Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs?

Nadia I. El Mallakh†

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† J.D. Candidate, School of Law, University of California, Berkeley (Boalt Hall), 2002; M.C.P. Candidate, Department of City and Regional Planning, University of California, Berkeley, 2002; B.S., University of California, Berkeley, 1997. First and foremost, I would like to thank my mother, Dr. Dorothea El Mallakh, and sister, Helen El Mallakh, for all of their tremendous support, love, insight, and guidance throughout my life. I would also like to thank Paul Washington for his encouragement, advice, and aid with brainstorming as well as countless revisions of this Comment. My deepest gratitude is extended to family, friends, University of California faculty, law review members, attorneys, and others who edited and invaluably contributed to the Comment, including: Stephen Barton, Jason Bezis, David Booher, Thomas Brown, Professor Karen Christensen, Zack Cowan, Professor Elizabeth Deakin, Dean John Dwyer, Dr. Cecelia Lange, Jerry Lange, Professor Andrea Peterson, Sarah Shaw, and Tita Young. Finally, this Comment is dedicated to the memory of a brilliant and loving man, my father Dr. Ragaei El Mallakh.

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Nadia I. El Mallakh

INTRODUCTION

Since the landmark decision *Village of Euclid v. Ambler Realty Co.*[1] upheld the use of zoning as a legitimate exercise of the police power, zoning has been employed not only for constructive land-use purposes but also to exclude low-income housing development and minorities from particular neighborhoods.[2] This practice is known as exclusionary zoning. Exclusionary zoning has been defined in numerous ways; in essence, it is the improper use of zoning to exclude certain groups[3] from a location such as a city or a neighborhood.[4] Examples of exclusionary zoning techniques employed by municipalities include requiring overzealous minimum house-size specifications, allowing only single-family (not multi-family) residential development,[5] and setting a large minimum lot size.[6]

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1. 272 U.S. 365 (1926).

2. Zoning was viewed as a public land-use tool to supplement private law:

> The insulation of single-family residences that was approved in *Euclid* was an attempt to use the power of the state (or city) to regulate land uses more rigidly and effectively than had been the case with private devices (particularly covenants and defeasible fees) that ran the risk of unreasonably restricting the essential right of alienation.

CHARLES M. HARR & MICHAEL ALLEN WOLF, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 373 (4th ed. 1989).

3. Historically in the United States, the "groups" of individuals targeted by exclusionary zoning have been low-income families/individuals, new immigrants, and minorities, particularly African-Americans. Nonetheless, exclusionary zoning applies to any group that is excluded by the use of zoning. *See id.* at 372-76.

4. Exclusionary zoning can be defined broadly as the act of zoning itself: "Exclusion is the essence of Euclidean [referring to zoning upheld in *Village of Euclid v. Ambler Realty Co.*] zoning." *Id.* at 372. Nonetheless, even though zoning has an inherently exclusionary component, zoning is generally considered problematic only when certain groups are excluded. *Black's Law Dictionary* defines exclusionary zoning as a "[t]ype of zoning which has been challenged on the grounds that it serves to erect exclusionary walls on the municipality's boundaries according to local selfishness for socially improper goals which are beyond the legitimate purpose of zoning." BLACK'S LAW DICTIONARY 1619 (6th ed. 1990).

5. For example, a city could adopt only a single-family classification for its residential zones. Thus, multi-family units or apartments (that are generally less expensive than single-family dwellings) could not be constructed in the city. The practical result would be lower-income families could not afford to purchase or rent property in that city.

6. For instance, if a city requires one-acre lots per single-family dwelling, the price of the lot can be prohibitively expensive for low- and even moderate-income families.

Inclusionary zoning has emerged as a powerful tool to combat exclusionary zoning.[7] Inclusionary zoning is "the revision of residential zoning rules to encourage (or sometimes compel) the profitable construction of affordable housing in places where it otherwise would not be built."[8] In California, inclusionary zoning programs are established by a city or county at its discretion.[9] As such, inclusionary zoning programs are not mandated or established by the state legislature.[10] Local inclusionary zoning programs often require a developer of new residential housing[11] to construct some units that are affordable in exchange for a bonus or an incentive, such as allowing the developer to build at higher densities.[12] Alternatively, some cities allow developers to pay an in-lieu fee[13] instead of building inclusionary units.[14]

In 1995 the California Legislature adopted the Costa-Hawkins Rental Housing Act ("Costa-Hawkins Act") that preempts[15] and prohibits strict forms of local rent control by imposing vacancy decontrol.[16] Vacancy decontrol allows owners to set market rental rates when a tenant voluntarily or lawfully leaves a unit.[17] Once a new tenant occupies the unit, rent

7. Inclusionary zoning can be distinguished from other forms of land-use tools and regulations because it is uniquely fashioned to counter exclusionary zoning. For the purposes of this Comment, the term "inclusionary zoning" encompasses all forms of inclusionary housing programs. A variety of inclusionary zoning types exist. They will be explored in greater depth *infra* in Part I of this Comment.

8. Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 26 (1996). Other factors, in addition to exclusionary zoning, prevent the construction of affordable housing in certain areas, such as NIMBY ("not-in-my-back-yard") opposition and cumbersome processes for obtaining permits. Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 HOFSTRA L. REV. 539, 544-54 (1995).

9. Nico Calavita & Kenneth Grimes, *Inclusionary Housing in California: The Experience of Two Decades*, 64 J. AM. PLAN. ASS'N 150, 151 (1998).

10. *Id.*

11. This Comment focuses on new residential rental development (such as the construction of an apartment building) and not new for-sale residential development (for example, a condominium complex or single-family housing development), as this is the only type of development that would be impacted if the Costa-Hawkins Act prohibits local inclusionary zoning programs. As discussed *infra* Part III, this is because for-sale development does not involve the setting of rent. However, inclusionary zoning programs can apply to both types of developments.

12. *See* Padilla, *supra* note 8, at 540-41. For example, a developer normally might be able to build only a four-story project under a city's zoning requirements. However, a density bonus might allow the developer to build a six-story project.

13. For a definition of in-lieu fee, *see infra* note 63.

14. Padilla, *supra* note 8, at 553.

15. In *Dezerega v. Meggs*, the court addressed the Costa-Hawkins Act's preemptive impact on rent control: "Its overall effect is to preempt local rent control ordinances in two respects. First, it permits owners of certain types of property to adjust the rent on such property at will .... Second, it adopts a statewide system of what is known among landlord-tenant specialists as 'vacancy decontrol' ...." Dezerega v. Meggs, 99 Cal. Rptr. 2d 366, 375 (Ct. App. 2000), *as modified by* Dezerega v. Meggs, 83 Cal. App. 4th 935C (Ct. App. 2000) (holding that plaintiff landlord improperly evicted defendant tenant under a Berkeley ordinance, and that the Costa-Hawkins Act explicitly does not preempt the power of local governments to regulate evictions).

16. The Costa-Hawkins Rental Housing Act, CAL. CIV. CODE §§ 1954.50-1954.535 (2001).

17. *See* 4 WITKIN SUM. CAL. LAW REAL PROP. § 558 at 727 (9th ed. 1998).

controls may be imposed again using the owner-established rental rate as a baseline.[18] Vacancy control, sometimes referred to as "strict rent control," differs from vacancy decontrol because it requires that a unit remain under existing rent controls even when a tenant voluntarily or lawfully vacates a unit.[19]

Some have argued that a secondary effect of the Costa-Hawkins Act is the prohibition of certain forms of inclusionary zoning in California.[20] This argument involves two issues. The first is whether the following language from the Costa-Hawkins Act applies not just to local rent control programs but also to inclusionary zoning programs: "Notwithstanding any other provision of law, an owner of residential real property may establish the initial and all subsequent rental rates for a dwelling or a unit . . . ."[21] This language appears to conflict with inclusionary zoning programs in which a city or county requires an owner of rental property to lease inclusionary units in a project at specific below-market rates.[22] The conflict arises because the owner is not establishing "the initial and all subsequent rental rates" for those inclusionary units.

The second issue is the impact of a particular exception in the Costa-Hawkins Act on local inclusionary zoning programs.[23] This exception to the act may be interpreted in various ways that result in different conclusions regarding the prohibitive impact of the Costa-Hawkins Act on certain forms of inclusionary zoning programs. As the exception is complex and involves a California statute, the analysis of its impact on inclusionary zoning programs will be discussed further in Part II of this Comment.

To date, no court has addressed the merits of these arguments. Thus, the prohibitive impact of the Costa-Hawkins Act on inclusionary zoning programs is an unresolved question of law.[24] This Comment posits that, pursuant to the rules of statutory construction, it is unclear if the

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18. *See id.*

19. *See id.*

20. The Santa Monica Housing Council and the California Housing Council filed suit in Los Angeles Superior Court seeking a declaratory judgment that Santa Monica's inclusionary housing ordinance was preempted by the Costa-Hawkins Act. *See* Santa Monica Hous. Council v. City of Santa Monica, No. BC184061, slip op. (Cal. Superior Ct. Jan. 20, 1999). Santa Monica amended its inclusionary housing ordinance, which had previously required on-site low-income units to be constructed, to allow developers to pay an in-lieu fee. *Id.* at 2. The court held that this amendment made the lawsuit moot because an in-lieu option does not involve the setting of rent. *See id.* Therefore, the case was never tried on the merits, and the issue of whether the Costa-Hawkins Act preempts and/or prohibits local inclusionary zoning has not been resolved.

21. CAL. CIV. CODE § 1954.52(a) (2001).

22. *See* Padilla, *supra* note 8, at 552-54. An overview of the types of inclusionary zoning programs is discussed *infra* Part I.B.2.

23. *See infra* Part II.A.4.a.

24. *Santa Monica Hous. Council*, No. BC184061, slip op. (Cal. Superior Ct. Jan. 20, 1999).

Costa-Hawkins Act prohibits[25] specific forms of local inclusionary zoning programs. Nevertheless, it concludes that the act should be amended to expressly exclude all forms of inclusionary zoning because inclusionary zoning is a unique, necessary land-use tool that differs from rent control.

Part I of this Comment provides an overview of the detrimental impacts of exclusionary zoning, such as segregation. It also presents challenges to such exclusionary practices at the state level, including the famous New Jersey "Mount Laurel" cases.[26] Further, the various types of inclusionary zoning programs are reviewed along with California's approach to inclusionary zoning.

Part II details the text of the Costa-Hawkins Act. The California rules of statutory construction are then applied to the act, and arguments for and against the prohibitive impact of the Costa-Hawkins Act on inclusionary zoning programs are critically examined. Finally, inclusionary zoning and rent control are distinguished by examining material differences between the two land-use tools, including their histories, applications, and outcomes.

Part III explores recommendations to ensure the continued use of inclusionary zoning in California. First, the Comment argues that the Costa-Hawkins Act should be amended to expressly exclude all forms of inclusionary zoning. Second, and in the alternative, localities should modify their inclusionary zoning programs to include an in-lieu fee option because such an option does not involve the establishment of rent and thus avoids the reach of the Costa-Hawkins Act. Third, California's charter cities should investigate further the impact of the law of preemption on the Costa-Hawkins Act.

I
BACKGROUND

A. The Negative Impacts of Exclusionary Zoning: The Mount Laurel Township Example

> The day was unseasonably warm for an autumn Sunday in southern New Jersey. Inside Jacob's Chapel in the town of Mount Laurel . . . [the] stained-glass windows were opened wide to catch the breeze. For the sixty members of the all-black African Methodist Episcopalian congregation who were present, this October 1970 Sunday was a special day. The congregation had

25. This Comment applies the rules of statutory construction to determine if the Costa-Hawkins Act prohibits certain forms of inclusionary zoning programs. It does not examine the possible impact that the law of preemption may have on this issue in California's charter cities. However, Part III of the Comment recommends that charter cities should further explore arguments that the Costa-Hawkins Act does not preempt their inclusionary zoning programs.

26. *See infra* note 31.

> invited Mayor Bill Haines to announce the town's response to a plan to rezone thirty-two acres of land so that thirty-six garden apartments could be built for poor, mostly local, and mostly black families.[27]

Unfortunately, Mayor Haines arrived at Jacob's Chapel and notified the congregation that Mount Laurel's zoning ordinance did not allow "garden apartments" or any multi-family housing in the township and that the council would never approve any plan to the contrary.[28] In closing, the Mayor said, "If you people can't afford to live in our town, then you'll just have to leave."[29]

To the families in the congregation, many of whom could trace their roots in the township to the late seventeenth century, it was unimaginable that they were being forced to leave Mount Laurel because their mayor and township council had decided to zone the entire township solely for single-family residences.[30] The practical result was that no affordable housing could be constructed in Mount Laurel. Although some of the members of the congregation later became involved in the famous and groundbreaking *Mount Laurel* cases[31] that (among other things) endorsed the use of inclusionary zoning, their plight was similar to that of many others who have faced exclusionary zoning: displacement and no viable affordable housing opportunities.[32]

Exclusionary zoning has broader implications than displacement and a lack of affordable housing for low-income families, senior citizens, and individuals.[33] Of the detrimental impacts of exclusionary zoning, segregation is one of the greatest. The economic and social costs of segregation are high. Segregation of the poor from the non-poor results in isolation.[34] This

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27. DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA 1 (1995).

28. *See id.* at 2.

29. *Id.*

30. *See id.*

31. The Mount Laurel litigation lasted for fifteen years and involved three separate New Jersey Supreme Court decisions: *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621, 631 (N.J. 1986) (Mount Laurel III); *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (Mount Laurel II); *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. 1975) (Mount Laurel I). The cases are reviewed in detail *infra* Part I.B.1.

32. For a detailed history of the Mount Laurel story, see KIRP, *supra* note 27.

33. Calavita & Grimes, *supra* note 9, at 152. For instance, because exclusionary zoning commonly forces people to live far from where they work, it indirectly increases congestion and pollution. This occurs due to a mismatch between workers' earnings and housing prices in the geographic vicinity of their jobs. *Id.* As a result, workers cannot afford to live in the city where they work and must find housing in surrounding areas. *Id.* In turn, commuting times are lengthened, resulting in increased congestion and pollution. *Id.* In California, San Francisco serves as an example of this phenomenon.

34. Alan J. Abramson et al., *The Changing Geography of Metropolitan Opportunity: The Segregation of the Poor in U.S. Metropolitan Areas, 1970 to 1990*, *in* 6 HOUSING POLICY DEBATE 45, 67-68 (1995).

isolation is often in economically depressed areas.[35] A further complication is that low-income, isolated communities frequently have under-funded public institutions, such as public schools. The result can be disparate benefits and opportunities for residents compared to communities that are not segregated along socioeconomic lines.[36] In addition to under-funded public institutions, the segregated community may have a weak economic base that has trouble attracting capital and that is more susceptible to the harmful effects of economic downturns.[37]

Steps have been taken at both the state and federal levels to counter the practice of exclusionary zoning and its harmful impacts. However, given that this Comment focuses on California, only state actions will be examined in depth.

B. Challenging Exclusionary Zoning at the State Level: New Jersey Takes a Bold Step

1. The Mount Laurel Cases and Fair-Share Housing Obligations

In the landmark decision of *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel* ("*Mount Laurel I*"), the New Jersey Supreme Court invalidated Mount Laurel's exclusionary zoning ordinance.[38] The *Mount Laurel I* plaintiffs included nonresidents, residents, and the National Association for the Advancement of Colored People (N.A.A.C.P.). The plaintiffs alleged that a zoning ordinance of Mount Laurel, a New Jersey suburb, effectively prevented anything but low-density residential development.[39] The *Mount Laurel I* court held that the zoning ordinance was invalid because it violated the New Jersey Constitution's substantive due process and equal protection clauses.[40]

However, the *Mount Laurel I* court did not limit its condemnation of exclusionary zoning to the specific zoning ordinance at issue in the case. Instead, the court held that every municipality in New Jersey was required to meet its "fair share of the present and prospective regional need" for low-income housing.[41] This notion became known as the "fair-share housing obligation." Thus, the New Jersey Supreme Court imposed an affirmative duty upon municipalities to act against exclusionary zoning by requiring them to provide their fair share of low-income housing.

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35. *Id.*
36. *Id.*
37. *Id.*
38. 336 A.2d 713 (N.J. 1975).
39. *See id.* at 724.
40. *Id.* at 734.
41. *Id.* at 724.

In response to the ruling in *Mount Laurel I*, the town of Mount Laurel slightly modified its zoning ordinances to allow for twenty acres out of its approximately twenty-two square miles (14,300 acres) to be zoned for higher-density housing.[42] This revision in the ordinance totaled less than one-fourth of one percent of the total area of Mount Laurel.[43] The modified ordinance was challenged by the Southern Burlington County N.A.A.C.P. and individuals who had been plaintiffs in the *Mount Laurel I* decision.[44] The trial judge upheld the modified zoning ordinance, finding that Mount Laurel had complied with the standards set forth in *Mount Laurel I*.[45]

The case was appealed to the New Jersey Supreme Court and consolidated with five additional cases concerning the fair-share housing requirement.[46] In what has become known as the *Mount Laurel II* decision, the court affirmed the fair-share housing requirement that was announced in *Mount Laurel I* and strongly disapproved of Mount Laurel's failure to comply with the requirement: "[T]en years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor."[47] Consistent with its strong opposition to exclusionary zoning practices, the *Mount Laurel II* court expanded the fair-share obligation to include not only developing municipalities but also all municipalities designated by the state in its State Development Guide plan as "growth areas."[48]

In response to *Mount Laurel I* and *Mount Laurel II*, the New Jersey legislature enacted the New Jersey Fair Housing Act.[49] The act created an administrative agency, the Council on Affordable Housing (hereinafter "Council"), with the authority to define regions and housing needs in those regions.[50] Upon petition, the Council is further empowered to decide whether proposed ordinances and related measures of a particular municipality satisfy the municipality's *Mount Laurel* obligation to provide fair-share housing.[51]

In the final case in the Mount Laurel trilogy, referred to as *Mount Laurel III*, the New Jersey Supreme Court upheld the "constitutionality and

42. *See* Southern Burlington County N.A.A.C.P. v. Township of Mount. Laurel, 391 A.2d 935, 944 (N.J. Super. Ct. Law Div. 1978).

43. *Id.*

44. *Id.* at 935.

45. *Id.* at 954.

46. Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) (Mount Laurel II).

47. *Id.* at 410.

48. *Id.* at 432.

49. Hills Dev. Co. v. Township of Bernards, 510 A.2d 621, 631 (N.J. 1986) (Mount Laurel III).

50. *Id.*

51. *Id.*

the effect" of the New Jersey Fair Housing Act.[52] In upholding the Fair Housing Act, the court rejected arguments that the act was unconstitutional because it delayed the satisfaction of *Mount Laurel* obligations and impermissibly interfered with the court's exclusive power over prerogative writ actions.[53] The court reaffirmed its commitment to the first two *Mount Laurel* decisions and endorsed the legislature's decision to pursue the common goal of providing a "realistic opportunity for the construction of needed lower income housing."[54]

2. *The Types of Inclusionary Zoning That Emerged to Counter Exclusionary Zoning*

Arguably, the most important finding of *Mount Laurel II* was that municipalities must take proactive measures to cure exclusionary zoning.[55] These proactive measures, described by the court, are different types of inclusionary zoning.[56] In total there are four types or combinations of inclusionary zoning that a city or county may adopt. Additionally, there are three main implementation forms a city or county can adopt to accomplish the actual construction of affordable housing.[57] All of these types and forms of implementation of inclusionary zoning are outlined below.

Incentive zoning is a voluntary type of inclusionary zoning where a developer can elect to construct some low-income housing as part of a larger development in exchange for a benefit, such as higher density allowances (known as a density bonus).[58] However, as observed by the *Mount Laurel II* court, incentive zoning does not always result in the satisfaction of a community's fair-share housing obligation because developers may choose to forego the bonus and produce no low-income housing.[59]

Given this limitation in the effectiveness of incentive zoning, the court stated that "a more effective inclusionary device that municipalities must use if they cannot otherwise meet their fair share obligations is the

52. *Id.* (discussing The Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-311 to 329 (2001)).

53. *See id.* at 634-38. Defendant/Appellant townships challenged, on certification, the orders of various Superior Courts that refused to transfer pending and future litigation concerning the fair-share housing obligation to the Council on Affordable Housing under the Fair Housing Act.

54. *Id.* at 654.

55. Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 456 A.2d 390, 445-46 (N.J. 1983).

56. *Id.* For the purposes of this Comment, inclusionary zoning is classified into four types of combinations. However, this is not to suggest that some local governments may not have a variation that is not discussed here.

57. *See infra* notes 62-64 and accompanying text. Other implementation forms include allowing developers to buy credits from other developers who have exceeded the minimum inclusionary requirements or donation of land where an agency or other developer may construct affordable housing. Padilla, *supra* note 8, at 553.

58. Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 456 A.2d at 445-46.

59. *Id.* at 446.

mandatory set-aside."[60] A mandatory set-aside allows a city or county to require a developer to designate as affordable a certain number of units in the development without granting the developer any incentive, subsidy, or bonus.[61]

In all, there are four possible types or combinations of inclusionary zoning programs: (1) voluntary inclusionary zoning with no subsidies or incentives; (2) voluntary inclusionary zoning with subsidies or incentives; (3) mandatory inclusionary zoning with subsidies or incentives; and (4) mandatory inclusionary zoning with no subsidies or incentives.

Despite the differences among these four types of inclusionary zoning programs, they all may take one of three general implementation forms with regard to housing production. First, a city may require a developer to construct low-income units either on the development location itself (on-site units) or at some other site that the city and developer agree is suitable (off-site units).[62] For the purposes of this Comment, however, on-site and off-site units will be treated the same and referred to as "inclusionary units." This is because if the Costa-Hawkins Act is found to prohibit local inclusionary zoning programs, both on-site and off-site units will be equally impacted as both involve the setting of rent. Second, the developer may pay an in-lieu fee that may be placed in a city or county housing fund or other designated location.[63] Third, the developer may be permitted to choose between the construction of inclusionary units or the payment of an in-lieu fee.[64] Cities and counties have the option of selecting the implementation form they wish to adopt.[65]

The following chart outlines the various inclusionary zoning options a city or county may adopt.

60. *Id.*

61. Padilla, *supra* note 8, at 553.

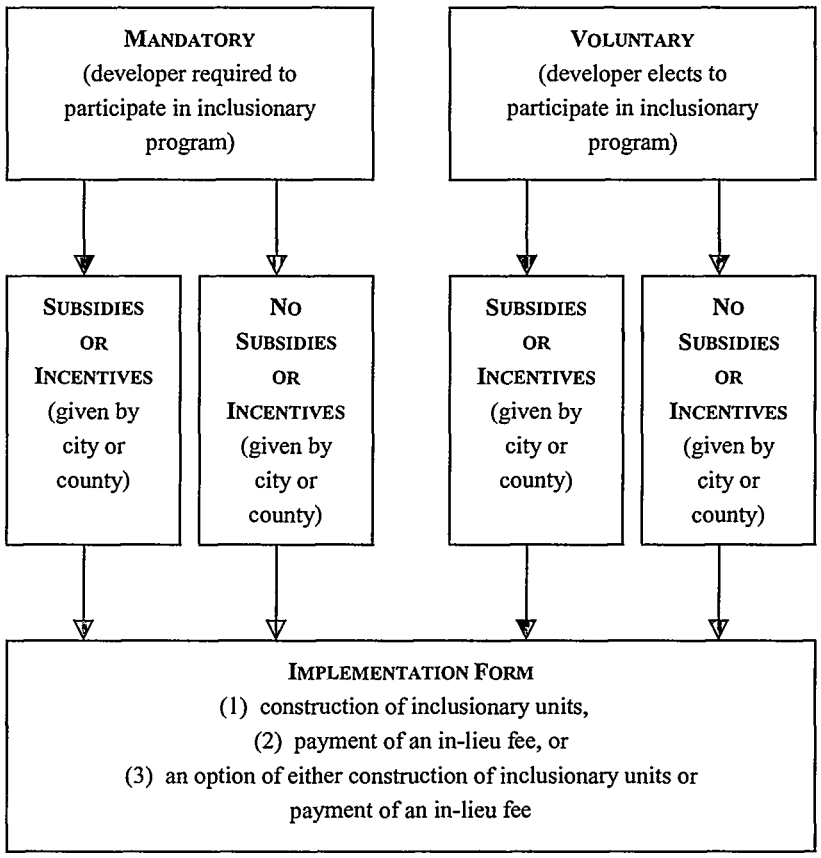
62. *See id.* at 552.

63. *See* Padilla, *id.* at 553. An in-lieu fee is a charge levied by a city or county instead of a developer building inclusionary units within the development project. These fees are usually paid to the regulating body, an agency, or a housing trust fund and thereafter designated for the promotion of affordable housing. *Id.* at 553; *see also* BLACK'S LAW DICTIONARY, 617, 786 (6th ed. 1990).

64. For example, the city of Napa allows a developer to pay an in-lieu fee or develop on-site units. Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60, 63 (Ct. App. 2001).

65. Calavita & Grimes, *supra* note 9, at 151. The types of inclusionary zoning programs adopted by cities and counties in California are discussed *infra* Part I.C.3.

TYPES OF INCLUSIONARY ZONING PROGRAMS A CITY OR COUNTY MAY ADOPT



The *Mount Laurel* cases brought national attention to the problem of exclusionary zoning and the unique remedies offered by inclusionary zoning. California, like many other states, soon began to take action to curb exclusionary zoning with inclusionary zoning techniques.[66]

C. *California's Approach to Inclusionary Zoning*

California requires each municipality to adopt a comprehensive, long-term general plan for the physical development of the city.[67] The plan must contain seven mandatory elements, including a housing element.[68] In 1990, the California Supreme Court declared that a city's general plan was its constitution for all future developments.[69] Thus, the general plan is a powerful tool that has been recognized as the paramount legal document for a city's development.

1. *The Fair-Share Housing Requirements of Municipalities*

The housing element of the general plan must identify and assess existing and projected housing needs. In particular, the element must address the jurisdiction's fair-share regional housing requirements regarding low-to-moderate-income housing.[70] Regional councils of governments[71] determine the fair-share regional housing requirements of municipalities.[72] One important way in which municipalities meet their fair-share housing obligations is through inclusionary zoning programs.[73]

2. *California Statute Compels Cities and Counties to Grant Developers Density Bonuses or Other Incentives Under Specified Circumstances*

In 1979, the California legislature passed a law that grants density bonuses for developments containing low-income housing when certain

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66. Although the *Mount Laurel* cases focused more attention on the issues of exclusionary and inclusionary zoning, cities in California, such as Palo Alto, had enacted forms of inclusionary zoning programs as early as 1973. *See* Padilla, *supra* note 8, at 551 n.57.

67. CAL. GOV'T CODE § 65300 (1997).

68. *Id.* § 65302 (1997). The seven state-mandated elements of a general plan are land use, circulation, housing, conservation, open space, noise, and safety.

69. *See* Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 322 (Cal. 1990) (holding that an ordinance passed by voter initiative involving growth limits was inconsistent with the city's general plan and was therefore invalid).

70. CAL. GOV'T CODE §§ 65302(c), 65583, 65584 (1997).

71. For example, in the San Francisco Bay Area, the Association of Bay Area Governments (ABAG) would establish the fair-share housing requirements for municipalities.

72. CAL. GOV'T CODE § 65584 (1997). Due to the limited scope of this Comment, a critical analysis of the fair-share requirement and housing element sections of general plans will not be discussed. However, both have been criticized for not having sufficiently strong enforcement mechanisms. *See, e.g.*, WILLIAM FULTON, GUIDE TO CALIFORNIA PLANNING 75 (1991).

73. *See* Calavita & Grimes, *supra* note 9, at 156; Telephone Interview with Stephen Barton, Director, City of Berkeley Housing Department (Feb. 16, 2001).

conditions are satisfied (the "Density Bonus Statute").[74] Although the Density Bonus Statute does not require cities or counties to adopt inclusionary zoning programs, it does require that under prescribed circumstances (outlined below), local governments, cities, and counties must provide specified density bonuses or other incentives.[75]

The Density Bonus Statute is triggered when a developer's plan reserves (1) twenty percent of the total units of the development for low-income households[76] with rent not exceeding thirty percent of sixty percent of the area's median income;[77] or (2) ten percent of total units for very-low-income households with rent not exceeding thirty percent of fifty percent of the area's median income;[78] or (3) fifty percent of the units for senior citizens age fifty-five or older.[79]

Thus, the Density Bonus Statute applies to both mandatory and voluntary inclusionary zoning programs; provided a developer meets the aforementioned threshold percentages, a city or county must grant the developer a bonus.[80] Specifically, a city or county must either do one of the following: (1) grant a twenty-five percent density bonus over the current density allowed and provide at least one of several additional zoning or other incentives,[81] unless the city makes a written finding that additional incentives beyond the density bonus are not necessary to compensate for the inclusionary units;[82] or (2) provide other incentives of equivalent financial value based upon the land cost per dwelling unit.[83]

Inclusionary units must remain affordable for a minimum of ten years pursuant to state law.[84] However, each jurisdiction may extend the ten-year

74. CAL. GOV'T CODE §§ 65915-65918 (1997).

75. *Id.* § 65915 (1997).

76. Section 50079.5 of the California Health and Safety Code defines low-income and very-low-income households as persons and families whose incomes do not exceed the qualifying limits for low-income or very-low-income families pursuant to section 8 of the United States Fair Housing Act of 1937. CAL. HEALTH & SAFETY CODE § 50079.5 (1996).

77. CAL. GOV'T CODE § 65915(b)-(c) (1997).

78. *Id.* § 65915(c) (1997).

79. *Id.* § 65915(b) (1997).

80. In essence, the Density Bonus Statute transforms a locality's mandatory or voluntary inclusionary zoning program *without* incentives/subsidies into a mandatory or voluntary inclusionary zoning program *with* incentives/subsidies if, and only if, the Density Bonus Statute threshold percentages are reached. Similarly, localities with no inclusionary zoning programs also could be required to provide prescribed bonuses or incentives under the statute if the threshold percentages are satisfied.

81. CAL. GOV'T CODE § 65915(b) (granting the density bonus) & 65915(f) (defining density bonus under the statute) (1997). Examples of other incentives include a reduction in setbaek, square footage, or parking requirements; approval of mixed-use zoning in eonjunction with the housing project if other land uses (for instance, commercial or office uses) will reduce the cost of the housing development; or other regulatory ineentives or concessions proposed by the devcloper, city, or county that result in identifiable cost reductions. *See id.* § 65915(h) (1997).

82. *Id.* § 65915(b) (1997).

83. *Id.*

84. *Id.* § 65915(c).

minimum. For example, the City of Berkeley requires that all inclusionary low-income rental units remain affordable for the life of the building.[85]

3. *The Types of Inclusionary Zoning Programs Implemented by Cities and Counties in California*

As noted, the type and implementation form of an inclusionary zoning program adopted by a city or county is at its discretion.[86] Regardless of the type of zoning program a city selects to adopt, the Density Bonus Statute automatically applies if a developer's plan satisfies the requirements of the statute.[87] The following passage describes the inclusionary zoning choices that California's cities and counties have made.

By 2000, at least 108 cities[88] and thirteen counties[89] in California[90] had adopted inclusionary zoning programs.[91] One 1992 study examining fifty-two cities and counties with inclusionary zoning programs indicated that only five had voluntary programs and the rest had mandatory inclusionary zoning programs.[92] A more recent study, completed in January 2001 by the City of San Diego Planning Department, surveyed thirty-nine California jurisdictions with inclusionary zoning programs and found that thirty-seven had mandatory programs.[93] Furthermore, of the thirty-nine jurisdictions

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85. BERKELEY, CAL., ZONING ORDINANCE 23C § 12.060(F) (1999).

86. Padilla, *supra* note 8, at 551-52. Inclusionary zoning programs are enacted under a municipality's zoning powers and are effectuated through ordinances, policy statements, or a city's housing statement. *Id.* For a discussion of the types of inclusionary zoning, see *supra* Part I.B.

87. *See* CAL. GOV'T CODE § 65915 (1997).

88. The cities include Agoura Hills, American Canyon, Arroyo Grande, Bakersfield, Beaumont, Bell, Belmont, Benicia, Berkeley, Blythe, Brawley, Brea, Buellton, California City, Calistoga, Carlsbad, Chula Vista, Clayton, Clovis, Coalinga, Corcoran, Coronado, Corte Madera, Cupertino, Daly City, Davis, Del Mar, Del Rey Oaks, Desert Hot Springs, East Palo Alto, Encinitas, Escondido, Farmersville, Fort Bragg, Gonzales, Grover Beach, Half Moon Bay, Hawthorne, Healdsburg, Hemet, Hidden Hills, Hollister, Huntington Park, Indio, Ione, Irvine, La Habra, La Quinta, La Verne, Lakewood, Larkspur, Lathrop, Livermore, Los Altos, Los Angeles, Los Gatos, Mammoth Lakes, Mendota, Menlo Park, Mill Valley, Monterey, Newport Beach, Novato, Oceanside, Palo Alto, Paramount, Patterson, Perris, Petaluma, Pico, Rivera, Pleasant Hill, Port Hueneme, Portola Valley, Poway, Rancho Palos Verdes, Redwood City, Ripon, Rolling Hills Estates, Salinas, San Anselmo, San Carlos, San Clemente, San Francisco, San Gabriel, San Jacinto, San Juan Capistrano, San Leandro, San Luis Obispo, San Marcos, San Rafael, Santa Cruz, Santa Moniea, Sebastopol, Signal Hill, Solana Beach, Sonoma, South Gate, Vista, Waterford, Watsonville, West Hollywood, West Sacramento, Willits, Winters, Woodland, Yorba Linda, and Yountville.

89. The counties include Colusa, Del Norte, Marin, Mono, Napa, Placer, San Bernardino, San Mateo, Santa Barbara, Santa Cruz, Shasta, Sutter, and Yolo.

90. As of June 2001 there were 476 incorporated cities in California and fifty-eight counties in the state. League of California Cities, *Facts at a Glance*, *at* http://www.cacities.org/doc.asp?id=53 (last visited Sept. 16, 2001).

91. California Resource Agency, The California Environmental Resources Evaluation System, *Jurisdictions That Have an Inclusionary Housing Program*, *at* http://ceres.ca.gov/planning/bol/survey_housing.htinl (last visited Sept. 16, 2001).

92. Padilla, *supra* note 8, at 550, 552 n.59.

93. CITY OF SAN DIEGO PLANNING DEPARTMENT, *California Jurisdictions with Inclusionary Housing Programs* (2001). The thirty-nine jurisdictions included thirty-seven cities and two counties.

surveyed, sixteen required the construction of inclusionary units rather than offering an in-lieu fee option.[94]

D. *The Costa-Hawkins Act*

In 1995, California adopted the Costa-Hawkins Act, a vacancy decontrol[95] measure that supersedes strict local rent control.[96] In essence, the Costa-Hawkins Act permits landlords to charge market rates for apartments that are voluntarily vacated, even in cities that impose strict rent control, such as Santa Monica or Berkeley. Pursuant to the act, vacancy decontrol raised rents between 1995 and 1998 with a series of stepped increments in legal rent ceilings on vacant units.[97] Full vacancy decontrol began on January 1, 1999.[98]

Although the act has been interpreted to prohibit and preempt local strict rent-control ordinances, it has not been interpreted to prohibit or preempt local inclusionary zoning programs.[99] Yet, some have argued that the Costa-Hawkins Act prohibits and even preempts certain forms of inclusionary zoning in California.

II
ANALYSIS

The Analysis portion of the Comment considers whether the Costa-Hawkins Act prohibits certain forms of inclusionary zoning in California. Part II.A applies the rules of statutory construction to the Costa-Hawkins Act to determine its effect on certain inclusionary zoning programs. The Comment concludes that it is unclear, based on the rules of statutory construction, whether the Costa-Hawkins Act prohibits certain forms of inclusionary zoning programs.

Given this lack of clarity, Part II.B argues that the Costa-Hawkins Act should be amended expressly to exclude all forms of inclusionary zoning. In support of this argument, the material differences between inclusionary zoning and rent control are examined, including each tool's varying rationales, applications, and outcomes. As such, the Comment highlights that inclusionary zoning is a unique, necessary land-use tool that should not be confused with rent control.

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94. *Id.*
95. *See supra* notes 17-18 and accompanying text for a definition of vacancy decontrol.
96. CAL. CIV. CODE §§ 1954.50-1954.535 (2001).
97. *Id.* §§ 1952 (C), 1954.53(c).
98. *Id.* § 1952(A)-(C).
99. *See* discussion *supra* note 15.

A. The Costa-Hawkins Act's Prohibitive Impact on Inclusionary Zoning: Insights Based on the Rules of Statutory Construction in California

This section first presents the language of the Costa-Hawkins Act, which some argue supports the idea that the act is intended to prohibit certain forms of inclusionary zoning in California.[100] Next, the scope of the Costa-Hawkins Act's potential impact is defined. Then, an overview of the rules of statutory construction in California is provided. Finally, these rules are applied to the relevant language of the Costa-Hawkins Act.

1. The Statutory Language at Issue

Section 1954.52(a) of the Costa-Hawkins Act outlines how owners can establish rental rates:

> Notwithstanding any other provision of law, an owner of residential real property *may establish the initial and all subsequent rental rates for a dwelling or a unit* about which any of the following is true[:] (1) It has a certificate of occupancy[101] issued after February 1, 1995. (2) It has already been exempt from the residential rent control ordinance of a public entity on or before February 1, 1995, pursuant to a local exemption for newly constructed units. (3) It is alienable separate from the title to any other dwelling unit or is a subdivided interest in a subdivision . . . .[102]

Of the numerous exceptions to the Costa-Hawkins Act, one is relevant to the act's impact on inclusionary zoning programs.[103] The language of the exception states that section 1954.52(a), quoted immediately above, "shall not apply where the owner has otherwise agreed by contract with a public entity in consideration for a direct financial contribution or any other forms of assistance specified in Chapter 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code [the Density Bonus Statute]."[104]

2. The Scope of the Act's Potential Impact upon Inclusionary Zoning Programs

Prior to applying the rules of statutory construction to the Costa-Hawkins Act, the scope of the act's impact upon inclusionary zoning

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100. *See* Santa Monica Hous. Council v. City of Santa Monica, No. BC184061, slip op. (Cal. Superior Ct. Jan. 20, 1999).

101. A certificate of occupancy is the final step in the permitting process; once it is issued, a unit can be legally rented.

102. CAL. CIV. CODE § 1954.52(a) (2001) (emphasis added).

103. *Id.* § 1954.53(2). For a complete list of the exceptions, see *id.* § 1954.3.

104. CAL. CIV. CODE § 1954.52(b) (2001). Chapter 4.3 of Division 1 of Title 7 of the government Code is the Density Bonus Statute discussed *supra* Part I.C.2.

programs must be defined. The language of the act suggests that, at most, it would only prohibit mandatory inclusionary zoning programs that require the construction of inclusionary units.[105] To be sure, cities and counties with mandatory inclusionary zoning programs requiring an in-lieu fee instead of construction of inclusionary units do not involve the "establishment" of rent. Hence, the language that an owner "may establish the initial and all subsequent rental rates for a dwelling or a unit" is inapplicable because no rent is being established with in-lieu fees.[106] Nevertheless, an interpretation that mandatory programs requiring the construction of inclusionary units are prohibited by the Costa-Hawkins Act may have broad-reaching impacts on inclusionary zoning and the nature of affordable housing.[107]

3. *Statutory Construction in California*

Statutes and case law in California emphasize the importance of legislative intent in statutory construction.[108] Section 1859 of California Civil Code states, "[i]n the construction of a statute the intention of the Legislature . . . is to be pursued . . . ."[109] Similarly, in *Laurel Heights Improvement Ass'n. v. Regents of the University of California,* the California Supreme Court stated: "As we have often noted, our role in interpreting or construing a statute is to ascertain and effectuate the legislative intent."[110]

When determining legislative intent, a court initially reviews the text of the statute. This is known as the "plain meaning rule."[111] The plain meaning rule requires that statutes be literally interpreted by relying on the common or plain meaning of the text.[112] Thus, when interpreting a statute, the legislative history should be examined only when the statutory language is shown to be ambiguous, unclear, or uncertain.[113]

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105. *See supra* Part I.B.2 for a discussion of the different types of inclusionary zoning programs. The act does not impact *voluntary* inclusionary zoning programs because a developer may elect not to build inclusionary units.

106. CAL. CIV. CODE § 1954.52 (2001).

107. For example, requiring inclusionary units ensures that low-income residents will not be segregated because they will live with residents paying market rate. This type of inclusionary zoning is significantly different from segregated low-income housing, such as public housing, where all of the residents in a building are low-income. For further discussion of how the lack of inclusionary units can change the nature of affordable housing, see *infra* Part III.B.

108. As this Comment focuses on California law, statutory interpretation in other states will not be examined.

109. CAL. CIV. PRO. CODE § 1859 (1983).

110. 864 P.2d 502, 509 (Cal. 1993). *See also* City of San Jose v. Superior Court, 850 P.2d 621, 625 (Cal. 1993); Hofacker v. Bd. of Supervisors, 70 Cal. Rptr. 374 (Ct. App. 1968); Spier v Peck, 171 P. 115 (Cal. Dist. Ct. App. 1918).

111. Granbery v. Islay Invs., 889 P.2d 970, 973 (Cal. 1995); Lennane v. Franchise Tax Bd., 885 P.2d 976, 978 (Cal. 1994).

112. *Granbery*, 889 P.2d at 973; *Lennane*, 885 P.2d at 978.

113. *Granbery*, 889 P.2d at 973; *Lennane*, 885 P.2d at 978.

Nevertheless, there are exceptions to the plain meaning rule. The California Supreme Court has recognized that even when the statutory language is not ambiguous, unclear, or uncertain, "[t]he literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in light of the statute's legislative history, appear from its provisions considered as a whole."[114] The idea that the literal construction of a statute does not prevail when it conflicts with legislative intent has been broadly adopted by California courts of appeals.[115]

Thus, even if the statutory language is not ambiguous, unclear, or uncertain, a court in California will examine the legislative history in order to (1) give effect to the manifest purposes of the statute as a whole, (2) assure realization of the legislature's intent, or (3) avoid an absurd result.[116]

4. *Applying the Rules of Statutory Construction to the Costa-Hawkins Act: Arguments That the Costa-Hawkins Act Prohibits Inclusionary Zoning Programs*

Perhaps the strongest argument that the Costa-Hawkins Act prohibits certain forms of local inclusionary zoning programs results from application of the plain meaning rule.[117] First, the plain meaning rule must be applied to the portion of the act stating "an owner of residential real property may establish the initial and all subsequent rental rates for a dwelling . . . ."[118] Hereinafter, this phrase will be referred to as the "Owner Clause." On its face, the Owner Clause suggests that the Costa-Hawkins Act prohibits all forms of inclusionary zoning requiring construction of inclusionary units. This is because the act permits an owner, rather than the city or county, to establish initial and subsequent rental rates.[119] Under this

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114. Sacramento County v. Hickman, 428 P.2d 593, 599 n.6 (Cal. 1967) (citation omitted). *Accord* Silver v. Brown, 409 P.2d 689, 692 (Cal. 1966); Poliak v. Bd. of Psychology, 63 Cal. Rptr. 2d 866, 869 (Ct. App. 1997) (citing Sacramento County v. Hickman, 428 P.2d 593 (Cal. 1967)).

115. *See, e.g.*, Marina Village v. California Coastal Zone Conservation Comm'n, 132 Cal Rptr. 120, 122-23 (Ct. App. 1976) (stating that "[t]he primary rule of statutory construction, to which every other rule . . . must yield, is that the intention of the legislature must be ascertained if possible, and, when once ascertained, will be given effect, even though it may not be consistent with the strict letter of the statute."); Pacific Gas & Elec. Co. v. Morse, 86 Cal. Rptr. 7, 9 (Ct. App. 1970) (stating the "[l]iteral construction [of a statute] will not prevail if it is opposed to [the] legislative objective."); Ivens v. Simon, 27 Cal. Rptr. 801, 805 (Ct. App. 1963) (stating that a statute's ". . . apparent purpose will not be sacrificed to a literal construction."); Farnsworth v. Nevada-Cal Mgmt., 10 Cal. Rptr. 531, 533 (Ct. App. 1961).

116. *See Hickman*, 428 P.2d at 599 n.6; *Poliak*, 63 Cal. Rptr. 2d at 869; *Marina Village*, 132 Cal Rptr. at 122-23; *Morse*, 86 Cal. Rptr. at 9; *Ivens*, 27 Cal. Rptr. at 805; *Farnsworth*, 10 Cal. Rptr. at 533.

117. Applying the plain meaning rule assumes that the language of the Costa-Hawkins Act is unambiguous, clear, and certain, as well as that none of the three aforementioned exceptions to the plain meaning rule apply.

118. CAL. CIV. CODE § 1954.52(a) (2001).

119. *See id.*

interpretation of the Owner Clause, city and county inclusionary zoning programs that involve the setting of rent would be invalid because the owner is not setting the initial and all subsequent rental rates. Yet, the Owner Clause must be interpreted in light of a relevant exception to the Costa-Hawkins Act.

a. The Exception to the Owner Clause

The Owner Clause must be harmonized and interpreted in conjunction with a relevant exception to the Costa-Hawkins Act. The exception provides that an owner of residential real property who has not "otherwise agreed by contract with a public entity in consideration for a direct financial contribution or any other forms of assistance specified in Chapter 4.3 [the Density Bonus Statute] . . ." may establish the initial and all subsequent rental rates (hereinafter the "Exception").[120]

The meaning of the Exception in relation to the Owner Clause is critical to the question of the act's impact on inclusionary zoning. As a threshold matter, a plain language analysis must consider the fact that the word "or" connects the portion of the Exception pertaining to contracts with the portion of the Exception that expressly mentions the Density Bonus Statute. One might interpret the contract language in the Exception as referring only to the Density Bonus Statute.

An alternative interpretation that places greater importance on the word "or" is that the Exception applies to any contract with a public entity in consideration for a direct contribution, whether or not that contract was formed under the Density Bonus Statute. This is significant because the scope of the Exception would be broader if it is interpreted to include any contract with a public entity in consideration for a direct contribution. Precisely how much broader is unclear, however, because the Costa-Hawkins Act does not define direct financial contribution.[121] Arguably, the term "direct financial contribution" is referring to the meaning of the term as it is used in the Density Bonus Statute, but this is not clear based on the plain language of the statute. From the above discussion, it is evident that the plain meaning of the Exception is not clear.

b. Expressio Unius Est Exclusio Alterius

Another argument that the Costa-Hawkins Act prohibits mandatory inclusionary zoning programs requiring the construction of inclusionary units is the maxim *expressio unius est exclusio alterius*. The maxim

120. *Id.* § 1954.53(b).
121. *See id.* § 1954.51.

dictates an inference that all omissions are considered exclusions.[122] Pursuant to the maxim, it is arguable that the Costa-Hawkins Act prohibits all inclusionary zoning programs except those that trigger the Density Bonus Statute because there are no other provisions addressing inclusionary zoning in the Costa-Hawkins Act. Nevertheless, this argument assumes that the "or" ambiguity in the Exception does not exist.[123]

The strength of this argument is undermined, however, by the fact that the maxim is not a rule of law.[124] Rather, it is subordinate to the primary rule that legislative intent governs the interpretation of the statute[125] and thus can be overcome by an indication of contrary legislative intent or policy.[126] The maxim also has been described as "unreliable" because "it stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislature."[127] Thus, the discussion in Part II.A.5.a pertaining to the legislative history of the Costa-Hawkins Act may reduce the force of arguments based on the maxim in this case, as does the ambiguity in the plain meaning of the Exception.

c. Legislative Attempts to Amend the Costa-Hawkins Act

An additional argument that the Costa-Hawkins Act prohibits local inclusionary zoning programs is that two legislative attempts to amend the Costa-Hawkins Act to exclude inclusionary zoning programs have not come to fruition.[128] Section three of Senate Bill 1106 (SB 1106) proposed making the Costa-Hawkins Act inapplicable to municipal programs that promoted affordable housing through "inclusionary housing programs or other means."[129] The bill also addressed the housing element requirement of general plans and other housing issues.[130] After only one hearing by the Senate Housing and Community Development Committee, no further action was taken on the bill;[131] it died at the end of the 1999-2000 legislative session.[132]

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122. NORMAN J. SINGER, SOUTHERLAND STATUTORY CONSTRUCTION, § 47:22, at 305-07 (6th ed. 2000) (citing Pacific Gas & Elec. Co. v. County of Stanislaus, 947 P.2d 291 (Cal. 1997); Stang v. Cabrol, 691 P.2d 1013 (Cal. 1984)).

123. *See supra* Part II.A.4.a. for a discussion of the Exception.

124. SINGER, *supra* note 122, at 315.

125. *Id.*

126. *Id.* (citing People v. Saunders, 284 Cal. Rptr. 212 (Ct. App. 1991) (holding that the maxim is subordinate to the primary rule that the legislative intent governs the interpretation of the statute)).

127. *Id.* at 308 n.6 (quoting Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 676 (D.C. Cir. 1973)).

128. SB 1106, 1999-2000 Sess. (Cal); SB 1098, 1999-2000 Sess. (Cal. 1999).

129. SB 1106, 1999-2000 Sess. (Cal.).

130. *Id.*

131. SB 1106 Senate Bill History, *at* http://info.sen.ca.gov/pub/99-00/bill/sen/sb_1101-1150/sb_1106_bill_20000201_history.html (last visited Sept. 16, 2001). After the initial hearing on the bill,

Similarly, a provision in the original version of Senate Bill 1098 (SB 1098), introduced in the 1999-2000 legislative session, stated that the legislature did not intend to preempt local inclusionary zoning ordinances with the Costa-Hawkins Act.[133] However, this inclusionary zoning provision was not part of the final draft of the bill that was passed.[134] There is no legislative history indicating the reason for this omission.

It could be argued that SB 1106 and the relevant portion of SB 1098 were not codified because the legislature wanted the Costa-Hawkins Act to exclude certain forms of inclusionary zoning programs. This argument is flawed for two reasons. First, from a practical standpoint, there could be numerous reasons why SB 1106 became inactive and SB 1098 was amended. Second, and more importantly, the California Supreme Court has rejected arguments that legal weight should be given to a bill that does not pass or language that was deleted from a bill.[135] In *Granberry v. Islay Investments*, the court stated, "As we have often observed, 'Unpassed bills, as evidences of legislative intent, have little value.'"[136] Therefore, attempts to argue that the disposition of both SB 1106 and SB 1098 has bearing on the intent of the legislature with regard to the prohibition of inclusionary zoning programs are unsound and not legally supported.

In sum, the strongest arguments that the Costa-Hawkins Act prohibits certain forms of inclusionary zoning are (1) pursuant to the plain meaning of the Costa-Hawkins Act, local inclusionary programs requiring mandatory inclusionary units that do not satisfy the Density Bonus Statute are prohibited, and (2) the maxim of *expressio unius est exclusio alterius* dictates that the only form of inclusionary zoning programs not prohibited by the Costa-Hawkins Act are those that satisfy the Density Bonus Statute. However, the assumptions, ambiguities, and speculation highlighted in this section permit an alternative interpretation of the Costa-Hawkins Act: namely, that the act does not prohibit local inclusionary zoning.

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no further hearings were scheduled. *Id.* The bill was then suspended for missing a deadline pursuant to Joint Rule 61(a)(2) and thereafter returned to the Secretary of the Senate pursuant to Joint Rule 56. *Id.*

132. SB 1106, Senate Bill Status, *at* http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1101-1150/sb_1106_bill_20000201_status.html (last visited Sept. 16, 2001).

133. SB 1098, 1999-2000 Sess. (Cal. 1999).

134. *Id.*

135. *Id.*

136. *Id.* (quoting Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n, 743 P.2d 1323, 1333 (Cal. 1987)); *see also* Grupe Dev. Co. v. Superior Court, 844 P.2d 545, 552 (Cal. 1993).

5. *Applying the Rules of Statutory Construction to the Costa-Hawkins Act: Arguments That the Costa-Hawkins Act Does Not Prohibit Inclusionary Zoning Programs*

a. *Ambiguities in the Statutory Language: Examining the Legislative History of the Act*

The ambiguities in the statutory language outlined in the preceding section support the idea that the Costa-Hawkins Act does not prohibit inclusionary zoning programs that require construction of inclusionary units. This is because the rules of statutory construction in California require consideration of legislative history when the language of a statute is ambiguous.[137] Further, even assuming arguendo that no ambiguities exist, at least one of the three exceptions to the plain meaning rule is present in the instant case and thereby precludes the rule's application.[138] Specifically, an interpretation of the Costa-Hawkins Act suggesting that the act prohibits inclusionary zoning programs would arguably (1) not give effect to the manifest purposes of the statute as a whole, and (2) not realize the legislature's intent.[139]

Assembly Bill 1164 (AB 1164) was codified as the Costa-Hawkins Act. Four statements made by Assemblyman Phil Hawkins, a co-author of AB 1164, describe the manifest purposes of the Costa-Hawkins Act. These statements are known as "sponsor statements" and may be considered by courts as evidence of legislative intent.[140]

First, Assemblyman Hawkins stated that the bill will solve the problems of extreme vacancy control,[141] meaning strict rent control, which he described as a "failed policy" hurting those it was supposed to help the most, including "families with children, lower-income, less educated residents and college students."[142] In this context, Assemblyman Hawkins further noted that "[i]n Berkeley, Santa Monica and West Hollywood, the number of rental housing units available for these people significantly decreased between 1980 and 1990. Meanwhile, rental households with higher income, higher educated professional workers have increased. This

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137. *See supra* Part II.A.3.

138. *See supra* Part II.A.3.

139. *See* Sacramento County v. Hickman, 428 P.2d 593, 599 n.6 (Cal. 1967) (citation omitted). *See also* Silver v. Brown, 409 P.2d 689, 692 (Cal. 1966); Poliak v. Bd. of Psychology, 63 Cal. Rptr. 2d 866, 869 (Ct. App. 1997) (citing Sacramento County v. Hickman, 428 P.2d 593, 599 n.6 (Cal. 1967)).

140. Lopez v. Tulare Joint Union High Sch. Dist., 40 Cal. Rptr. 2d 762, 775 n.6 (Ct. App. 1995); Kern v. County of Imperial, 276 Cal. Rptr. 524, 530 n. 8 (Ct. App. 1990).

141. Assemblyman Hawkins used the term "extreme vacancy control" to describe what this Comment refers to as "strict rent control." *See supra* notes 17-19 and accompanying text.

142. PHIL HAWKINS, AUTHOR'S BILL FILE FOR ASSEMBLY BILL 1164, IMPORTANT FACTS ABOUT ASSEMBLY BILL 1164 (HAWKINS/COSTA) AND THE IMPACTS OF EXTREME VACANCY CONTROL, 1995-96 Sess., at 1.

is contrary to the original purpose of restrictive rent control."[143] Given that inclusionary zoning effectively aids in the construction of affordable, low-income housing and thereby helps the disadvantaged groups mentioned by Assemblyman Hawkins, it would be inconsistent with this sponsor statement to assert that the legislature intended to prohibit inclusionary zoning programs with the Costa-Hawkins Act.[144]

Second, Assemblyman Hawkins stated that the bill would prohibit extreme vacancy controls, not end rent control.[145] He noted, "Cities with moderate (vacancy decontrol) ordinances such as Los Angeles, San Francisco, San Jose and Oakland are unaffected by the limits on vacancy control in this legislation."[146] This statement indicates that inclusionary zoning is not prohibited by the Costa-Hawkins Act because the cities that Assemblyman Hawkins mentioned all have inclusionary zoning programs, and therefore they would be impacted if the legislation does indeed implicate inclusionary zoning.

Third, Assemblyman Hawkins expanded upon the second statement above by stating that the vast majority of cities with "moderate" rent control would not be impacted by the Costa-Hawkins Act.[147] Rather, only cities with "extreme vacancy control" would be affected.[148] More specifically, "[o]f the 476 cities in California, about 100 have some form of rent control in place. Of those . . . only five communities[149] will be affected by the vacancy decontrol provision of AB 1164."[150] This statement suggests that the Costa-Hawkins Act does not prohibit any form of inclusionary zoning because at least 108 cities and thirteen counties in California have inclusionary zoning programs, whereas Assemblyman Hawkins said that only five communities were supposed to be affected by the vacancy decontrol provisions of the Costa-Hawkins Act.

Fourth, Assemblyman Hawkins stated that the act was not intended to prohibit local government control: "This measure will have no impact on local governments, even those communities with rent controls in place."[151] Given that inclusionary zoning programs are local programs adopted and administered by local governments, cities, and counties, this statement

143. *Id.*

144. Calavita & Grimes, *supra* note 9, at 165-66. According to Calavita and Grimes, as of 1992 some 24,000 inclusionary units had been constructed in California. *Id.*

145. PHIL HAWKINS, AUTHOR'S BILL FILE FOR ASSEMBLY BILL 1164, IMPORTANT FACTS ABOUT ASSEMBLY BILL 1164 (HAWKINS/COSTA) AND THE IMPACTS OF EXTREME VACANCY CONTROL, 1995-96 Sess., at 2.

146. *Id.*

147. *Id.* at 1.

148. PHIL HAWKINS, AUTHOR'S BILL FILE FOR ASSEMBLY BILL 1164, QUESTIONS AND ANSWERS ABOUT AB 1164 AND LOCAL GOVERNMENT, 1995-96 Sess., at 1 (on file with author).

149. *Id.* The five communities with "extreme vacancy control" are Berkeley, Cotati, East Palo Alto, Santa Monica, and West Hollywood.

150. *Id.*

151. *Id.*

constitutes further evidence that the Costa-Hawkins Act does not prohibit inclusionary zoning.

Finally, statements in committee reports and analysis are also legitimate aids in determining legislative intent.[152] According to the Senate Judiciary Committee, the final version of AB 1164 was intended to "pre-empt local rent control provisions which impose vacancy controls on the rental of apartment-type dwelling units" and to allow "a rent increase on the rental unit when it is vacated except where the vacancy occurs because the tenancy is terminated by the landlord's service of a termination notice or a change in the terms of tenancy."[153] As with sponsor statements, there is no mention of local inclusionary zoning programs or the prohibition of such programs in the committee's report.

Given the above legislative history, it appears that the intent of the legislature and the manifest purposes of the Costa-Hawkins Act were to abolish extreme rent control programs in five cities because those programs were detrimental to the state's goal of promoting affordable housing programs. There is no mention of inclusionary zoning in the legislative history of the act.[154] Further, unlike the legislature's findings regarding extreme rent control programs, inclusionary zoning promotes rather than undermines the state's affordable housing goals.[155] As such, an interpretation that the Costa-Hawkins Act prohibits inclusionary zoning programs does not give effect to the manifest purposes of the statute as a whole (abolishing extreme rent control) and thereby conflicts with the legislative intent of the act.

b. The Role of the Owner Clause Exception

The weakness of this legislative history argument is that it does not acknowledge the role of the Exception.[156] Depending upon the interpretation of the Exception, certain forms of inclusionary zoning may be prohibited. As previously noted, the maxim of *expressio unius est*

152. Hutnick v. U.S. Fidelity & Guaranty Co., 763 P.2d 1326, 1331 n.7 (Cal. 1988); National R.V., Inc. v. Foreman, 40 Cal. Rptr. 2d 672, 678 (Ct. App. 1995); Pacific Bell v. California State Consumer Serv. Agency, 275 Cal. Rptr. 62, 67 (Ct. App. 1990).

153. SENATE JUDICIARY COMMITTEE, SENATE FLOOR AMENDMENTS: COMMITTEE ANALYSIS, July 1995, 1995-96 Sess. (on file with author). Before AB 1164 was sent to the California Senate for approval, the act did not address rent control. Instead, it focused on repealing outmoded and obsolete housing programs, none of which had any relationship to inclusionary zoning programs. *See* ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, HEARING REPORT, April 5, 1995 (on file with author). However, when the act went to the Senate, it was amended to include the vacancy decontrol provisions that were ultimately enacted in AB 1164.

154. The author reviewed approximately seventy-five pages of legislative materials, ranging from committee analysis statements to post-enrollment documents prepared by Legislative Intent Services, none of which described the act as having a prohibitive effect on local inclusionary zoning programs.

155. *See, e.g.*, Calavita & Grimes, *supra* note 9, at 162, 164.

156. *See* CAL. CIV. CODE § 1954.53(2) (2001). *See supra* Part II.A.4.a for a discussion of the Exception.

exclusio alterius supports the view that the act prohibits all forms of inclusionary zoning programs not satisfying the Density Bonus Statute.

However, the maxim of *expressio unius est exclusio alterius* is not a rule of law and is subordinate to the primary rule that legislative intent governs interpretation of a statute.[157] Given that the plain meaning of the Exception is unclear[158] and that the legislative history indicates the act's manifest purpose is to abolish extreme rent control in five cities and not to prohibit inclusionary zoning, the maxim should give way to legislative intent in the instant case.

In sum, it is debatable whether the Costa-Hawkins Act prohibits certain, or any, forms of inclusionary zoning. For this reason, the legislature needs to clarify the act with an amendment expressly excluding all forms of inclusionary zoning. If the act is not amended, its interpretation will be left to the courts.[159]

An interpretation of the Costa-Hawkins Act that prohibits inclusionary zoning programs equates such programs with rent control. Such a view is inappropriate, however, because inclusionary zoning is a unique, necessary land-use tool that differs from rent control.[160] The remainder of this Comment focuses on (1) the material differences between inclusionary zoning and rent control, and (2) the importance of inclusionary zoning as an affordable-housing tool.

B. Distinguishing Inclusionary Zoning from Rent Control: The Differing Rationales, Applications, and Outcomes of Each Tool

Although inclusionary zoning and rent control are both land-use tools employed to promote affordable rental housing by impacting rental rates, a more detailed examination of the two mechanisms reveals consequential differences. These differences support amending the Costa-Hawkins Act to clarify that it does not prohibit any inclusionary zoning programs.

1. The Differing Rationales and Purposes of Inclusionary Zoning and Rent Control

Inclusionary zoning and rent control have divergent historical rationales and purposes. Inclusionary zoning, as discussed in Part I of this Comment, is uniquely fashioned to combat exclusionary zoning practices

157. *See supra* text accompanying notes 124-26.

158. See *supra* Part II.A.4.a.

159. The outcome in such a situation likely will be determined by whether the court examines legislative history or only applies the plain meaning rule.

160. This is not to argue that all forms of inclusionary zoning are without problems. However, inclusionary zoning has an important role in providing affordable housing units in California and, unlike rent control, ensures that low-income households occupy the units.

like those that occurred in the *Mount Laurel* cases.[161] In contrast, rent control was created by local governments to protect World War I servicemen from eviction.[162] Early rent control efforts were intended to be temporary and were voluntary in all locations except New York and Washington, D.C.[163] Renewed popularity of rent control occurred during World War II with the passage of the Emergency Price Control Act of 1942.[164] Post-World War II rent controls, known as the "second generation of rent control," were imposed to equalize rents in the private housing market.[165]

Modern rent control is usually imposed through acts of the local legislature, such as a city council or board of supervisors.[166] These acts set fixed rental rates as of a particular day.[167] Ensuing rent increases are set in a variety of ways, such as by a local rent control board or the consumer price index; however, rent controls do not dictate to whom the owner must rent.[168] Thus, rent control and inclusionary zoning programs have divergent historical paths and modern applications.

In addition to the above, rent control and inclusionary zoning are different in four material ways. First, they have contrasting impacts on the housing market. Rent control requires existing units to be rented at below-market rates whereas inclusionary zoning mandates the construction of new housing units, usually in return for an incentive. Thus, rent control does not aid in the construction of new affordable rental units.

Second, rent control and inclusionary zoning programs are administered differently. The United States Department of Housing and Urban Development (HUD) creates guidelines that are utilized by regional

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161. *See* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) (Mount Laurel II); *see also* Padilla, *supra* note 8, at 542-52.

162. Kenneth P. McNeely, *Special Project on Landlord-Tenant Law in the District of Columbia Court of Appeals: Rent Control*, 29 How. L.J. 165, 165 (1986). The war diverted building supplies and labor from the housing construction market to the war effort, causing a housing shortage. *Id.*

163. Kari Anne Gallagher, Comment, *Yee v. City of Escondido: Will Mobile Homes Provide an Open Road for the Nollan Analysis?*, 67 Notre Dame L. Rev. 821, 821 n.1 (1992) (citing John W. Willis, *A Short History of Rent Control Laws*, 36 Cornell L.Q. 54, 69-72, 74 (1950)).

164. *Id. See also* Emergency Price Control Act of 1942, ch. 26, § 901-906, 56 Stat. 23 (1942) (repealed in 1966).

> Section 901 related to purposes, time limit, and applicability of former 50 U.S.C. Appx. §§ 901et seq.; § 901a related to purposes and policies of decontrol during transition period; § 902 related to regulation of prices, rents, and market and renting practices; § 903 related to maximum prices of agricultural commodities; § 904 prohibited violation of rules and regulations relating to prices, rents, and market and renting practices and disclosure or use of information otherwise than in course of official duty; § 905 authorized Administrator to confer with groups having to do with commodities and to enter into voluntary agreements relating to purposes of former 50 U.S.C. Appx. §§ 901 et seq.; § 906 provided for the establishment and adjustment of maximum prices.

50 U.S.C. Appx. § 901 (2000).

165. Gallagher, *supra* note 163, at 821 n.1 (citing Richard E. Blumberg et al., *The Emergence of Second Generation Rent Controls*, 8 Clearinghouse Rev. 240 (1974)).

166. *Id.*

167. *Id.* (citing Charles M. Harr & Lance Liebman, Property and Law, 314-29 (1977)).

168. *Id.*

councils of governments.[169] For purposes of inclusionary zoning, these guidelines are employed to classify renters as very-low-income or low-income residents[170] and to establish the rent that an owner of inclusionary units is generally allowed to charge tenants.[171] In contrast, rent control rates are set by a local legislative body such as a local rent control board or by an annually prescribed percentage in the local rent control act.[172]

Third, inclusionary zoning programs have a broader scope than rent control. Rent control only applies to rental units, whereas inclusionary zoning programs can and often do apply to single-family and condominium developments.[173] Inclusionary zoning programs can promote both affordable home-ownership and rental opportunities, whereas rent control only affects rental properties. This is significant in that inclusionary zoning programs potentially create more diverse forms of affordable housing opportunities.

Fourth, in contrast to the income guidelines established by HUD for inclusionary zoning programs, rent control does not have provisions for reaching its target population of low-to-moderate-income residents; anyone can rent a rent-controlled unit.[174] This factor will be examined more closely in the next section, which addresses the affordable housing crisis in California.

Given the above, the historical and modern rationales and purposes of inclusionary zoning and rent control diverge substantially. These important divergences distinguish inclusionary zoning from rent control and represent a reason why the Costa-Hawkins Act should not prohibit inclusionary zoning. To allow prohibition would erroneously equate inclusionary zoning and rent control and ignore each regulation's distinct historic rationales and present-day aims.

2. *The Differing Applications and Outcomes of Rent Control and Exclusionary Zoning in Light of California's Housing Crisis*

Unlike rent control, inclusionary zoning includes provisions to ensure that low-income people receive affordable rental units.[175] This paramount difference between rent control and inclusionary zoning has significant implications given California's current affordable housing shortage.[176] Rents have skyrocketed in major metropolitan areas.[177] In simple economic

169. Padilla, *supra* note 8, at 554.
170. *Id.*
171. *Id.*
172. Gallagher, *supra* note 163, at 821 n.1 (citing CHARLES M. HARR & LANCE LIEBMAN, PROPERTY AND LAW 314-29 (1977)).
173. Padilla, *supra* note 8, at 552.
174. *Id.* at 554.
175. *Id.*
176. Calavita & Grimes, *supra* note 9, at 153.
177. *Id.*

terms, there is an imbalance between the limited supply of affordable units and the astronomical demand for affordable housing.

As of September 2000, some fourty-four percent of renters in California were unable to afford fair-market rent for a two-bedroom unit.[178] Fair-market monthly rent for a two-bedroom unit in California is $791.00.[179] A household earning thirty percent of the area median income of $52,629.00 (considered an extremely low-income household) can afford a monthly rental rate of no greater than $432.00.[180] A Californian who earns minimum wage can only afford monthly rent of $299.00 or less.[181] The amount a worker would have to earn per hour in a 40-hour week to afford a two-bedroom unit at the area's fair-market rent is $15.22.[182] This is 265 percent of the present minimum wage of $5.75 per hour.[183]

Exclusionary zoning, NIMBY (not-in-my-back-yard) opposition, and inefficient permitting processes have contributed to the shortage of affordable housing in California.[184] As noted above, an overriding rationale of both inclusionary zoning and rent control is to ensure affordable housing. However, inclusionary zoning, not rent control, is uniquely suited to counter the impacts of exclusionary zoning, such as segregation, and to reach the targeted low-income population.[185]

Unlike inclusionary zoning, rent control does not have enforcement provisions for reaching its target population of low-to-moderate-income residents. Anyone may lease a "rent-controlled" unit, regardless of income. Although rent increases are often policed by local rent control boards for buildings or units subject to such control, there are no requirements regarding eligible tenants.[186] This is especially significant because low-income renters may be stigmatized and stereotyped as poor-quality renters. Under a system of rent control, a landlord or owner may deliberately overlook lower-income applicants. Thus, in practice, rent control may fall short of providing affordable housing for residents of modest financial means.

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178. National Low Income Housing Coalition, *at* http://www.nlihc.org/cgi-bin/oor2000.pl?getstate=on&state=CA (last visited Sept. 16, 2001). A unit is considered affordable if it costs no more than thirty percent of the renter's income. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Brian Augusta, *Building Housing from the Ground Up: Strengthening California Law to Ensure Adequate Locations for Affordable Housing*, 39 SANTA CLARA L. REV. 503, 509-10 (1999).

185. *See* Calavita & Grimes, *supra* note 9, at 152. Inclusionary zoning is able to avoid NIMBY opposition faced in communities fighting the location of low-income housing within their boundaries. *Id.*

186. Padilla, *supra* note 8, at 554-58.

In contrast, because a fundamental purpose of inclusionary zoning is to prevent discrimination based on race or socioeconomic status,[187] inclusionary zoning mandates that low-to-moderate-income residents occupy inclusionary units.[188] The qualifying income guidelines, generally established by HUD, vary among local programs.[189] Local units of government use these guidelines to determine qualifying limits.[190] Therefore, unlike rent control, the target population is assured of receiving the benefits of inclusionary zoning. For these reasons, inclusionary zoning is better able to address the affordable housing crisis in California than rent control.[191]

III
RECOMMENDATIONS

A. The Legislature Should Amend the Costa-Hawkins Act Expressly to Exclude All Forms of Inclusionary Zoning

Inclusionary zoning is distinct from rent control in its rationale, applications, and outcomes. It is uniquely situated to combat California's current affordable housing crisis. In addition, inclusionary zoning is a key tool for combating racial and socioeconomic segregation.[192] Nevertheless, pursuant to the rules of statutory construction, it is unclear whether the Costa-Hawkins Act prohibits specific forms of local inclusionary zoning programs,[193] and therefore a court could interpret the Costa-Hawkins Act as prohibiting inclusionary zoning. However, to allow the prohibition of certain forms of inclusionary zoning without open and fair debate in the California Legislature is unsound policy. Thus, for all of these reasons, the Costa-Hawkins Act should be amended to exclude all forms of inclusionary zoning.

B. Absent a Legislative Amendment, Localities Should Modify Local Inclusionary Zoning Programs to Allow for In-Lieu Fees as an Alternative to the Construction of Inclusionary Units

If no legislative amendment is forthcoming, localities may avoid prohibition of their inclusionary zoning programs by allowing developers to

187. Calavita & Grimes, *supra* note 9, at 152.

188. Padilla, *supra* note 8, at 554.

189. *Id.*

190. *Id.* For example, in the San Francisco Bay Area, the Association of Bay Area Governments (ABAG) establishes qualifying limits.

191. Although rent control may still be a beneficial tool for improving the housing crisis in California, the scope of this Comment does not allow for a full examination of the benefits and drawbacks of rent control.

192. Calavita & Grimes, *supra* note 9, at 152.

193. *See supra* Part II.A.

select between an in-lieu fee and the construction of inclusionary units. In *Santa Monica Housing Council v. City of Santa Monica*,[194] a group of developers' organizations filed suit seeking a declaratory judgment stating that Santa Monica's inclusionary zoning ordinance was preempted and prohibited by the Costa-Hawkins Act. However, while the lawsuit was pending, Santa Monica amended its inclusionary zoning ordinance. The ordinance formerly had required the construction of inclusionary units.[195] The amendment allowed developers to select between payment of an in-lieu fee or construction of low-income inclusionary units.[196] According to the court, the amendment mooted the issue of whether the Costa-Hawkins Act preempted the inclusionary zoning ordinance.[197] Thus, if cities and counties amend their inclusionary zoning programs to allow for in-lieu fees, the Costa-Hawkins Act cannot affect their programs because no establishment of rent is involved with in-lieu fees.

Unfortunately, this solution may be problematic because allowing in-lieu fees instead of low-income inclusionary units defeats integration, a significant benefit of inclusionary zoning. Specifically, the construction of inclusionary units in developments where most residents will pay the fair-market rate allows people of various income groups to live together.[198] This is significant because it avoids many of the problems that have contributed to the failure of public housing developments.[199] Reasons for the failure of public housing include: (1) the stigmatization of low-income housing and low-income residents; (2) the concentration of low-income people; (3) racial segregation within public-housing projects; and (4) the usual location of low-income housing in poor inner-city settings where education and local services are inadequate, thus making it harder for low-income residents to achieve upward mobility.[200]

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194. No. BC184061, slip op. (Cal. Superior Ct. 1999).

195. *Id.* at 2.

196. *Id.*

197. *Id.* "On July 1998, the Santa Monica City Council enacted Ordinance No. 1918 (CCS) and Resolution No. 9295 (CCS). These measures permanently eliminated the IHP's [Inclusionary Housing Program's] on-site, price-controlled unit requirements and adopted moderate development fees. At that point, Plaintiff's lawsuit became moot." *Id.*

198. Another possible problem with in-lieu fees is that they may be considered an exaction and therefore a taking under the Fifth Amendment. Recently, the validity of in-lieu fees for residential development inclusionary zoning programs was challenged as a taking in *Home Builders Ass'n v. City of Napa*, 108 Cal. Rptr. 2d 60 (Ct. App. 2001) (rejecting plaintiff's contention that Napa's inclusionary zoning ordinance was facially invalid). Although the court held in June 2001 that there was no taking, the case may be appealed to the California Supreme Court. As this Comment is limited in scope, a full takings analysis cannot be undertaken. Of course, inclusionary units also could be challenged as a taking but it appears that in-lieu fees are currently a target; at this time, the California Supreme Court has not ruled definitively on the issue.

199. *See* Padilla, *supra* note 8, at 547 (citing EUGENE J. MEEHAN, PUBLIC HOUSING POLICY: CONVENTION VERSUS REALITY 169-70 (1975)).

200. *See id*; *see also* R. ALLEN HAYS, THE FEDERAL GOVERNMENT AND URBAN HOUSING 90-92 (2d ed. 1985).

Inclusionary zoning programs avoid these problems. Low-income residents are not stigmatized because residents paying market rate for their units frequently are unaware that inclusionary units exist in their building and, if aware, likely do not know which residents live in inclusionary units.[201] This is because inclusionary zoning programs often require inclusionary units to be dispersed throughout a development with exterior designs consistent with those of non-inclusionary units.[202] For example, Berkeley requires that "[a]ll Inclusionary Units shall be reasonably dispersed throughout the project, be of the same size and contain, on average, the same number of bedrooms as the non-Inclusionary Units . . . and be comparable with the design or use of non-Inclusionary Units in terms of appearance, materials and finish quality."[203] Therefore, stigmatization of low-income residents is severely curtailed if not completely removed.

Inclusionary zoning also offers the significant benefit of allowing residents who achieve upward mobility to stay in their buildings and neighborhoods if they so choose. A major drawback of public or solely low-income housing projects is that tenants must move when they no longer qualify for low-income housing. Accordingly, support systems of family or friends may be lost when a tenant must leave.

It is true that many of the aforementioned positive aspects of inclusionary units could be achieved, at least in part, if cities and counties use the in-lieu fee in creative and innovative ways. However, the success of in-lieu fees at times has appeared questionable. The administration by the city of a housing fund and the actual construction of units can be cumbersome, bureaucratic, and inefficient. Moreover, the money in the fund may go unused because of these or other problems.[204] Two cities that adopted in-lieu fees instead of requiring on-site units offer an example. As of 1994, Coronado and Del Mar had not produced any units with their $1,637,500 total of in-lieu fee monies, even though the programs had been in place for over seven years.[205]

For all of the aforementioned reasons, the construction of low-income inclusionary units is preferable to forcing a city or county to adopt in-lieu fees. Therefore, a legislative amendment to the Costa-Hawkins Act is the best solution to the potential prohibition of inclusionary units. If, however, localities are forced to adopt the in-lieu fee option, it is critical that innovative techniques are employed so that localities do not repeat the mistakes of the federal public-housing projects.[206]

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201. *See* Padilla, *supra* note 8, at 553.

202. *Id.*

203. BERKELEY, CAL., ZONING ORDINANCE 23C § 12.040(D) (1999).

204. Padilla, *supra* note 8, at 578.

205. *Id.* at 578 n.236.

206. For example, cities and counties could apply in-lieu funds to non-profit housing developments in order to create mixed-income projects.

C. *Charter Cities Should Examine Arguments That the Costa-Hawkins Act Does Not Preempt Their Inclusionary Zoning Programs*

In California, a municipal corporation (commonly referred to as a city) is either a charter or general law city.[207] Of the 476 cities in California, 105 are charter cities and the remaining 372 cities are general law cities.[208] The form of a city is important for preemption analysis. In the case of general law cities, all state statutes (known as general laws) preempt conflicting local ordinances and laws.[209] Charter cities, however, are more autonomous and preemption of local laws by general laws is not automatic.[210]

Charter cities may attempt to argue that their inclusionary zoning programs are not prohibited by the Costa-Hawkins Act because they are not preempted by that act. A comprehensive analysis of this argument is beyond the scope of this Comment. However, charter cities should explore arguments that the Costa-Hawkins Act does not preempt their local inclusionary zoning programs.[211]

CONCLUSION

Exclusionary zoning abuses the zoning power to "erect barricades" and only let "certain kinds of people" into a city or county.[212] Social ills, such as segregation and the lack of affordable housing options for families, the elderly, and individuals, result from exclusionary zoning practices. In California, exclusionary zoning tactics fuel the current affordable housing crisis.

Fortunately, inclusionary zoning has emerged to combat exclusionary zoning and its harmful effects. Inclusionary zoning offers an opportunity to provide integrated, affordable housing in California. Nonetheless,

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207. *See* CAL. CONST. art. XI §§ 5(a), 7.

208. League of California Cities, *supra* note 90.

209. CAL. CONST. art. XI, § 7.

210. *Id.* art. XI, § 5(a).

211. For an overview of the law of preemption in California, *see generally* 45 CAL. JUR. 3D (REV) *Municipalities* §§ 175-204, at 272-322 (2000).

212. *See* Vickers v. Township Comm., 181 A.2d 129, 147 (N.J. 1962) (Hall, J., dissenting) (upholding Gloucester zoning regulation that prohibited mobile homes). *Vickers* was overruled in *Mount Laurel II.* Southern Burlington County N.A.A.C.P. v. Mt. Laurel, 456 A.2d 390, 450 (N.J. 1983). Justice Hall stated:

> . . . [the] legitimate use of the zoning power by . . . municipalities does not encompass the right to erect barricades on their boundaries through exclusion or too tight restriction of uses where the real purpose is to prevent feared disruption with a so-called chosen way of life. Nor does it encompass provisions designed to let in as new residents only certain kinds of people. . . . When [this occurs] . . . deeper considerations intrinsic in a free society gain the ascendancy and courts must not be hesitant to strike down purely selfish and undemocratic [zoning] enactments.

Id.

inclusionary zoning is threatened by assertions that the Costa-Hawkins Act prohibits certain forms of inclusionary zoning.

Application of the rules of statutory construction fails to yield a definitive answer regarding the act's prohibitive impact on inclusionary zoning. The plain meaning of the statute could suggest that certain forms of inclusionary zoning are prohibited, such as those failing to satisfy the Density Bonus Statute. In the final analysis, the plain meaning of the statute is ambiguous, particularly the Exception. To provide clarity, legislative history is instructive and buttresses the opposite view: that the Costa-Hawkins Act does not prohibit inclusionary zoning programs. The act's legislative history indicates its goal was the prohibition of strict rent control in five cities. Accordingly, it does not follow that the Costa-Hawkins Act could impact some 108 cities and thirteen counties with inclusionary zoning programs in California. Furthermore, one must equate inclusionary zoning with rent control to argue that the act prohibits inclusionary zoning programs. However, as previously illustrated, such an equation is inappropriate; inclusionary zoning and rent control have distinct rationales, applications, and outcomes. For example, only inclusionary zoning contains provisions to ensure that low-income people receive affordable rental units.

Currently, the fate of inclusionary zoning programs is unclear and rests with the courts. Thus, to avoid costly litigation and the risk of prohibiting inclusionary zoning, the Costa-Hawkins Act should be amended to exclude all forms of inclusionary zoning. Such an amendment would ensure the continued promotion and construction of affordable, integrated housing in California.