.H. 1981)). To satisfy the "nexus" requirement, there must be some link between the asserted legitimate state interest and the permit condition imposed by the government. *Id.*

161. *Id.* at 391.

162. *Id.*

163. *Id.* at 391, 393.

164. *Id.* at 391 n.8.

165. See, e.g., James S. Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 423 (2009) ("For the most part, the courts have not yet properly applied the doctrine of unconstitutional conditions to inclusionary zoning."); David L. Callies, *Mandatory Set-Asides as Land Development Conditions*, URB. LAW., Fall 2010/Winter 2011, at 307, 322–23.

166. *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 876 (9th Cir. 1991).

167. 941 F.2d 872.

new commercial developments and the shortage of affordable housing in the city.¹⁶⁸ The court clarified that *Nollan* does not require a showing that the development directly *caused* the “social ill in question.”¹⁶⁹ Rather, it was sufficient for the City to rely on a detailed study revealing a substantial connection between commercial development and a lack of affordable housing in the community.¹⁷⁰

California state courts have also applied *Nollan* and *Dolan* to inclusionary zoning ordinances and upheld the ordinances so long as they provide an opportunity for relief to property owners who can demonstrate the absence of any reasonable relationship or nexus between the impact of the development and the inclusionary requirement.¹⁷¹ The California courts have also adopted a deferential standard of review for generally applicable inclusionary zoning legislation, holding that the heightened standard of *Nollan* and *Dolan* only applies to individualized development fees.¹⁷² In sum, courts that have applied the development conditions framework to inclusionary zoning have upheld mandatory set-aside ordinances so long as they are supported by a “nexus study” and provide some administrative relief to individual property owners who can demonstrate that the ordinance lacks a nexus or reasonable relationship as applied to their property.

D. Lingle v. Chevron U.S.A., Inc. Removed the Last Remnants of Federal Substantive Due Process from Land Use Takings Claims

Government entities may act under their police power to regulate activities for the protection of health, safety, morals, and general welfare.¹⁷³ But when the government exceeds the limits of its authority,

168. *Id.* at 875. The City produced studies that showed the link between new commercial developments and a need for additional affordable housing. *Id.*

169. *Id.*

170. *Id.*

171. See *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 41 P.3d 87 (Cal. 2002) (holding that *Dolan* only applies to individualized development fees and not generally applicable ones); *Home Builders Ass’n of N. Cal. v. City of Napa*, 108 Cal. Rptr. 2d 60, 66 (Cal. Ct. App. 2001), *cert. denied*, 535 U.S. 954 (2002) (holding that for generally applicable legislation, “the heightened standard of review described in *Nollan* and *Dolan* is inapplicable . . .”). *But see* *Bldg. Indus. Ass’n of San Diego Cnty., Inc. v. City of San Diego*, No. GIC817064, 2006 WL 1666822 (Cal. Super. Ct. May 24, 2006) (holding San Diego’s mandatory set-aside ordinance an unconstitutional exaction because it did not provide for waivers when a developer could demonstrate an absence of “nexus” or “reasonable relationship”).

172. See *San Remo Hotel L.P.*, 41 P.3d at 103, 105; *Home Builders Ass’n of N. Cal.*, 108 Cal. Rptr. 2d at 66.

173. See *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928).

a citizen may bring a substantive due process claim under the Fourteenth Amendment.¹⁷⁴ With the end of the *Lochner* era in the late 1930s, the Supreme Court largely abandoned its reliance on substantive due process to strike down social and economic legislation.¹⁷⁵ However, some remnants of the substantive due process analysis remained in the Court's takings analysis.¹⁷⁶ The intertwining of due process and takings law culminated in the U.S. Supreme Court case *Agins v. City of Tiburon*.^{177, 178} In *Agins*, the Court declared that the "application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests."¹⁷⁹ This "substantially advances" formula was subsequently cited as a stand-alone regulatory takings test independent from *Penn Central* and the per se takings tests.¹⁸⁰

In *Lingle v. Chevron U.S.A., Inc.*, the U.S. Supreme Court explained the importance of keeping takings and substantive due process analyses distinct and eliminated the vestiges of due process analysis from its preferred takings framework.¹⁸¹ After reviewing the history of the "substantially advances" language, the *Lingle* court concluded that the formula was derived from due process and not takings precedent and concluded that the test was not a valid takings inquiry.¹⁸² In overruling *Agins*, the Court declared the "substantially advances" formula a "means-end" review that required courts to determine if a regulation of private property is *effective* in achieving some legitimate public purpose.¹⁸³ The Court then highlighted the practical challenges of such a test and suggested the test would require judges to substitute their own

174. *Id.* at 188–89. The Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

175. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.4(b) (5th ed. 2012). In the late 1800s and in the first third of the 1900s, the U.S. Supreme Court fully embraced the substantive due process doctrine and Justices routinely invalidated social and economic legislation that they—at their discretion—determined was not "reasonably related" to legitimate ends. *See id.* § 15.3(a).

176. *See, e.g.*, *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) (examining whether prohibition of excavation below the water table exceeds town's police power and is thus a taking).

177. 477 U.S. 255 (1980), *overruled by* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

178. *See Lingle*, 544 US at 531–32.

179. *Agins*, 477 U.S. at 260.

180. *Lingle*, 544 U.S. at 540.

181. *See id.* at 540–46.

182. *See id.* at 540–45.

183. *Id.* at 542.

judgments for those of the policy-making branches of government.¹⁸⁴

The unanimous *Lingle* court did acknowledge a limited, ongoing role for substantive due process considerations, explaining, “[t]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.”¹⁸⁵ A regulation may be *impermissible* “because it fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process,” and in either of those instances, “no amount of compensation can authorize such action.”¹⁸⁶ Justice Kennedy also wrote separately to emphasize that the Court’s decision did not preclude substantive due process challenges for arbitrary or irrational regulations.¹⁸⁷ However, the Court has only rarely invalidated a regulation on substantive due process grounds and has stated a strong preference for deferring to legislative determinations regarding the need for and likely effectiveness of regulatory actions.¹⁸⁸ At the very least, the Court made it clear that courts should no longer inquire into whether a government action effectively promotes a legitimate interest when deciding whether an action constitutes a taking.¹⁸⁹

IV. WASHINGTON’S TAKINGS ANALYSIS DIFFERS CONSIDERABLY FROM THE FEDERAL TAKINGS ANALYSIS

Although the Washington takings analysis is based on federal takings law, it introduces novel elements and unique interpretations of federal law.¹⁹⁰ Most notably, the Washington approach includes a “threshold test” that funnels disputed land use regulations into either a substantive due process analysis *or* a takings analysis.¹⁹¹ Because the standard remedy for a due process violation is invalidation of the offensive

184. *Id.* at 544 (“[Such a test] would require courts to scrutinize the efficacy of a vast array of state and federal regulations Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.”).

185. *Id.* at 543.

186. *Id.*

187. *Id.* at 548 (Kennedy, J., concurring).

188. *Id.* at 545. Even prior to *Lingle*, some federal circuit courts have discouraged using substantive due process when a takings analysis is more appropriate. *See, e.g.,* *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 465–66 (7th Cir. 1988) (arguing that an overreliance on the due process analysis gives judges too much discretion and invites courts to sit in judgment of all state action).

189. *See Lingle*, 544 U.S. at 548.

190. *See Wynne*, *supra* note 28, at 170–77.

191. *Guimont v. Clarke*, 121 Wash. 2d 586, 594, 854 P.2d 1, 6 (1993); *Presbytery of Seattle v. King Cnty.*, 114 Wash. 2d 320, 329, 787 P.2d 907, 912 (1990).

regulation, the Washington method has been criticized for shielding local governments from paying compensation, as required under a takings claim.¹⁹² It has also been criticized as being “needlessly confusing”¹⁹³ and for claiming to adopt a federal analysis when in fact Washington’s method is unique.¹⁹⁴ This section reviews Washington’s takings analysis while the next section discusses Washington’s due process analysis.

A. *Washington Courts Apply a Takings Test that Combines Elements of Federal Law with Elements of Washington State Law*

In *Orion Corp. v. State*,¹⁹⁵ the Washington State Supreme Court attempted to harmonize inconsistencies between state and federal takings law by simply applying the federal takings analysis to resolve a takings claim based on both the U.S. and Washington Constitutions.¹⁹⁶ Three years later, the Washington State Supreme Court abandoned the pure federal analysis and restated Washington takings law as a coordinated approach meant to combine both Washington and federal takings law in a “comprehensive formula.”¹⁹⁷ Over the next several years the court applied the Washington formula even to claims that raised only a federal takings challenge.¹⁹⁸

Until the Washington State Supreme Court decided *Manufactured Housing Communities of Washington v. State*,¹⁹⁹ the court had never engaged in a conscious analysis of whether the Washington Constitution provided additional protection to Washington citizens in the context of a takings claim.²⁰⁰ Although article I, section 16 of the Washington

192. See Wynne, *supra* note 28, at 160–63.

193. *Id.* at 176.

194. *Id.* at 155.

195. 109 Wash. 2d 621, 747 P.2d 1062 (1987).

196. *Id.* at 657–58, 747 P.2d at 1082 (“The breadth of constitutional protection under the state and federal just compensation clauses remains virtually identical.”).

197. *Presbytery of Seattle v. King Cnty.*, 114 Wash. 2d 320, 328, 787 P.2d 907, 912 (1990).

198. *Guimont v. Clarke*, 121 Wash. 2d 586, 604–08, 854 P.2d 1, 11–14 (1993); *Sintra, Inc. v. City of Seattle (Sintra I)*, 119 Wash. 2d 1, 13–18, 829 P.2d 765, 771–75 (1992); *Robinson v. City of Seattle*, 119 Wash. 2d 34, 49–54, 830 P.2d 318, 327–31 (1992).

199. 142 Wash. 2d 347, 13 P.3d 183 (2000). See *infra* Part IV.B.i for a discussion of the case and its holdings.

200. *Manufactured Hous.*, 142 Wash. 2d at 356 n.7, 13 P.3d at 187–88 n.7 (“[I]n this case, we answer the call to conduct a *Gunwall* analysis for the first time and should not be limited to prior pronouncements of parallelism between our state and federal takings’ clauses.”) (emphasis in original). In Washington, before applying a unique interpretation of a federal constitutional provision or relying on an independent provision of the state constitution, a court must undergo a

Constitution is not identical to the federal takings clause,²⁰¹ the Washington State Supreme Court often treated them as if they provided the same protections.²⁰² The *Manufactured Housing* court determined that the Washington State Constitution provided broader protections to property owners than did the federal Constitution.²⁰³ This contrasted sharply with the court's previous commitment in *Orion* to follow a federal approach.²⁰⁴ Since the *Manufactured Housing* decision, at least one federal court in Washington has continued to rely on *Orion*'s pronouncement that the federal and state takings clauses are coextensive and applied a federal analysis even for state takings claims.²⁰⁵

The U.S. Supreme Court made a significant course change with its decision in *Lingle*, and the Washington State Supreme Court has not yet explained how that decision might impact the Washington takings analysis.²⁰⁶ Both Division I and Division II of the Washington State Court of Appeals have acknowledged that *Lingle* may obviate certain elements of the Washington analysis, but declared that the effect of

"*Gunwall* analysis," which includes six nonexclusive criteria for determining whether the Washington Constitution extends broader rights than the U.S. Constitution. See Hugh D. Spitzer, *Which Constitution? Eleven Years of Gunwall in Washington State*, 21 SEATTLE U. L. REV. 1187, 1193-94 (1998).

201. The Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. In contrast, Article I, Section 16 of the Washington State Constitution provides:

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made

WASH. CONST. art. I, § 16.

202. See *Manufactured Hous.*, 142 Wash. 2d at 405-06, 13 P.3d at 212-13 (Talmadge, J. dissenting) ("Until today, we have interpreted art. I, § 16 and the Fifth Amendment as essentially coextensive.").

203. *Id.* at 361, 13 P.3d 1 at 190.

204. See *Orion Corp. v. State*, 109 Wash. 2d 621, 657-58, 747 P.2d 1062, 1082 (1987) ("[I]n order to avoid exacerbating the confusion surrounding the regulatory takings doctrine, and because the federal approach may in some instance provide broader protection, we will apply the federal analysis to review all regulatory takings claims."). The *Manufactured Housing* court pointed out that because *Orion* failed to consider *Gunwall* in its analysis, the *Orion* court's assertion that the state and federal takings analyses are "coextensive" was not binding. *Manufactured Hous.*, 142 Wash. 2d at 356 n.7, 13 P.3d at 187-88 n.7.

205. See *Heitman v. City of Spokane Valley*, No. CV-09-0070-FVS, 2010 WL 816727, at *2 (E.D. Wash. Mar. 5, 2010) (holding that Washington state courts expressed an intent for regulatory takings to be consistent with the federal constitution and declining to decide the case on independent state grounds because the plaintiff failed to brief the requisite *Gunwall* factors).

206. This question is especially relevant for substantive due process inquiries that were adopted directly from federal takings law.

Lingle on Washington takings claims was not yet decided.²⁰⁷ Perhaps the question will be answered soon in *Lemire v. Pollution Control Hearings Board*,²⁰⁸ a land use case recently argued by the Washington State Supreme Court.²⁰⁹ The remainder of this section will discuss Washington's takings analysis as it currently stands, which consists of two threshold questions followed by a full takings analysis.

B. A Court Begins the Washington Takings Analysis By Applying Two Threshold Tests

A Washington court begins its analysis of a land use regulation claim with two threshold questions. First, the court will assess whether the regulation constitutes a per se taking or destroys one or more of the fundamental attributes of property ownership. Second, the court will ask whether the regulation protects the public interest in health, safety, the environment, or fiscal integrity (general welfare), that is, whether the regulation is a proper exercise of police power.²¹⁰ By asking these questions at the outset, the court may determine whether a government action is a per se taking requiring just compensation, or whether the claim should be funneled into a due process analysis or a takings analysis.²¹¹

207. See *Thun v. City of Bonney Lake*, 164 Wash. App. 755, 761 n.4, 265 P.3d 207, 212 n.4 (2011); *City of Des Moines v. Gray Bus., LLC*, 130 Wash. App. 600, 612 n.33, 124 P.3d 324, 330 n.33 (2005) (noting that *Lingle* removes the "substantially advances" inquiry and hypothesizing that the *Guimont* test will be replaced by the federal tests described in *Lingle*).

208. No. 87703-3 (Wash. argued Nov. 13, 2012).

209. *Id.* The Washington State Association of Municipal Attorneys submitted an amicus brief urging the court to abandon the state takings analysis in favor of the federal analysis. The brief relied largely on the arguments in Roger Wynne's article, see generally Wynne, *supra* note 28, and cited to the article extensively. Brief for Washington State Ass'n of Municipal Attorneys et al. as Amici Curiae, *Lemire v. Pollution Control Hearings Bd.*, No. 87703-3 (Wash. Sept. 28, 2011).

210. *Guimont v. Clarke*, 121 Wash. 2d 586, 594, 854 P.2d 1, 6 (1993).

211. *Sintra, Inc. v. City of Seattle (Sintra I)*, 119 Wash. 2d 1, 15, 829 P.2d 765, 772 (1992) ("The threshold test is designed to prevent undue chilling on legislative bodies' attempts to properly and carefully structure land use regulations which prevent public harms."). The Washington State Supreme Court has stated the distinction between eminent domain power and the police power as follows: "Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public." *Eggleston v. Pierce Cnty.*, 148 Wash. 2d 760, 768, 64 P.3d 618, 623 (2003) (quoting *Conger v. Pierce Cnty.*, 116 Wash. 27, 36, 198 P. 377, 380 (1921)).

1. *A Washington Court Will Inquire into Whether a Government Action Is a Per Se Taking under Loretto, Lucas or under Washington's "Fundamental Attribute" Test*

Under the first prong of the threshold test, a court must determine if the government has engaged in a “per se” taking.²¹² A “per se” or “categorical” taking occurs when the regulation constitutes either a “physical invasion” or “total taking” under the *Loretto* and *Lucas* tests, or destroys a fundamental attribute of ownership.²¹³ While the physical invasion and total takings elements are adopted directly from federal takings law, the “fundamental attribute” element is unique to Washington.²¹⁴ Under the Washington test, a fundamental attribute of ownership includes the right to possess, to exclude others, or dispose of property.²¹⁵ When the government engages in any of the three categorical takings, just compensation is required and no further analysis is necessary.²¹⁶ If a landowner alleges an intrusion that is less severe than a physical invasion, a total taking, or a derogation of a fundamental attribute of ownership, the court then moves to the second threshold question.²¹⁷

In *Manufactured Housing*, a plurality of the Washington State Supreme Court held that a statute giving qualified tenant organizations the right of first refusal during the sale of a mobile home park destroyed a fundamental attribute of ownership.²¹⁸ In a splintered opinion,²¹⁹ a plurality determined that a tenant’s right of first refusal disrupted the park owner’s right to freely dispose of his or her property.²²⁰ The

212. *Guimont v. City of Seattle (Guimont II)*, 77 Wash. App. 74, 80, 896 P.2d 70, 76 (1995); *see also Guimont*, 121 Wash. 2d at 598–604, 854 P.2d at 8–11.

213. *Guimont*, 121 Wash. 2d at 600, 854 P.2d at 9.

214. *Wynne*, *supra* note 28, at 164–66. According to *Wynne*, this third prong has created some confusion in the takings analysis. *Id.* at 143–44. The *Guimont II* court was unsure how to treat a regulation that did not constitute a “physical invasion” or “total taking” but that implicated a fundamental attribute of property ownership. *Id.* at 143. The *Manufactured Housing* court subsequently treated the “fundamental attribute” violation as a “categorical” taking—in the same category as a per se taking. *Manufactured Hous. Cmty. of Wash. v. State*, 142 Wash. 2d 347, 355, 13 P.3d 183, 187 (2000).

215. *Manufactured Hous.*, 142 Wash. 2d at 355, 13 P.3d at 187.

216. *Guimont*, 121 Wash. 2d at 600, 854 P.2d at 9–10.

217. *Id.* at 603, 854 P.2d at 10.

218. *Manufactured Hous.*, 142 Wash. 2d at 374, 13 P.3d at 191–94.

219. Three justices signed Justice Ireland’s majority opinion, and Justice Madsen concurred in the result only. Justice Sanders wrote a separate concurrence and Justice Johnson wrote a dissent, which Justice Smith also signed. Finally, Justice Talmadge wrote his own dissent.

220. *Manufactured Hous.*, 142 Wash. 2d at 364–68, 13 P.3d at 196–97.

plurality also classified the right of first refusal as an important property right and held that a statutory transfer of a property right from one private individual to another constitutes a taking.²²¹ The lead opinion then held that the disruption of the right to freely dispose of property and the forced transfer of a property right interfered with fundamental attributes of ownership and declared the statute a per se taking.²²² Finally, the lead opinion distinguished the protections of the Washington State Constitution from the U.S. Constitution and declared that the state's constitution contained "an absolute prohibition against taking private property for private use."²²³ It held that the Washington Constitution's absolute prohibition against taking private property for private purposes cut off further inquiries into appropriate compensation.²²⁴ As a remedy, the plurality simply invalidated the law that restricted the right of a mobile home park owner to freely dispose of his or her property and sell to any chosen buyer.²²⁵

In his dissent, Justice Charles Johnson disagreed with the plurality view that the right of first refusal was a property right.²²⁶ He asserted that even if the statute implicated a fundamental attribute of ownership, not every infringement on that attribute necessarily constitutes a taking.²²⁷ Justice Phil Talmadge supported Johnson's opinion, but wrote separately to express his concern about the effect of the majority's disposition on the police power in Washington.²²⁸ Talmadge emphasized the statute's unanimous passage by the state legislature and warned of the dangers of allowing such an imprecise takings analysis to intrude on the police power in ways that could affect "everything from social welfare law to public health rules to environmental and land use regulation."²²⁹ He also wrote, "The majority departs from the traditional

221. *Id.* at 369–70, 13 P.3d at 194–95.

222. *Id.* at 366, 13 P.3d at 192.

223. *Id.* at 357–59, 13 P.3d at 188–89 (the court characterized the federal constitution as only prohibiting the taking of private property without a justifying public purpose).

224. *Id.* at 361–62, 13 P.3d at 190.

225. *Id.* ("[Article 1, section 16 of the Washington State Constitution's] absolute prohibition against taking private property for private use bars any additional inquiry about compensation and requires invalidation of chapter 59.23 RCW."). It is interesting to note that invalidating the statute is at odds with the prescribed remedy for a taking, which is just compensation. *See Sintra, Inc. v. City of Seattle (Sintra II)*, 131 Wash. 2d 640, 689–90, 935 P.2d 555, 580 (1997).

226. *Id.* at 385–87, 13 P.3d at 202–04 (Johnson, J., dissenting) (citing numerous cases to that end and writing that no interest in land is created by a right of first refusal, and therefore only *personal* rights are affected).

227. *Id.* at 387, 13 P.3d at 203.

228. *Id.* at 392, 13 P.3d 206 (Talmadge, J., dissenting).

229. *Id.* at 426–27, 13 P.3d at 223–24.

elements of takings law we articulated in [*Guimont*], in favor of a novel interpretation of art. I, § 16 of our Constitution by suggesting even a minor regulation of property may be a taking.”²³⁰ Instead, he advocated following the well-established *Penn Central* regulatory takings analysis,²³¹ and found it instructive to consider the outcome under Washington’s substantive due process test.²³²

2. *If a Regulation Is Not a Per Se Taking, a Washington Court Will Ask if the Regulation “Seeks Less to Prevent a Harm” than to Require Others to “Provide an Affirmative Public Benefit”*

The second part of the threshold test asks if the regulation protects the public interest in health, safety, the environment, or fiscal integrity.²³³ According to Washington courts, it is important to distinguish between due process and takings claims because “the police power and the power of eminent domain are essential and distinct powers of government.”²³⁴ In Washington, local governments enjoy broad police power,²³⁵ and local jurisdictions may put forth any regulation that complies with state law, aims to achieve a legitimate government interest,²³⁶ and is reasonably calculated to achieve that purpose.²³⁷ Courts must look beyond “labels” to determine whether a government action is properly characterized as police power or eminent domain power.²³⁸ Not every government action that takes, damages, or destroys property is a taking: “[e]minent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the

230. *Id.* at 405, 13 P.3d at 212 (citations omitted) (“Until today, we have interpreted art. I, § 16 and the Fifth Amendment as essentially coextensive.”).

231. *Id.* at 406, 13 P.3d at 213.

232. *Id.* at 411–12, 13 P.3d at 215–16 (the plaintiff did not raise a substantive due process violation, but Justice Talmadge engaged in the analysis to demonstrate how the statute would fare).

233. *Robinson v. City of Seattle*, 119 Wash. 2d 34, 49–50, 830 P.2d 318, 328 (1992); *Presbytery of Seattle v. King Cnty.*, 114 Wash. 2d 320, 329–30, 787 P.2d 907, 912 (1990).

234. *Eggleston v. Pierce Cnty.*, 148 Wash. 2d 760, 767, 64 P.3d 618, 623 (2003).

235. See Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495, 497–506 (2000).

236. This interest is “wide and comprehensive” and includes promoting “the public peace, health, safety, morals, education, good order and welfare.” *Spokane Cnty. v. Valu-Mart, Inc.*, 69 Wash. 2d 712, 719, 419 P.2d 993, 998 (1966) (citing *Shea v. Olsen*, 185 Wash. 143, 53 P.2d 615 (1936)).

237. See Donya Williamson, Note, *Urbanites Versus Rural Rights: Contest of Local Government Land-Use Regulations Under Washington Preemption Statute 82.02.020*, 84 WASH. L. REV. 491 (2009) (citing Spitzer, *supra* note 235, at 507–509).

238. *Eggleston*, 148 Wash. 2d at 767, 64 P.3d at 623.

safety, morals, health and general welfare of the public.”²³⁹

In *Presbytery of Seattle v. King County*,²⁴⁰ the court contrasted permissible regulations of the public interest with impermissible regulations “that go[] beyond preventing a public harm and actually enhance[] a publicly owned right in property.”²⁴¹ In subsequent cases, the court equated a valid regulation with the standard police power definition (health, safety, general welfare),²⁴² and restated an impermissible regulation as one that “seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit.”²⁴³ The court has acknowledged the tension present in the test: “[b]oth the conferral of benefit and the prevention of a real harm are often present in varying degrees.”²⁴⁴

In *Sintra Inc. v. City of Seattle*,²⁴⁵ the Washington State Supreme Court considered yet another challenge to the City of Seattle HPO,²⁴⁶ this time considering the constitutionality of the ordinance.²⁴⁷ The landowner in *Sintra* brought a takings action under both the state and federal constitutions and a due process claim to recover damages he incurred while subject to the HPO.²⁴⁸ The court addressed the threshold question of whether the HPO was merely a permissible police power to safeguard the public interest.²⁴⁹ The City argued that the ordinance was “enacted to prevent a public harm—displacement and homelessness of low-income tenants” and that it did not “enhance any publicly-owned interest in property.”²⁵⁰ The court rejected the argument and held that the regulatory scheme went beyond preventing harm because it required

239. *Id.* at 767–68, 64 P.3d at 623 (quoting *Conger v. Pierce Cnty.*, 116 Wash. 2d, 36, 198 P. 377, 380 (1921)) (emphasis omitted) (footnote omitted) (citations omitted).

240. 114 Wash. 2d 320, 787 P.2d 907 (1990).

241. *Id.* at 329, 787 P.2d at 912.

242. *Guimont v. Clarke*, 121 Wash. 2d 586, 595, 854 P.2d 1, 6 (1993) (“If the regulation merely protects the public health, safety, and welfare (question 1) . . .”).

243. *Robinson v. City of Seattle*, 119 Wash. 2d 34, 49, 830 P.2d 318, 328 (1992); *see also Guimont*, 121 Wash. 2d at 603, 854 P.2d at 10.

244. *Presbytery of Seattle v. King Cnty.*, 114 Wash. 2d 320, 329 n.13, 787 P.2d 907, 912 n.13 (1990).

245. *Sintra, Inc. v. City of Seattle (Sintra I)*, 119 Wash. 2d 1, 829 P.2d 765 (1992).

246. *See supra* Part I for a discussion of the HPO.

247. *Sintra I*, 119 Wash. 2d at 10, 829 P.2d at 770.

248. *Id.*

249. *Id.* at 13, 829 P.2d at 771. Prior to *Guimont*, this threshold question was asked prior to the “fundamental attributes of property ownership” threshold question. *See Guimont v. Clarke*, 121 Wash. 2d 586, 600, 845 P.2d 1, 9 (1993).

250. *Sintra I*, 119 Wash. 2d at 14, 829 P.2d at 772 (quoting Brief of Respondent at 37).

landowners to make additional steps of providing new housing.²⁵¹ According to the court, the allocation of burden to individual property owners, rather than citizens at large, exceeded the City's police power and met the requirements of the takings threshold test.²⁵²

In sum, a regulation that does not destroy a fundamental attribute of property ownership and seeks only to protect the public health, safety, and general welfare, is not subject to a takings challenge; instead, the governmental action must be evaluated simply for its validity under due process law.²⁵³ On the other hand, a regulation that “goes beyond mere harm prevention to require a property owner to provide a public benefit,” must be evaluated under the takings framework.²⁵⁴

C. Under the Washington Takings Framework, a Court Asks if A Regulation “Substantially Advances a Legitimate State Interest” Before Applying the Penn Central Analysis

Once a claim makes its way through a threshold analysis and into the takings branch, a Washington court will ask if a regulation “substantially advances a legitimate state interest.”²⁵⁵ If the regulation does not substantially advance a legitimate state interest, it is treated as a taking.²⁵⁶ If it does advance a legitimate interest, the court will then apply the federal *Penn Central* tests.²⁵⁷ Washington's *Penn Central* test does not differ from the federal analysis described in Part III.A.2 above. What remains unique is the “substantially advances a legitimate state interest” test, which was abandoned by the U.S. Supreme Court in *Lingle*.²⁵⁸ In *City of Des Moines v. Gray Business, LLC*,²⁵⁹ a Washington State appellate court raised the point that *Lingle* abolished this portion of the federal takings test and suggested that Washington should probably

251. *Id.* at 15, 829 P.2d at 773.

252. *Id.* at 15–16, 829 P.2d at 773. Ironically, the result of exceeding the police power is to continue with a takings analysis. If the court determined that the regulation did not “seek less to prevent a harm than to impose an affirmative benefit,” the analysis would move to the substantive due process analysis and essentially ask if the City exceeded its police power.

253. *Robinson v. City of Seattle*, 119 Wash. 2d 34, 50, 830 P.2d 318, 328 (1992).

254. *Id.* at 50, 830 P.2d at 328; *see also* *Guimont v. Clarke*, 121 Wash. 2d 586, 595, 845 P.2d 1, 6 (1993).

255. *Presbytery of Seattle v. King Cnty.*, 114 Wash. 2d 320, 333, 787 P.2d 907, 914 (1990).

256. *Margola Assocs. v. City of Seattle*, 121 Wash. 2d 625, 645, 854 P.2d 23, 35 (1993); *Presbytery*, 114 Wash. 2d at 333, 787 P.2d at 914.

257. *Presbytery*, 114 Wash. 2d at 335–36, 787 P.2d at 915.

258. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545 (2004). *See also supra* Part III.B.

259. 130 Wash. App. 600, 124 P.3d 324 (2005).

eliminate its “substantially advances” inquiry as well.²⁶⁰ However, the Washington State Supreme Court has given only a cursory analysis of this test when considering past housing ordinances; and, in each instance the court concluded the ordinance substantially advanced a legitimate interest.²⁶¹

V. WASHINGTON HAS RETAINED A SUBSTANTIVE DUE PROCESS ANALYSIS FOR DETERMINING THE VALIDITY OF LAND USE REGULATIONS

Washington’s reliance on substantive due process in land use cases differs fundamentally from the U.S. Supreme Court’s treatment of substantive due process and takings law.²⁶² The Washington State Supreme Court has explained that a regulation that is a valid use of the police power is not a taking.²⁶³ The U.S. Supreme Court, by contrast, presumes a regulation’s validity under the police power before even engaging in a takings analysis.²⁶⁴ After *Lingle*, the U.S. Supreme Court will only engage in a substantive due process analysis in the most egregious circumstances—for example, where a regulation is arbitrary or capricious.²⁶⁵ The Washington State Supreme Court has not commented on the continued value of its unique substantive due process test after *Lingle*.²⁶⁶ As things currently stand, Washington courts employ a three-part substantive due process test and ask: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary for achieving that purpose; and (3) whether it is unduly oppressive to the land owner.²⁶⁷ The third prong is often the most difficult and determinative one.²⁶⁸

260. *Id.* at 612 n.33, 124 P.3d at 330 n.33.

261. *See* *Guimont v. Clarke*, 121 Wash. 2d 586, 609–10, 854 P.2d 1, 14–15 (1993) (mobile home relocation assistance advances a legitimate interest in assisting victims of mobile home park closings); *Sintra, Inc. v. City of Seattle (Sintra I)*, 119 Wash. 2d 1, 17, 829 P.2d 765, 774 (1992) (HPO advances legitimate interest of protecting City’s low income housing supply); *Robinson v. City of Seattle*, 119 Wash. 2d 34, 53, 830 P.2d 318, 330 (1992) (HPO “advance[s] legitimate state interests in the general welfare of the citizens of Seattle in attempting to preserve rental housing stock and assist low income tenants.”).

262. *See supra* Part IV.

263. *Sintra, Inc. v. City of Seattle (Sintra II)*, 131 Wash. 2d 640, 690, 935 P.2d 555, 581 (1997).

264. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2004).

265. *See supra* Part IV.

266. *Wynne*, *supra* note 28, at 168.

267. *Presbytery of Seattle v. King Cnty.*, 114 Wash. 2d 320, 330, 787 P.2d 907, 913 (1990).

268. *Id.* at 330–31, 787 P.2d at 913 (“The first and second part of this test are often easily met by challenged government action. The third part is a more difficult determination.”).

In *Robinson v. City of Seattle*,²⁶⁹ the Washington State Supreme Court invalidated the tenant relocation assistance provisions of Seattle's former HPO on substantive due process grounds.²⁷⁰ Without much analysis, the court concluded that the ordinance advanced a legitimate public purpose and employed reasonable means to achieve its goals.²⁷¹ In employing the third due process question—that of undue oppression, the court balanced the following list of nonexclusive factors to weigh the City's interests against the Property owners':

On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.²⁷²

While agreeing that homelessness presented a serious problem, the court questioned the extent to which a single owner's land or property contributes to the problem: "The problems of homelessness and a lack of low income housing in Seattle are in part a function of how all Seattle landowners are using their property."²⁷³ The *Robinson* court ultimately found the ordinance unduly oppressive to the landowners who had to pay relocation costs for their tenants.²⁷⁴ The court insisted that the decrease in affordable rental housing in the city was a burden that had to be "shouldered commonly and not imposed on individual property owners."²⁷⁵

One year later, the Washington State Supreme Court used similar reasoning in *Guimont v. Clarke*²⁷⁶ to hold that the Mobile Home Relocation Assistance Act violated park owners' substantive due process rights.²⁷⁷ The *Guimont* court agreed that the regulation achieved a legitimate public purpose of assisting mobile home park residents in the

269. 119 Wash. 2d 34, 830 P.2d 318 (1992).

270. *Id.* at 55, 830 P.2d at 331.

271. *Id.* at 54, 830 P.2d at 330.

272. *Id.* at 55, 830 P.2d at 331 (quoting *Presbytery*, 114 Wash. 2d at 331, 787 P.2d at 913).

273. *Id.* at 55, 830 P.2d at 331.

274. *Id.*

275. *Id.*

276. 121 Wash. 2d 586, 854 P.2d 1 (1993).

277. *Id.* at 590, 854 P.2d at 3–4.

event of park closures.²⁷⁸ In applying the second part of the test, the court asked whether it was reasonably necessary to require the assistance be paid by the park owner, but then turned directly to *Robinson's* “undue oppression” balancing test to help answer that question.²⁷⁹ When considering the factors on the “public’s side,” the *Guimont* court acknowledged that the lack of low-income housing in Washington was a serious problem.²⁸⁰ The court also admitted that closure of mobile home parks contributed to the immediate need for relocation assistance.²⁸¹ But, the court placed the greater blame on the general unavailability of low-income housing and not on the individual park owner who desired to close his or her park.²⁸² According to the court, the shifting of burdens from society at large to the individual owners represented an oppressive solution that should have been spread throughout society.²⁸³ On the “owner’s side,” the *Guimont* court emphasized that relocation costs could amount to “large sums of money,”²⁸⁴ and that the cost imposed by the Act attached to the act of *leaving* the mobile home park business rather than *entering* or simply conducting the business.²⁸⁵

In *Laurel Park*, the Ninth Circuit Court of Appeals considered whether a zoning ordinance that limited the use of existing mobile home parks was a violation of Washington’s substantive due process law.²⁸⁶ Like the *Guimont* court, the *Laurel Park* court moved quickly through the first two steps of the analysis, concluding the ordinance used reasonably necessary means to advance a legitimate public purpose.²⁸⁷ But the court did not find the ordinance unduly oppressive, even though it acknowledged that the ordinance placed a public burden on individual mobile home park owners.²⁸⁸ In weighing the list of nonexclusive factors, the court concluded that the two most important factors were the negligible present-day effect on the landowners’ property values, and the

278. *Id.* at 609–10, 854 P.2d at 14.

279. *Id.* at 610, 854 P.2d at 14 (citing *Robinson v. City of Seattle*, 119 Wash. 2d 34, 55, 830 P.2d 318, 331 (1992)).

280. *Id.* at 610, 854 P.2d at 15.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* at 611, 854 P.2d at 15.

285. *Id.* at 612, 854 P.2d at 16 (reasoning that imposing costs on entering business is less oppressive because the landowner has the ability to avoid the cost).

286. *Laurel Park Cmty., L.L.C. v. City of Tumwater*, 698 F.3d 1180, 1193-95 (9th Cir. 2012). See *supra* Part III.B.3 for discussion of the takings questions in *Laurel Park*.

287. *Laurel Park Cmty.*, 698 F.3d at 1193–94.

288. *Id.* at 1194.

fact that the owners could continue with existing operations of their mobile home parks.²⁸⁹ The court emphasized that its conclusion was based on the plaintiff's facial challenge, and that if plaintiffs could show a significant diminution in value of particular parcels of land, the outcome may differ.²⁹⁰

VI. A MANDATORY SET-ASIDE ORDINANCE DOES NOT CONSTITUTE A FEDERAL TAKING IF IT MEETS CERTAIN CRITERIA

Mandatory set-asides do not impose a taking on landowners under the per se takings test or under the *Penn Central* analysis so long as the economic burden on landowners is not too great. Furthermore, mandatory set-asides do not impose unconstitutional conditions on developers if the set-aside program is developed pursuant to findings that demonstrate a nexus between residential development and the need for low-income housing. Finally, a mandatory set-aside program should not be susceptible to a federal due process challenge unless it is implemented in a way that is arbitrary, capricious, or prejudicial.

A. *Mandatory Set-Asides Do Not Amount to a Per Se Taking*

Under the federal takings analysis, a mandatory set-aside ordinance would not qualify as a per se taking unless it deprived a landowner of all economically viable use or imposed a physical invasion of the property.²⁹¹ The U.S. Supreme Court held in *Yee v. Escondido*²⁹² that a rent control statute prohibiting the eviction of tenants is not a "physical occupation" under the *Loretto* theory of per se takings.²⁹³ The Court has also emphasized that physical appropriations are relatively rare and that treating land-use regulations as per se takings "would transform government regulation into a luxury that few governments could afford."²⁹⁴ Because a mandatory set-aside ordinance is nearly identical to a rent control ordinance in terms of its physical effect on land owners, it will not be classified as a per se taking based on a physical invasion of

289. *Id.*

290. *Id.* at 1194–95.

291. *See supra* Part III.A.1.

292. 503 U.S. 519 (1992).

293. *Id.* at 528–29, 532 (clarifying that rent control ordinances do not compel a physical occupation; rather, they regulate the economic relations of landlords and tenants).

294. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323–24 (2002).

property. Therefore, unless a mandatory set-aside program denies a property owner of *all* economically viable use, the regulation will not be a per se taking under the federal analysis.

B. Mandatory Set-Asides Are Not a Taking under Penn Central Unless They Go Too Far

An ordinance that survives a per se takings analysis must then be considered under the *Penn Central* balancing test. A mandatory set-aside ordinance must strike a balance to meet the needs of the community in a way that does not impose excessive burdens on a developer. Under a federal takings analysis, an ordinance must consider the economic impact of regulations, interference with investment-backed expectations, and the character of the government action.²⁹⁵ In large part, the outcome of a *Penn Central* inquiry turns upon “the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.”²⁹⁶ So long as the economic impact of a mandatory set-aside program is not too great, a court should find that mandatory set-asides are permissible under the *Penn Central* tests.

1. Economic Impact

As the Ninth Circuit pointed out in *Laurel Park*, a court will rarely declare a regulation a taking based on economic impact alone.²⁹⁷ Unless a mandatory set-aside ordinance devalues a landowner’s property by an excessively large amount, other factors must be present.²⁹⁸ However, a court will balance a demonstrated economic impact with other factors, and a developer or landowner who shows clear evidence of a large negative economic impact will have a better case for a takings claim.²⁹⁹ Of course, without evidence of negative economic impact, a landowner would hardly have a case for a taking at all.

295. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1977).

296. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2004).

297. *Laurel Park Cmty., L.L.C. v. City of Tumwater*, 698 F.3d 1180, 1189 (9th Cir. 2012).

298. *See id.* In *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003), the court held a taking occurred based on the 96% loss of return on equity. *Id.* at 1343. However, the U.S. Supreme Court has rejected takings claims where a regulation caused a 75% diminution in value, *see Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and a 87.5% diminution in value, *see Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

299. *Laurel Park Cmty.*, 698 F.3d at 1189–90.

2. *Investment-Backed Expectations*

When considering economic impact, a court will pay special attention to whether a regulation interferes with a distinct investment-backed expectation.³⁰⁰ In *Penn Central*, the Court emphasized that the New York law in question did not interfere with investment-backed expectations because it permitted Penn Central Station to not only profit from the use of its property, but to also obtain “a reasonable return” on its investment.³⁰¹ Because mandatory set-aside regulations are imposed on *future* housing developments, it will be difficult for a landowner to show that a new regulation disrupts a discrete investment-backed expectation unless the regulation deprives the owner of profitable use of the property.

A landowner typically must show that his or her *primary* investment expectation was disrupted by a regulation.³⁰² In most instances, a landowner’s primary expectation is that he or she will be able to continue operating the property in its current condition.³⁰³ Property owners do not have a right to develop their property based on speculation about future market conditions.³⁰⁴ In the Ninth Circuit, speculative prospects only amount to investment-backed expectations if those speculations are probable enough to affect the land’s current market price.³⁰⁵

Developers operate in a world of changing regulations that sometimes impose new costs. When land is purchased, owners do not have a perpetual right to develop land free from future regulation.³⁰⁶ Unless a mandatory set-aside program is so costly to developers that their present expectations are no longer profitable, its enforcement will not constitute a taking. For example, consider a developer (D) who purchases land in a multi-family residential district and the land has a current market price that allows for the profitable development of 120 market-rate units at

300. *Penn Cent.*, 438 U.S. at 123.

301. *Id.* at 136.

302. *Id.*; *Laurel Park Cmty.*, 698 F.3d at 1189–90.

303. *Penn Cent.*, 438 U.S. at 136; *Laurel Park Cmty.*, 698 F.3d at 1189–90.

304. *See Laurel Park Cmty.*, 698 F.3d at 1189–90.

305. *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120–21 (9th Cir. 2010).

306. Washington’s vested rights doctrine provides a contrast to this principle. A development project will be considered “vested” on a specified date of filing a building permit or plat application for the project, or through other processes provided by local ordinances. *See* WASH. REV. CODE §§ 19.27.095, 58.17.033 (2012); *W. Main Assocs. v. City of Bellevue*, 106 Wash. 2d 47, 51, 720 P.2d 782, 785 (1986). Once developers’ rights are vested, they are protected from subsequent changes to land use and zoning regulations. *W. Main Assocs.*, 106 Wash. 2d at 51, 720 P.2d at 785.

maximum density. If a city passes an ordinance that requires 50% of housing units to be affordable and this makes D's project unprofitable, the city has disrupted D's investment-backed expectation. If instead, the ordinance requires 15% of the units to be affordable but still allows D to make a reasonable return on the project, D's investment-backed expectations are unlikely to be disrupted.³⁰⁷ Finally, if the city provides additional benefits to D—extra density allowances, expedited permitting, reduced permitting costs, etc.—then the city is even more protected against a claim that it disrupted D's investment-backed expectations.³⁰⁸

3. *Character of the Government Action*

When a court evaluates the “character of a governmental action” it will consider whether the action is more similar to an impermissible physical invasion or instead resembles a public program that adjusts “benefits and burdens” to promote the common good.³⁰⁹ A court should determine that a properly-drafted mandatory set-aside ordinance is not a taking under the third prong of *Penn Central*. While mandatory set-asides have some bearing on legitimate property rights, i.e. the right to rent to anyone, this restriction is not so severe that it resembles a physical invasion. Rather, mandatory set-asides, like many zoning regulations, operate to ensure an appropriate mix of land uses within a community. In other words, they place minimal restrictions on some housing developers in order to provide adequate housing for low and moderate-income residents.

Like the historical preservation ordinance in *Penn Central*, a mandatory set-aside ordinance applies broadly to land owners who meet certain criteria.³¹⁰ Also, a mandatory set-aside ordinance has the advantage of spreading both burdens and benefits across a larger segment of the population than the MHP ordinance in *Laurel Park*.³¹¹ Of

307. While D may personally believe that his or her investment-backed expectations have been disrupted, a court is principally concerned with whether D's present uses are disrupted and if D can still make a reasonable return on investment. *See Penn Cent.*, 438 U.S. at 136.

308. In *Penn Central*, the Court emphasized the landowners' ability to transfer development rights when determining that investment backed expectations were not disrupted. *Id.* at 137.

309. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2004).

310. In *Penn Central*, the historic preservation ordinance extended to all New York City structures eligible for historic designation. *Penn Cent.*, 438 U.S. at 133. Likewise, mandatory set-aside ordinances typically apply to all landowners who seek to develop more than a specified number of units. *See IGLESIAS & LENTO, supra* note 7, at 99.

311. *See supra* Part III.B.3

course, private housing developers will bear the responsibility of providing some amount of low-income housing to the population. But government often places sector-specific regulatory burdens on various industries as a means of promoting health, safety, and the general welfare.³¹² And like the historic preservation ordinances in the *Penn Central* case, or any number of restrictions on private property—environmental regulations or zoning, for example—a number of property owners will always be more severely impacted than others.³¹³

Mandatory set-asides are regulatory programs that adjust benefits and burdens for the benefit of all society. Residents generally benefit from the reduction in traffic and pollution when low-income workers do not have to travel long distances from the affordable outskirts of the city to reach jobs in the city center. And all residents benefit from the inherent value of allowing citizens of all walks and phases of life to live in mixed-income communities. Asking all landowners who seek to develop a certain quantity of housing to comply with a minimal affordability obligation does not disproportionately and unconstitutionally burden a small segment of the population. This is especially true when the city mitigates the burden by providing incentives and rewards for doing so.

C. Mandatory Set-Asides Are Not Unconstitutional Exactions under Nollan and Dolan if They Are Supported by Proper Legislative Findings

A mandatory set-aside program is constitutional under *Nollan* if the jurisdiction implementing the program can demonstrate a nexus between the conditions imposed on new developments and the jurisdiction's regulatory justification. Therefore, a city implementing a mandatory set-aside program should produce findings that demonstrate a strong correlation between the targeted residential developments and the need for more affordable housing. Because *Dolan* demands that a required dedication be roughly proportional “in nature and extent” to the impact of the development,³¹⁴ a city should be prepared to produce concrete evidence of this proportionality, especially if the city faces an as-applied

312. See, e.g., Nutrition Labeling and Education Act, Pub. L. No. 101-535, § 2, 104 Stat. 2353-57 (codified as amended at 21 U.S.C. § 343 (2006)) (requiring food manufacturers to place nutrition and ingredient information on all food packaging); Federal Motor Vehicle Safety Standards and Regulations, Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified as amended at 49 U.S.C. §§ 30101-30169 (2006)) (imposing numerous safety, efficiency, and other standards on car manufacturers).

313. See *Penn Cent.*, 438 U.S. at 133–34.

314. *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1993).

challenge.³¹⁵ The Ninth Circuit held that a nexus was adequately established in *Commercial Builders* when the city produced a study showing the number of additional low-income workers a new commercial development would generate, and the concomitant need for additional housing to accommodate them.³¹⁶ A Washington court should follow this persuasive authority and uphold a mandatory set-aside ordinance if a city implementing a mandatory set-aside program can produce some reasonable evidence of the link between new residential development and the displacement of low-income housing.³¹⁷

If a mandatory set-aside ordinance is challenged in an as-applied challenge, the city will carry the burden of demonstrating the proper nexus and proportionality.³¹⁸ However, if the City fails to meet its burden, the plaintiff will not have to comply with the set-aside requirements, but the ordinance itself will not be invalidated. If a developer brings a facial exactions challenge, the burden should shift back to the developer to prove the invalidity of a generally applicable law.³¹⁹ A city that produces findings showing the nexus between development and the need for set-asides will have a much easier time overcoming the *Nollan* and *Dolan* tests since such findings are entitled to deference by the courts.³²⁰

Dolan offers a refinement of the *Nollan* test and requires that an

315. See *supra* Part III.C. For an as-applied challenge, the City carries the burden of proving proportionality. *Id.*

316. *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th. Cir. 1991).

317. See *supra* Part III.C. The *Commercial Builders* court did not require evidence of causation, just of a substantial connection. *Id.*

318. See *supra* Part III.C.

319. See *Dolan*, 512 U.S. at 385 (distinguishing general, city-wide legislation from adjudicative permit decisions). See also THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 10:5 (3d ed.) (taking their cue from *Dolan*'s emphasis on the fact that the case involved an adjudicative decision, most courts have found heightened scrutiny inapplicable to broad-based legislative conditions); Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. REV. 242 (2000) (noting that where property owners must bargain on a case by case basis, in what is essentially an adjudicatory setting, the safeguards of the open legislative process are lost, and concern arises that the individual may be compelled to give more than a fair share).

320. To date, Bainbridge Island, WA may be the only community in Washington that has prepared a residential nexus report. See WASHINGTON REAL PROPERTY DESKBOOK SERIES: VOL. 5 LAND USE PLANNING, HOUSING § 10.7, 10–25 (4th ed. 2012). A number of California communities have also compiled nexus reports for the impact of new residential housing on the loss of low-income housing. See ADAM F. CRAY, THE USE OF RESIDENTIAL NEXUS ANALYSIS IN SUPPORT OF CALIFORNIA'S INCLUSIONARY HOUSING ORDINANCES: A CRITICAL EVALUATION (Nov. 2011), available at <http://www.cbia.org/go/linkservid/06D3172D-35C3-4C71-9A9098D439C63874/showMeta/0/>.

exaction be roughly proportional in nature and extent of the impact of the proposed development.³²¹ In the context of set-aside programs, a city should ensure that it keeps its percentage requirements low enough that it does not overburden developers. A city's findings on the extent of the connection between new residential development and a loss of low-income housing will help inform what an appropriate requirement may be. For smaller communities, findings on a citywide basis may be appropriate. But in a larger city like Seattle, the best findings will be those that demonstrate impacts within a particular neighborhood.

D. Mandatory Set-Asides Should Not Be Susceptible to a Federal Substantive Due Process Claim

After *Lingle*, the U.S. Supreme Court has removed all substantive due process tests from its takings analysis.³²² The Court renounced substantive due process as the primary method for invalidating social and economic legislation in the first half of the twentieth century.³²³ Therefore, except in unique circumstances, generally applied mandatory set-aside legislation should not be vulnerable to a federal substantive due process claim. However, the federal takings analysis does not subsume *all* potential land use claims.³²⁴ There is still room for substantive due process when, for example, a property owner claims that a land use regulation was adopted for prejudicial reasons, that a development right was denied in bad faith, or that a regulation lacked legitimate public purpose.³²⁵ In such instances, the action may be held to violate substantive due process on grounds of arbitrariness and no amount of compensation would make such a regulation constitutional.³²⁶

But a typical mandatory set-aside program should not have too much difficulty overcoming a federal substantive due process challenge. A government effort to increase the supply of affordable housing, promote

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

322. *See supra* Part II.

323. *Id.* *See also* *Armendariz v. Penman*, 75 F.3d 1311, 1318–19 (9th Cir. 1996), *overruled on other grounds by* *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856–57 (9th Cir. 2007) (recognizing that the “use of substantive due process to extend constitutional protection to economic and property rights have been largely discredited”).

324. *See supra* Part II.

325. *Id.*

326. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005) (“[I]f a government action is found to be impermissible—for instance because it fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.”).

mixed income neighborhoods, and increase housing near job sites is a legitimate public purpose.³²⁷ As long as the program does not single out a small number of landowners and instead is applied uniformly throughout a city or neighborhood, it should not be deemed arbitrary or prejudicial. Finally, an ordinance that allows for administrative relief if a landowner can demonstrate that an ordinance is prejudicial or lacks a reasonable relationship to the community's need for affordable housing should be protected from a facial substantive due process challenge.³²⁸

VII. EVEN UNDER WASHINGTON'S EXISTING TAKINGS FRAMEWORK, MANDATORY SET-ASIDES CAN SURVIVE A TAKINGS CHALLENGE

For the sake of simplicity and predictability,³²⁹ the Washington State Supreme Court should abandon its unique takings analysis in favor of the federal analysis.³³⁰ However, even if the court retains its present analysis, it ought to find that a properly implemented mandatory set-aside program does not constitute a taking or a substantive due process violation. Part A explains why mandatory set-asides do not fail the first threshold test, which asks if a regulation is a per se, or categorical taking. While the plurality in *Manufactured Housing* articulated an overreaching version of Washington's unique "fundamental attribute test," even under that standard, mandatory set-asides do not derogate a fundamental attribute of property ownership and thus are not per se unconstitutional. Part B considers the second threshold test, which asks, "does a regulation seek less to prevent a harm than to impose an affirmative public benefit?," and argues that mandatory set-asides both prevent a harm *and* impose an affirmative benefit. Therefore, they may be funneled into either the due process analysis or the takings analysis. Part C analyzes the likely result if a mandatory set-aside ordinance is

327. See *Kelo v. City of New London*, 545 U.S. 469 (2005) (deferring to legislative judgment and holding that economic development constitutes a "public purpose"); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (deferring to legislature and finding elimination of land oligopoly a legitimate public purpose).

328. See *supra* text accompanying note 171.

329. From a practical perspective, the Washington test should be abandoned because it is confusing. The Washington test is modeled on federal law, but introduces unique elements and interpretations that muddle a relatively straightforward takings framework. See Wynne, *supra* note 28, at 129. Additionally, no one case contains the entire Washington takings analysis; instead, elements must be pieced together from multiple cases. *Id.* at 134–35.

330. This argument is developed at length in Roger Wynne's article, *The Path Out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis*, *supra* note 28. Some of Wynne's arguments are also summarized in the sections that follow.

funneled into the takings framework and argues that mandatory set-asides do “advance a legitimate state interest.” Finally, because of the weaknesses of the substantive due process framework, Part D argues that Washington should abandon its reliance on the doctrine in favor of the federal takings analysis. Part D further argues that even if Washington courts retain the current framework for evaluating land use regulations, mandatory set-asides should survive both a takings and a due process challenge.

A. *Mandatory Set-Asides Do Not Derogate a Fundamental Attribute of Property Ownership and Do Not Amount to a Per Se Taking under Washington’s First Threshold Question*

As discussed in Part VI.A, a mandatory set-aside ordinance does not constitute a physical occupation and would not deprive a landowner of all economically viable use of his or her property. Therefore, it would not amount to a per se taking under the first two per se takings tests. Additionally, mandatory set-asides should not be considered a per se taking under Washington’s third form of per se takings because requiring limited set-asides of rental units does not derogate a “fundamental attribute” of property ownership.³³¹ The ordinance in *Manufactured Housing* restricted the right to dispose of property by selling to a person of the owner’s choice. Courts have emphasized a landowner’s right to freely dispose of property,³³² and if a mandatory set-aside program is applied to owner-occupied housing, it may suffer the same fate as the right-of-first-refusal statute in *Manufactured Housing*.³³³ However, a program that only regulates rental activity limits the right to exclude rather than the right to dispose of property. A landowner who provides rental housing to the public does not have a completely unrestrained right to exclude whomever he or she desires.³³⁴ Because most mandatory set-aside programs place only minimal

331. *See supra* Part.III.B.1 for discussion of Washington’s “fundamental attribute” test.

332. *See, e.g.*, *Laurel Park Cmty., L.L.C. v. City of Tumwater*, 698 F.3d 1180, 1192 (9th Cir. 2012); *Manufactured Hous. Cmty. of Wash. v. State*, 142 Wash. 2d 347, 364–66, 13 P.3d 183, 191–92 (2000).

333. AHIPA provides that incentive zoning programs may set guidelines for both renter or owner occupancy housing. WASH. REV. CODE § 36.70A.540(2)(b) (2012).

334. *See, e.g.*, WASH. REV. CODE §§ 49.60.030, .222 (2012) (prohibiting exclusion of tenants based on sex, marital status, sexual orientation, race, creed, color, national origin, familial status, veteran or military status, or disability); SEATTLE, WASH., MUN. CODE ch. 14.08 (2013) (prohibiting tenant discrimination based on age or source of income). *See also* *Manufactured/Mobile Home Landlord-Tenant Act*, WASH. REV. CODE § 59.20.080 (2012) (requiring landowners to terminate or fail to renew a lease only with just cause).

restrictions on the right to exclude, such programs are distinguishable from the right of first refusal statute that was struck down in *Manufactured Housing*.

If a Washington court follows the *Manufactured Housing* plurality's expansive interpretation of the "fundamental attribute" test,³³⁵ nearly any regulation that negatively impacts a property right is a per se taking, regardless of the social utility of the regulation and the intensity of the burden placed on a property owner. As Justice Talmadge pointed out in his dissenting opinion, all zoning laws could be abrogated under the test since they interfere with an owner's possession and use of property to some extent.³³⁶ Under the plurality's approach, a mandatory set-aside program could be deemed a "derogation" of a fundamental attribute of property ownership because it implicates the right to exclude tenants based on income. However, the state already places limitations on property rights in a myriad of permissible ways—for example by prohibiting discrimination in housing practices,³³⁷ or by exercising its police power to require building set-backs, height and density restrictions, and even certain aesthetic criteria.³³⁸ A "fundamental attribute test" that prohibits interference with core property rights but that does not explain how to distinguish an impermissible interference from typical zoning practices is unworkable and ripe for abuse. When considering a mandatory set-aside program, a court should refrain from such an expansive application of *Manufactured Housing* and rely instead on the federal takings tests.³³⁹

B. Mandatory Set-Asides Both Prevent a Social Harm and Provide an Affirmative Public Benefit and May Be Analyzed under Either a Due Process or a Takings Framework

The second threshold question—does a regulation “seek[] less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit”—is what allows Washington courts to funnel potential takings claims into a substantive due process analysis instead. A regulation that does not destroy a fundamental attribute of property ownership and seeks only to protect the public

335. See *supra* Part IV.B.

336. *Manufactured Hous.*, 142 Wash. 2d at 417, 13 P.3d at 218 (Talmadge, J., dissenting).

337. See WASH. REV. CODE § 49.60.030 (2012).

338. See *Robinson v. City of Seattle*, 119 Wash. 2d 34, 56, 830 P.2d 318, 331 (1992).

339. For a more in-depth discussion of why the Washington State Supreme Court should abandon the fundamental attribute test see Wynne, *supra* note 28, at 164–66.

health, safety, and general welfare is not subject to a takings challenge and is evaluated under due process law.³⁴⁰ But a regulation that “goes beyond mere harm prevention to require a property owner to provide a public benefit,” must be evaluated under the takings framework.³⁴¹ Because the distinction between preventing harm and providing affirmative benefits is unworkable, the Washington State Supreme Court should eliminate this test from its analysis. Mandatory set-asides both prevent a harm and provide an affirmative benefit. Therefore, a court could easily funnel mandatory set-asides into a substantive due process or a takings claim depending on the result desired.

The harm versus benefit dichotomy is particularly challenging in the land use context where regulations often work to prevent a harm in order to confer a benefit to another landowner, or to the broader community.³⁴² The U.S. Supreme Court recognized this challenge in *Lucas*, where it eliminated the harm-benefit test from its analysis, noting that the distinction between a harm and benefit is “often in the eye of the beholder.”³⁴³ To use the facts in *Lucas* as an example, imposing a servitude on one landowner’s land may be necessary to prevent the owner from harming the state’s ecological resources; alternatively, it might achieve the benefits of creating an ecological preserve for the state.³⁴⁴ Likewise, mandatory set-asides seek to mitigate the harm of new residential developments driving out existing low and moderate-income housing and/or excluding mixed-income housing options.³⁴⁵ At the same time, mandatory set-asides provide a benefit to low and moderate income residents who lack access to affordable housing, especially in areas of the city that are close to jobs and services.

As previously mentioned, Washington courts have often shielded communities from the financial liabilities of a takings challenge by analyzing land use regulations under the due process test.³⁴⁶ A city may prefer this result in order to protect its financial resources. However, this course of action also has the undesirable result of invalidating the

340. *Robinson*, 119 Wash. 2d at 50, 830 P.2d at 328.

341. *Id.*; see also *Guimont v. Clarke*, 121 Wash. 2d 586, 594, 854 P.2d 1, 6 (1993).

342. For example, imposing a servitude on one landowner’s land may be necessary to prevent the owner from harming the state’s ecological resources, or it could help achieve the benefits of creating an ecological preserve. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1024 (1992).

343. *Id.* at 1024.

344. See *id.* at 1024–25.

345. This requirement reemphasizes the need for government findings on the impact of new residential development on existing low-income and moderate housing. See Part VI.C. (calling for residential nexus studies).

346. See *supra* note 192 and accompanying text; see also *Wynne*, *supra* note 28, at 154–55.

ordinance in its entirety.³⁴⁷ A successful as-applied takings claim, on the other hand, would require a municipality to award compensation to a single developer, but would not invalidate the regulation out-right. This result may be preferable in the context of a mandatory set-aside program, since it would allow for the continuation of the program in the event of a successful challenge, but would also provide for compensation in circumstances where mandatory set-asides unfairly impose a hardship on an individual landowner.

Regardless of which way a court comes out on the second threshold question, mandatory set-asides should be able to survive either a takings *or* a substantive due process challenge under the Washington framework. Part C below argues that mandatory set-asides can pass the takings prong of the Washington framework, while Part D.1 asserts mandatory set-asides can survive the substantive due process prong. Finally, Part D.2 argues that Washington should abandon its overreliance on substantive due process and instead rely on the federal takings framework.

C. *Mandatory Set-Asides Can Survive a Washington Takings Challenge Because They Advance a Legitimate State Interest in Providing Adequate Housing*

As discussed in Part IV.C., when a claim makes its way through a threshold analysis and into the takings analysis, a Washington court will ask if a regulation “substantially advances a legitimate state interest” before applying the *Penn Central* test.³⁴⁸ If Washington courts continue to apply the substantially-advances inquiry,³⁴⁹ it should present little threat to a mandatory set-aside ordinance. The Washington State Supreme Court has applied the test leniently in the past, and determined that both the Mobile Home Relocation Assistance Act in *Guimont v. Clarke* and the HPO in *Sintra I* and *Robinson* substantially advanced a legitimate state interest.³⁵⁰ Likewise, a Washington court should find that a mandatory set-aside program advances a legitimate state interest, especially in light of state requirements that municipalities provide

347. See Wynne, *supra* note 28, at 161.

348. See *supra* Part IV.C.

349. As mentioned in Part VI.D, the U.S. Supreme Court removed the “substantially advances” formula from the Court’s substantive due process analysis in *Lingle*. Because the Washington State Supreme Court adopted the “substantially advances” test directly from the federal takings analysis, it too should extricate the test from its takings analysis at the next available opportunity.

350. See *supra* Part IV.C. Those courts focused more on the legitimacy of the state interest than on whether the ordinance effectively advanced that interest.

adequate housing to low and moderate-income residents.³⁵¹

After applying the “substantially advances” test, a Washington court will apply the federal *Penn Central* factors to determine if the regulations constitute a regulatory taking.³⁵² Because the tests are identical, the result should be the same as described in Part VI.B, and a Washington court should find that a mandatory set-aside requirement that still allows developers a reasonable return on investment is safe from a takings challenge.

D. Mandatory Set-Aside Programs Can Still Survive Challenges under the Existing Substantive Due Process Test, but Washington Courts Should Abandon the Substantive Due Process Analysis for Land Use Regulations

Under Washington’s existing substantive due process analysis, a mandatory set-aside ordinance should be safe from a substantive due process challenge. So long as a mandatory set-aside ordinance does not impose excessive costs on developers and applies prospectively across a large enough segment of the population, a court ought to hold that it does not violate the substantive due process rights of landowners. Given the flexibility of the substantive due process test, a Washington court certainly *could* rely on substantive due process to invalidate a mandatory set-aside ordinance. However, out of respect for the superior policymaking capacity of legislative bodies and in furtherance of the separation of powers, a Washington court ought to exercise restraint before overturning important social and economic legislation.³⁵³ To that end, the Washington State Supreme Court should abandon its overreliance on substantive due process in the land use context and conform to the federal standard as laid out in *Lingle*.³⁵⁴

1. Mandatory Set-Asides Do Not Violate Substantive Due Process under Washington’s Current Test

If a Washington court analyzes a mandatory set-aside ordinance under a substantive due process analysis, it will ask: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses

351. See WASH. REV. CODE § 36.70A.070(2) (2012); WASH. ADMIN. CODE § 365-196-410(2)(e) (2012).

352. See *supra* Part III.C.

353. See Susan Boyd, *A Doctrine Adrift: Land Use Regulation and the Substantive Due Process of Lawton v. Steele in the Supreme Court of Washington*, 74 WASH. L. REV. 69, 89 (1999).

354. See generally *supra* Part III.

means that are reasonably necessary for achieving that purpose; and (3) whether it is unduly oppressive to the land owner.³⁵⁵ The substantive due process test should not present much of a hurdle to a jurisdiction implementing a mandatory set-aside program. The *Robinson*, *Sintra*, *Guimont*, and *Laurel Park* courts all agreed that the housing ordinances at issue aimed to achieve a legitimate public purpose.³⁵⁶ Likewise, the Washington State Supreme Court should have no problem determining that a mandatory set-aside ordinance has a legitimate public purpose of increasing the supply of affordable housing and supporting inclusive, mixed-income communities.

The question of whether mandatory set-aside ordinances are “reasonably necessary” to achieve the government’s public purpose is more challenging and harkens back to the *Lingle* court’s warnings about the judiciary substituting its own judgment for that of legislative and administrative bodies.³⁵⁷ If a city or county desires to produce more affordable housing, there certainly are other ways of doing so. For example, the city potentially could impose a broad tax on all citizens and build more public housing through housing authorities. The city could also allocate additional public money to provide even more enticing incentives for developers who voluntarily build affordable housing—for example, cash incentives, a waiver of all or most development fees, or the provision of public land. However, every municipality has to make its own calculations about how to allocate limited resources, and judges are not well-positioned to make judgments on the “reasonable necessity” of various policy decisions.³⁵⁸ Perhaps in light of this challenge, the *Robinson*, *Sintra*, *Guimont*, and *Laurel Park* courts all punted on the “reasonably necessary” question and relied instead on the third question.³⁵⁹

The final question of the substantive due process analysis—whether a regulation is unduly oppressive to a landowner—requires a court to consider a set of nonexclusive factors when balancing the public’s interest against those of a regulated landowner.³⁶⁰ When considering the factors on the “public side” of the oppressiveness test,³⁶¹ the *Guimont*,

355. *Presbytery of Seattle v. King Cnty.*, 114 Wash. 2d 320, 330, 787 P.2d 907, 913 (1990).

356. *See supra* Part IV.D.

357. *See supra* Part III.B.

358. *See supra* Part III.

359. *See supra* Part IV.D.

360. *See id.*

361. *See id.* The factors on the public side include the seriousness of the problem, the extent to which the owner’s land contributes to it, the degree to which the proposed regulation solves it, and

Robinson, and *Sintra* courts acknowledged that the lack of low-income housing in Washington was a serious problem.³⁶² However, the courts all concluded that the shifting of burdens from society at large to individual landowners represented an oppressive solution that should have been spread throughout society.³⁶³ Mandatory set-aside programs will not suffer from the same burden-shifting flaws as the previously invalidated housing ordinances if a municipality can demonstrate that new developments are driving out existing low-income housing options, contributing to homelessness, or diluting the availability of mixed-income housing. Additionally, plenty of evidence supports the efficacy of inclusionary zoning as a method of providing affordable housing in an otherwise cost-prohibitive area.³⁶⁴ Thus, a court should give deference to a jurisdiction's legislative findings regarding the degree to which mandatory set-asides mitigate the lack of affordable housing in the community. Such findings should help a city overcome the relevant factor on the "public side" of the oppressiveness test.

On the "owner's side" of the oppression test,³⁶⁵ mandatory set-aside programs do not suffer from the same weaknesses as previous housing ordinances. A mandatory set-aside ordinance that imposes a minimal—or at least reasonable—financial obligation on landowners does not have the same economic effect as the burdensome ordinances of *Sintra* or *Guimont*.³⁶⁶ This is even more true when the program rewards

the feasibility of less oppressive solutions. *Id.*

362. *See supra* Part IV.

363. *Id.*

364. *See, e.g.,* Jenny Schuetz, Rachel Meltzer & Vicki Been, *31 Flavors of Inclusionary Zoning: Comparing Policies From San Francisco, Washington, DC, and Suburban Boston*, 75 J. AM. PLAN. ASS'N 441 (2009). The authors used empirical evidence to analyze inclusionary zoning in three regions and concluded that inclusionary zoning policies vary widely and have varying levels of effectiveness depending on the structure of the program. For example, in the Washington, DC metropolitan area, 15,252 units of affordable housing had been developed as of 2003 as a result of inclusionary zoning. *Id.* at 451. In the San Francisco Bay Area, only 9154 units were produced due to inclusionary zoning, approximately 2.3% of new units permitted. *Id.* According to the authors, correlations in their data suggest that programs that offer density bonuses and exempt small developments produced the most affordable units; however, more research must be done to determine what program structure will be most effective in a given location. *Id.* at 453.

365. *See supra* Part IV.D. The factors on the owner's side include the economic effect of the regulation, the extent of available remaining uses for the property, the temporary or permanent nature of the regulation, the extent to which an owner could anticipate the regulation, and the owner's ability to alter present or currently planned uses.

366. In *Guimont v. Clarke*, mobile home park owners were required to pay \$7500 per tenant, regardless of the tenant's income level, simply to close their park. 121 Wash. 2d 586, 611–12, 854 P.2d 1, 15 (1993). Similarly, the ordinance under review in *Sintra* imposed a \$218,000 low income housing replacement fee on an owner attempting to develop a \$670,000 warehouse. *Sintra, Inc. v. City of Seattle (Sintra I)*, 119 Wash. 2d 1, 22, 829 P.2d 765, 777 (1992).

developers with lucrative development incentives. Furthermore, unlike previous ordinances that imposed restrictions on landowners when *leaving* their existing enterprises, a set-aside ordinance is imposed solely on new developments. Thus, mandatory set-asides do not suffer from being wholly unforeseeable to affected property owners, and they do not place limits on a landowner's current or planned use. Finally, under AHIPA, a set-aside ordinance imposes a fifty-year affordability requirement.³⁶⁷ The lack of permanence in the regulatory burden, along with other mitigating factors on the "public" and "owner" side, should help protect an ordinance from invalidity on substantive due process grounds.

2. *Washington Should Abandon Its Overreliance on Substantive Due Process in the Land Use Context*

Washington should abandon its overreliance on substantive due process and conform to the federal norm of relying on takings law as the primary constitutional safeguard against burdensome land use regulations. This would mean eliminating both the outdated *Agins* "substantially advances a legitimate state interest" test,³⁶⁸ and eliminating the "second threshold question," which asks if a regulation "seeks less to prevent a harm than to impose the requirement of providing an affirmative public benefit."³⁶⁹ Eliminating the due process branch of Washington's takings analysis would both simplify Washington land use law and limit the role of courts in evaluating the efficacy of various policy decisions.

The advantage of the substantive due process analysis, as articulated in *Orion* and *Sintra II*, is that it shields local governments from financial liability as required by a Fifth Amendment takings claim.³⁷⁰ But, as Roger Wynne argues in his article on the Washington takings analysis, funneling claims into the substantive due process analysis when a

367. WASH. REV. CODE § 36.70A.540(2)(e) (2012).

368. *See supra* Part III.C.

369. *See supra* Part III.B.2.

370. *See Sintra, Inc. v. City of Seattle (Sintra II)*, 131 Wash. 2d 640, 689–90, 935 P.2d 555, 580 (1997) (citing *Orion Corp v. State*, 109 Wash. 2d 621, 651, 747 P.2d 1062, 1078 (1987) ("If all excessive regulations require just compensation, rather than invalidation, land-use decision makers, who adopt regulations in a good faith attempt to prevent a public harm, will nevertheless be held strictly liable for regulations that result in a taking. Undoubtedly, the specter of financial liability will intimidate legislative bodies from making the difficult, but necessary choices presented by . . . land-use problems. . . . Strict liability would not result for all excessive regulations, however, under the approach developed in our own regulatory takings jurisprudence.")).

landowner seeks compensation from a takings claim may lower the floor of constitutional protections that are available to landowners.³⁷¹ Additionally, the Washington State Supreme Court can ensure adequate protection to landowners without relying on its less precise substantive due process analysis, because *Nollan* and *Dolan* already protect landowners from unconstitutional exactions and *Penn Central* shields landowners from regulations that are overly oppressive.³⁷²

Finally, one of the most obvious shortcomings of substantive due process is that the doctrine empowers courts to step into a policymaking role and evaluate the efficacy and value of social and economic legislation.³⁷³ The U.S. Supreme Court abandoned its reliance on substantive due process for this reason long ago.³⁷⁴ And in *Lingle*, the Court reaffirmed its commitment to evaluate land use claims under the takings, rather than due process framework.³⁷⁵ The “substantially advances” test presents an opportunity for a court to use its own judgment of whether legislation actually furthers the interest it seeks to advance.³⁷⁶ This kind of “means-end”³⁷⁷ analysis is best left to legislative bodies. The Washington State Supreme Court has invalidated housing ordinances on substantive due process grounds because of the Justices’ assessment that there was no causal connection between the developers’ actions and the lack of affordable housing in the community.³⁷⁸ If the government meets its burden of showing the necessary causal connection between a policy and a social ill, judges should not attempt to impose their own social philosophies or personal opinions to overturn important social and economic legislation.

CONCLUSION

Inclusionary zoning can be a valuable tool for local governments that are trying to achieve affordable housing policy goals. AHIPA provides

371. Wynne, *supra* note 28, at 160–63.

372. *See supra* Part III.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005).

378. *See, e.g., Sintra, Inc. v. City of Seattle (Sintra I)*, 119 Wash. 2d 1, 22, 829 P.2d 765, 777 (1992) (“Sintra’s property cannot be singled out as contributing to the problem of homelessness in any pronounced way; the lack of low income housing was brought about by a great number of economic and social causes which cannot be attributed to an individual parcel of property.”).

authority for both voluntary and mandatory inclusionary zoning programs and explicitly states that such programs do not violate RCW 82.02.020. AHIPA's amendment to the tax preemption statute means that Washington courts can no longer rely solely on *San Telmo* and *R/L Associates* to invalidate low-housing ordinances that otherwise conform with AHIPA. Consequently, constitutional theories, such as due process, unconstitutional exactions, or takings may become the bases for new challenges to inclusionary zoning ordinances. Washington courts have applied a unique takings analysis to land use regulations and have relied on substantive due process tests that the U.S. Supreme Court denounced in *Lingle v. Chevron U.S.A., Inc.* The Washington State Supreme Court should reject its prior takings framework in favor of the streamlined federal approach and reserve the substantive due process doctrine for rare circumstances. However, so long as a mandatory set-aside program does not impose economic hardship on developers and is supported by evidence of a nexus between development and the need for affordable housing, it should be safe from a constitutional challenge under both the Washington and federal constitutions.