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THE USE OF LEGAL MECHANISMS TO PROVIDE FOR AFFORDABLE HOUSING IN ENGLAND AND THE UNITED STATES

Edward J. Sullivan* and Robert Williams†‡

“I am completely penniless, and absolutely homeless. Yet there are worse things in the world than that . . . . I would not a bit mind sleeping in the cool grass in summer, and when winter came on sheltering myself by the warm close-thatched rick, or under the penthouse of a great barn, provided I had love in my heart.”1

I. INTRODUCTION

Love and shelter are essential elements of human life. This paper concerns itself with shelter. National, regional, and local governments around the world are concerned with the supply of affordable housing. Some governments provide direct or indirect subsidies for land acquisition, construction, and upkeep of this housing; others require public or private developers to supply such housing; and still others attempt a combination of these approaches. This paper focuses on the use of legal mechanisms to require developers to “set aside” portions of residential development for affordable housing, however defined, in order to bridge the gap between market price and a certain level of household income. In particular, this paper discusses the use of these mechanisms in England and the United States.

The use of legal mechanisms to require the provision of affordable housing has obvious impacts on the housing market, as the developer will likely receive less in return for providing affordable units than what the market would ordinarily supply. In response, the developer must either seek government incentives to mitigate the damage or “swallow” the differential. There are obvious political, social, and economic arguments that may be raised to either limit or

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‡ The authors acknowledge and express their gratitude to Caleb Huegel, J.D. Expected 2020, Willamette University, for his assistance in the preparation of this article.

1 OSCAR WILDE, DE PROFUNDIS (1905).
expand the use of these mechanisms, or to justify incentives. These are matters for
the political branch to consider. However, there are also constitutional and other
legal limitations on the use of these mechanisms that must be considered in order
to assess their utility as a planning tool.

This paper compares the use of legal mechanisms to encourage or require
the provision of affordable housing in England and the United States and
evaluates constitutional or other legal challenges to those mechanisms. The
following section is a brief description of these mechanisms as currently used in
the two jurisdictions under consideration.

A. Set-Asides and Inclusionary Housing Efforts in the United States

In the United States, there is no national system of general land use
control. Rather, individual states authorize local governments to plan and regulate
land use under their own statutory schemes, subject only to federal and state
constitutional limitations. Of those fifty states, “set-asides” have been used most
extensively in California, Massachusetts, and New Jersey. The programs in these
states vary widely in several respects: from being voluntary to mandatory, from
applying under general law to being imposed on an ad hoc basis, from focusing
on home ownership to rental housing, from requiring on-site affordable units to
allowing them off-site, and in setting applicant qualifications and developer
incentives. Typically, however, housing units are designated for low- or

2 See Emily Thaden & Ruoni Wang, Lincoln Inst. of Land Policy, Inclusionary Housing
https://www.lincolninst.edu/sites/default/files/pubfiles/thaden_wp17et1_0.pdf (“Inclusionary
housing programs are heavily concentrated in three states: New Jersey, California, and
Massachusetts, accounting for nearly 80 percent of all programs.”). This study of 1,379 programs
in 791 jurisdictions is the latest and most extensive review of inclusionary housing programs in the
United States. See id. at 56. Unlike the United Nations, the United States does not recognize a
right to adequate housing. See Office of the United Nations High Comm’r for Human
Rights, Fact Sheet No. 21: The Right to Adequate Housing 1 (Rev. 1 2009),

3 See Thaden & Wang, supra note 2, passim. According to this study, of the known jurisdictions
with inclusionary housing programs, those that responded had constructed 173,707 affordable
housing units and had collected $1.7 billion in fees for affordable housing. See id. at 58. While
many of these programs are locally-oriented, California, New Jersey, and Massachusetts have
extensive state programs to encourage affordable housing. See id. at 26–31; see also Benjamin
Schneider, CityLab University: Inclusionary Zoning, CityLab (July 17, 2018),
Brian Stromberg & Lisa Sturtevant, Nat’l Housing Conference, What Makes
Inclusionary Zoning Happen? (2016),
http://media.wix.com/ugd/19cfbe_2b02286eba264acd872fd2edb3d0cb8f.pdf; Inclusionary
moderate-income occupancy, applicants for that housing are eligible based on household income, and eligible applicants may then occupy the housing while they remain eligible. Provision is usually made so that the initial owner or renter cannot “flip” the housing to an ineligible occupant and pocket the difference. While other authors have dealt with the myriad details of inclusionary housing programs in the United States, this paper deals with those programs involving development conditions. This discrete subset of obligations includes requirements imposed by local governments not only through generally-applicable schedules (for example, a requirement to provide one below-market unit for every 25 market units), but also by way of development conditions on individual projects.

Our analysis of ad hoc development conditions comports with the approach of the United States Supreme Court in regulatory takings cases, in which the possibility of unfairness in a public permit process, where the regulator or another public agency is also seen as the beneficiary of the condition it imposes, results in a more intensive review of these conditions. Moreover, this analysis also comports with the most frequent constitutional weapons for challenging development conditions: substantive due process under the Fourteenth Amendment and the Takings Clause of the Fifth Amendment.

While the Court has not overtly distinguished generally-applicable development requirements, it has signaled that adherence to a policy structure may allow for more deference in constitutional adjudication. Thus, we will

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5 U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

6 U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

7 See Dolan, 512 U.S. at 391 n.8 (Rehnquist, C.J.) (“JUSTICE STEVENS’ dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. See, e. g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Here, by contrast, the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. In this situation, the burden properly rests on the city. See Nollan, 483 U. S. at 836.”). While the Supreme Court has yet to speak further regarding this distinction, it may do so in the near future. See Kriston Capps, Will the Supreme Court Strike Down Inclusionary Zoning?, CITYLAB (Oct. 3, 2019), https://www.citylab.com/equity/2019/10/supreme-court-inclusionary-zoning-constitutional-takings-clause/596863/.
undertake an analysis of American development conditions as involving either their *ad hoc* imposition or their imposition under general code requirements applicable to like situations.

**B. The English Planning System and Developer Contributions**

In England, the state strictly regulates development, requiring those who wish to develop land to obtain development consent, or “planning permission,” which is ordinarily granted by local planning authorities. Although local authorities have broad discretion to grant or deny planning permission for development, that discretion is not unfettered. Local authorities are required by statute to decide applications for planning permission in accordance with the “development plan” for their area, “unless material considerations indicate otherwise.” However, it is for the decision-maker (i.e., the local authority) to determine whether a particular proposal is in accordance with the development plan, or whether material considerations justify granting permission for a proposal notwithstanding deviation from the plan. Moreover, it is the responsibility of the local authority to draft and review “local plans”—land use plans which form the central tenet of the development plan. Local plans, which generally span a period of fifteen to twenty years, set out a vision and framework for the future development of their area. It can therefore be seen that, in England, local government plays a significant role in the planning system: both in terms of plan-making and decision-making.

Central government, namely the Secretary of State for Housing, Communities, and Local Government, also plays an important role in the English planning system. The Secretary of State promulgates national policy in the form of the National Planning Policy Framework. This has a significant influence on

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8 “Development” constitutes either operational development (building, engineering, mining, etc.) or a material change in the use of land. See Town and Country Planning Act 1990, c. 8, § 55(1).

9 In this paper we focus on the development consent regime under the Town and Country Planning Act 1990, pursuant to which the majority of development is consented, including virtually all proposals for housing. Nationally significant infrastructure projects fall outside this regime. See Planning Act 2008, c. 29, §§ 14–30A.

10 Planning and Compulsory Purchase Act 2004, c. 5, § 38(6) (emphasis added).


the planning system in at least two ways. First, local plans are required, as a matter of policy, to be consistent with the National Planning Policy Framework. Second, national policy is invariably an important material consideration when local authorities are determining whether to grant planning permission. For instance, compliance with national policy can justify granting such permission even where the local plan would not support it. In addition, the Secretary of State hears appeals of local planning permission denials and, for significant or controversial developments, “calls-in” the application and makes a decision themselves—taking the decision out of the local authority’s hands.

Set-asides, or “developer contributions” as they are commonly known in the United Kingdom, are a familiar part of the English planning system and, of all developer contributions, those for affordable housing are the most prevalent. National policy requires local plans to make “sufficient provision” for, inter alia, affordable housing, and securing planning permission for residential developments of ten or more dwellings will ordinarily be contingent on a proportion of those dwellings being affordable. Failure by a landowner-developer to provide a sufficient amount of affordable housing can, and often does, justify a refusal to grant planning permission.

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13 See id. ¶ 35(d).

14 It is widely accepted that, while the precise relevance varies from case to case, national policy will ordinarily be an important material consideration when applying the statutory test and determining whether to “depart” from the development plan. See supra note 10 and accompanying text.

15 See Town and Country Planning Act 1990, c. 8, § 77.

16 See infra note 85 and accompanying text.

17 NPPF, supra note 12, ¶ 20(a).

18 National policy indicates that provision of affordable housing should not be sought for residential developments below this threshold, though the threshold can be lower in designated rural areas if established through a local plan. See NPPF, supra note 12, ¶ 63. In practice, most developments of ten or more residential dwellings will be expected to provide a level of affordable housing.

19 By way of a recent example, the Secretary of State for Housing, Communities and Local Government—to whom appeals from local planning permission denials are made—refused to grant planning permission for a residential redevelopment which would have provided 340 dwellings in central London, primarily on the basis that it would have provided an inadequate amount of affordable housing. See Land at Williams Sutton Estate, APP/K5600/W/17/3177810 (Dec. 18, 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765962/Willian_Sutton_Estate.pdf.
II. **Use of Conditions to Provide Affordable Housing in the United States**

A. **Federal Statutes**

Under the American federal system, a local government seeking to use development conditions to augment the supply of affordable housing must first contend with applicable constitutional and statutory limitations. Statutory limitations on the use of development conditions may involve the legitimacy of a legislative delegation of power to the local government to impose those conditions or limitations placed on the use of that power by the legislature. While the federal government may indirectly affect the supply of affordable housing through various funding mechanisms\(^ {20} \) or through substantive legislation\(^ {21} \), it has, for better or worse, largely declined to participate in local land use decisions.\(^ {22} \) Thus, limitations on land use regulations and actions are most often imposed under either federal or state constitutions, or state laws.\(^ {23} \)

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\(^{20}\) Federally-funded housing programs for low-income, elderly, and disabled individuals and families include public housing (i.e., state-owned, affordable rental houses or apartments), the Housing Choice Voucher Program (formerly known as “Section 8 Vouchers”), and competitive grants administered by the federal Department of Housing and Urban Development. See [*Find Affordable Rental Housing*, USA.gov](https://www.usa.gov/finding-home) (last visited Oct. 24, 2019); [*Grants Management and Oversight Division*, HUD.gov](https://www.hud.gov/program_offices/spm/gmomgmt) (last visited Oct. 24, 2019).

\(^{21}\) The federal government is authorized to combat discrimination in housing, *inter alia*, on the basis of race, color, and familial status under the Fair Housing Act of 1968, as amended by the Fair Housing Act Amendments of 1988, see 42 U.S.C. §§ 3601–3631, and on the basis of disability under the Americans with Disabilities Act of 1991, see 42 U.S.C. §§ 12101–12213.

\(^{22}\) This is not to say that the federal government *cannot* participate in those decisions. Its vast regulatory powers under the Commerce Clause, see U.S. Const. art. I, § 8, cl. 3 (“The [United States] Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”), give it wide authority to interpose itself in housing issues, as it has done with the Fair Housing and Americans with Disabilities Acts. See [*supra* note 21. However, since the first zoning case, land use has generally been viewed as a state and local government issue in the United States. See [*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)].

\(^{23}\) On the other hand, while not substantive in nature, three post-Civil War amendments to the federal constitution, see U.S. CONST. amend. XIII (ending slavery), XIV (establishing rights and remedies for citizens), XV (prohibiting denial of voting rights based on previous condition of
B. The Federal Constitution

Although a number of federal constitutional provisions might apply to land use regulations (such as freedom of expression under the First Amendment as applied to signs and billboards,24 or the Equal Protection Clause of the Fourteenth Amendment25), the principal grounds on which the nature or extent of land use regulations are challenged under federal constitutional law have been either the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment.

While there was a Due Process Clause in Bill of Rights,26 which amended the original 1787 Constitution, those provisions were enacted to limit only the powers of the federal government, rather than those of the states or their local governments.27 Following the adoption of the Fourteenth Amendment, however, servitude, changed the architecture of the constitution so as to create civil rights that are federally-enforceable against state and, by extension, local governments. Today, federal law provides for remedies against “[e]very person who, under color of . . . any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of [civil] rights,” including damages, attorney fees, and costs. 42 U.S.C. §§ 1983, 1988.


25 Although Equal Protection may apply to land use regulations, most courts defer to local classifications unless a protected constitutional right (such as speech or religion) or a protected class (distinguished by race, religion, or color) is involved. See Euclid, 272 U.S. 365. But see Nectow v. City of Cambridge, 277 U.S. 183 (1928); Village of Willowbrook v. Olech, 528 U.S. 562 (2000). Absent these exceptions, challenges to land use regulations under the Equal Protection Clause have been examined under a deferential “rational basis” standard. See Doug Linder, Levels of Scrutiny Under the Equal Protection Clause, EXPLORING CONSTITUTIONAL LAW, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epcscrutiny.htm (last visited Oct. 24, 2019).

26 The Fifth Amendment provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added).

which contained its own Due Process Clause applying specifically to the states, the United States Supreme Court determined that most provisions of the Bill of Rights applied to the states as well, a process referred to as “incorporation.”

Yet, apart from incorporation, American courts interpreted the Due Process Clause of the Fourteenth Amendment somewhat differently than its original iteration in the Fifth Amendment. From the last quarter of the nineteenth century until almost 1940, the American courts reviewed legislation so as to effectively second-guess the policy decisions made by federal, state, and local governments under a peculiar interpretation of the Due Process Clause which gave them power to declare those decisions “unreasonable”:

To justify the state in thus interposing its authority in behalf of the public, it must appear first that the interests of the public generally, as distinguished from those of a particular class, require such interference, and second that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

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28 The Fourteenth Amendment provides that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added). The Amendment also provides that Congress may enforce its provisions “by appropriate legislation.” Id. § 5.


30 For two very different views on the subject, see Ryan Williams, The One and Only Substantive Due Process Clause, 120 YALE L.J. 408 (2010); Edwin Chemerinski, Substantive Due Process, 15 Touro L. Rev. 1501 (1999).

31 See e.g., Munn v. Illinois, 94 U.S. 113 (1877); Mugler v. Kansas, 123 U.S. 623 (1887).


33 Lawton v. Steele, 152 U.S. 133, 137 (1894).
It was the courts, of course, that judged the appropriateness of the legislation’s ends, means, nature, and degree of application. This doctrine, known as “substantive due process,” portends that there are substantive limits on policy-making, which judges are specially qualified to apprehend in determining the validity of those policies. Under the doctrine, legislation is frequently challenged as being “arbitrary and capricious” or having no “substantial relation to the public health, safety, morals, or general welfare.”

The sequence of history is important because it was during this period of intrusive judicial scrutiny that the United States Supreme Court decided the first four American land use cases. Each of these decisions was based on substantive due process challenges. In Euclid, the Court found that the use of zoning as a land use regulatory tool was not facially unconstitutional. The result in Zahn was similar. In Nectow, however, the Court affirmed the judgments of the lower courts that the land use regulation at issue was unreasonable as applied to an individual property, but did not disturb the validity of the remainder of the zoning ordinance. Finally, Roberge involved the ability of a neighboring owner to


35 Using classic substantive due process language, the Court concluded that the village’s arguments were “sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” Euclid, 272 U.S. at 395.

36 Justice Sutherland, who wrote the majority opinion in Euclid, also wrote the unanimous opinion in Zahn, where he reached a similar conclusion using substantive due process terminology:

The common council of the city, upon these and other facts, concluded that the public welfare would be promoted by constituting the area, including the property of plaintiffs in error, a zone “B” district, and it is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable. The most that can be said is that whether that determination was an unreasonable, arbitrary, or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this Court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.

Zahn, 274 U.S. at 328.

37 Justice Sutherland again wrote a unanimous opinion, wherein he concluded that:

The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.
unilaterally change a zoning restriction under Seattle’s zoning regulations, which the Court found to be an unconstitutional delegation of authority, enabling adjacent landowners to effectively veto otherwise compatible and lawful uses.\textsuperscript{38}

The United States Supreme Court did not review another land use case until 1974.\textsuperscript{39} By this time, substantive due process was no longer the weapon of choice against government regulation, particularly in the economic and social spheres. The recognizable sign of this transition was \textit{United States v. Carolene Products Co.},\textsuperscript{40} which indicated that traditional substantive due process under the federal constitution was, for all intents and purposes, no longer available.\textsuperscript{41}

\begin{quote}
Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case. \textit{Nectow}, 277 U.S. at 188 (citation omitted).
\end{quote}

\begin{quote}
In another unanimous opinion, this time authored by Justice Butler, the Court concluded that:

The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals, or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject the trustee to their will or caprice. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. \textit{Roberge}, 278 U.S. at 121–22 (citations omitted).
\end{quote}

\textsuperscript{38} In another unanimous opinion, this time authored by Justice Butler, the Court concluded that:

\begin{quote}
304 U.S. 144 (1938). In the now-famous footnote 4, the Court indicated that it would no longer review the substance of legislation in these spheres, but would instead reserve its scrutiny for defects in the political process:
\end{quote}
Since *Penn Central Transportation Co. v. City of New York*\(^4^2\) in 1978, the Takings Clause of the Fifth Amendment has become the primary instrument for challenging government overreach in the field of land use regulation.\(^4^3\) The Supreme Court had not considered the limits of land use regulation since the

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, on restraints upon the dissemination of information, on interferences with political organizations, as to prohibition of peaceable assembly.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities. [W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.*, 304 U.S. at 152 n.4 (citations omitted).

\(^4^1\) Nevertheless, many states have due process clauses in their respective state constitutions and many state courts have imported the pre-1938 federal interpretation of substantive due process into their own decisions. See Hans A. Linde, *Without “Due Process:” Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970) (suggesting that, even in the absence of a due process clause in state constitutions, appellate courts have simply assumed its existence and applicability despite changes in the Supreme Court’s interpretation of the federal constitution). Moreover, the doctrine has never expressly overruled and is still used occasionally by the Supreme Court in land use cases. *See Belle Terre*, 416 U.S. 1; *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). It has also been used, albeit with different terminology, in more controversial cases. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (abortion rights); *Lawrence v. Texas*, 539 U.S. 558 (2003) (consensual sexual activity).


\(^4^3\) During this long hiatus, there was at least one major case that peripherally involved land use regulations. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). In that case, the petitioner owned a sand- and gravel-mining operation, which began before zoning was first applied to his site. *See id.* at 591. When the town adopted its zoning ordinance, the petitioner successfully avoided increased levels of regulation because his use was lawfully nonconforming and thus could continue. *See id.* Later, the town adopted new, non-zoning safety regulations that had a significant economic impact on the petitioner’s operations. *See id.* at 592. Because the Court ultimately upheld these regulations under a substantive due process analysis, this case may very well have convinced landowners that a different constitutional theory was needed to successfully challenge economic regulations. *See id.* at 595–96.
series of four cases it decided in the 1920s. In the decades that followed, while substantive due process had ultimately proven to be an unsuccessful weapon for landowners, the Takings Clause became an effective substitute when the Court eventually resurrected another doctrine that had fairly languished since the 1920s.

In *Pennsylvania Coal Co. v. Mahon*, a coal company, which had retained mining rights under a residence, challenged a state statute prohibiting the exercise of those rights. The Supreme Court found that the statute, as applied to the subject property, violated the Takings Clause since the only property interest held by the coal company was the right to mine. Justice Holmes, writing for the majority, opined that, while regulations affecting property values are a feature of everyday life, regulations that go “too far” require just compensation in order to sustain them. This indeterminate calculus was given substance over fifty years later in *Penn Central*, which, in addition to stressing the importance of the circumstances of each case, provided three “factors” for determining whether a regulation has gone “too far”:

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

For more than forty years, *Penn Central* has been the default test for evaluating takings claims under the Fifth Amendment in the field of land use regulation. However, there are two situations in which courts will almost always find that a taking has occurred. These are known as *per se* or categorical takings:

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44 260 U.S. 393 (1922).
45 Id. at 418.
46 Id. at 415.
47 *Penn Central*, 438 U.S. at 124 (citations omitted).
1. The first instance occurs when government either causes or authorizes another to undertake a physical invasion of private property.\textsuperscript{48}

2. The second instance occurs where “the State seeks to sustain regulation that deprives land of all economically beneficial use, [in which case] it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”\textsuperscript{49} Thus, denial of all viable economic use, at least where the construction of a single-family house is concerned, will usually trigger a valid compensation claim unless there are other property interests involved (for example, if the state retains a property interest in a streambed) or the use is characterized as a common law nuisance.\textsuperscript{50}

Having set out the general parameters of the limitations imposed by the Takings Clause, we now turn to its application to conditions generally and, finally, to the use of conditions to provide for affordable housing. A trilogy of Supreme Court cases sets out Takings Clause limitations on the use of development conditions. Briefly stated, they are:

1. \textit{Nollan v. California Coastal Commission}, which requires an “essential nexus” between the condition imposed and the purpose of the

\textsuperscript{48} See, e.g., Ark. Game & Fish Comm’n v. United States, 568 U.S. 23 (2012) (arising when the U.S. Army Corps of Engineers authorized routine water releases from upstream dams that flooded state-owned forests and damaged merchantable timber); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that a city-authorized physical invasion to allow cable access for apartment tenants was a taking and that a uniform $1 payment could therefore be contested as “just compensation”).

\textsuperscript{49} Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992). After noting the other \textit{per se} takings category, physical occupation, the court added:

\begin{quote}
We believe similar treatment must be accorded confiscatory regulations, \textit{i.e.}, regulations that prohibit all economically beneficial use of land: any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.
\end{quote}

\textit{Id.} at 1029.

\textsuperscript{50} See \textit{id.} at 1029–30.
restriction that would justify denial of the permit. The use of a condition to obtain an easement that the government would otherwise be constitutionally-obligated to pay for, where the easement does nothing to alleviate the government’s concerns regarding the development, converts the permit proceeding into an “an out-and-out plan of extortion.”

2. *Dolan v. City of Tigard*, in which there was arguably an essential nexus for conditions requiring a plumbing supply store to dedicate property for a bike path and flood protection along an adjacent creek, but where the degree of connection between the purpose of the conditions and their burden on the individual landowner was at issue. In that case, the Supreme Court required a showing of “rough proportionality” to justify conditions that do not arise from a general requirement under local land use regulations.

3. *Koontz v. St. Johns River Water Management District*, which reaffirmed the essential nexus and rough proportionality holdings of *Nollan* and *Dolan* but extended their application to conditions involving money and the undertaking of public works.

Thus, *Nollan*, *Dolan*, and *Koontz* might apply to conditions requiring the provision of affordable housing as part of development approval, known in some

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51 483 U.S. 825, 837 (1987). Justice Scalia’s majority opinion noted that there is a broad range of public interests which could justify denial of a permit, and for which the imposition of a condition could be justified as a substitute for denial, and added:

> We assume, without deciding, that this is so—in which case, the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes, unless the denial would interfere so drastically with the Nollans’ use of their property as to constitute a taking.

*Id.* at 835–36 (citation omitted).

52 *Id.* at 837.


54 *Id.* at 391 (Rehnquist, C.J.) (“We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”).

American jurisdictions as “inclusionary zoning.” The argument advanced by the landowner-development community against inclusionary zoning is that the construction of additional housing does not, by itself, create the need for affordable housing and, therefore, inclusionary zoning does not pass muster under *Nollan*, *Dolan*, and *Koontz*.57

The Supreme Court, then with a complement of eight justices following the death of Justice Scalia, declined to decide this issue in 2016 and it remains unsettled.58 That case was *California Building Industries Ass’n v. City of San Jose*, which dealt extensively with the federal (and state) constitutional issues surrounding inclusionary zoning or set-asides and which involved a facial challenge to an ordinance requiring all new residential developments of twenty or more units to sell at least fifteen percent of them at a price affordable to low- or moderate-income households.60 Although the principal challenge was based on the Fifth Amendment to the federal constitution and a similar provision of the state constitution, the landowner specifically raised the “unconstitutional conditions” language used in *Dolan* and *Koontz*.61

The California Supreme Court rejected these challenges. Given the mere regulatory nature of the ordinance, the court found that no exaction had occurred

56 See, e.g., Schneider, supra note 3. This article provides an example of inclusionary zoning in practice:

In Washington, D.C.’s rapidly gentrifying Petworth neighborhood, the recently opened Fahrenheit building could easily be seen as a symbol of the area’s increasing unaffordability. Its bright red exterior and ground-floor craft cider house send a powerful signal about the price of the apartments above, which range from $2,400 to $2,745 for a two-bedroom unit. But all is not as it seems. Three of the Fahrenheit’s 31 units are available at below market rates as part of the District’s inclusionary zoning (IZ) program, which, in fiscal year 2016, offered two-bedroom apartments for an average rent of $1,636.


59 351 P.3d 974 (Cal. 2015).

60 See *id.* at 978.

61 See *id.* at 987–88.
and no claim for an unconstitutional condition existed. Unlike the *ad hoc* circumstances of *Nollan*, *Dolan*, and *Koontz*, the city did not acquire any property or money, or require that the landowner perform any public works on its behalf. While noting the “ambiguity” of *Nollan*, *Dolan*, and *Koontz*’s application to legislative actions such as fee schedules and set-asides, the court observed that the California courts had not yet extended those cases that far, and instead compared the set-asides at issue to regulations such as those prohibiting drive-in windows at restaurants, requiring handrails in multi-family residences, and requiring certain amounts of parking at commercial facilities. The court characterized the challenged ordinance as simply regulating the use of property by limiting the sales price of some homes in the interests of the community at large.

62 See id. at 991.
63 See id. at 988–91, 995.
64 See id. at 990–91, 990 n.11. The court added that “[a] predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing,” and noted the separation of due process from takings jurisprudence which justifies a takings analysis only for conditions so onerous that, outside the permit process, they would constitute a *per se* taking. Id. at 990 (quoting *Koontz* v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 612 (2013)) (citing *Lingle* v. Chevron U.S.A., Inc., 544 U.S. 528, 547 (2005)). The court concluded:

Nothing in *Koontz* suggests that the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval. It is the governmental requirement that the property owner convey some identifiable property interest that constitutes a so-called “exaction” under the takings clause and that brings the unconstitutional conditions doctrine into play.

Id.
65 See id. at 992. The court noted that the United States Supreme Court had previously upheld a city’s rent control provisions against a takings challenge as merely a restriction on use. See id. (citing *Yee* v. City of Escondido, 503 U.S. 519, 532 (1992)). Citing other authority in which regulations of use—even when stringent—did not amount to a taking, the court concluded that:

As a general matter, so long as a land use regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property, such a restriction does not violate the takings clause insofar as it governs a property owner’s future use of his or her property, except in the unusual circumstance in which the use restriction is properly found to go “too far” and to constitute a “regulatory taking” under the ad hoc, multifactored test discussed by the United States Supreme Court in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104.
observing that price controls have long been recognized as a valid regulatory tool, subject to constitutional limitations.\textsuperscript{67} Thus, the court concluded:

\begin{quote}
[T]he basic requirement imposed by the challenged ordinance—conditioning the grant of a development permit for new developments of more than 20 units upon a developer’s agreement to offer for sale at an affordable housing price at least 15 percent of the on-site for-sale units—does not constitute an exaction for purposes of the takings clause so as to bring into play the unconstitutional conditions doctrine under the \textit{Nollan}, \textit{Dolan}, and \textit{Koontz} decisions.\textsuperscript{68}
\end{quote}

III. \textbf{The Delivery of Affordable Housing in England}

\textbf{A. Context}

The level and type of affordable housing that will \textit{ordinarily} be required from residential development is established in policies promulgated by local authorities through local plans.\textsuperscript{69} These requirements are generally expressed by way of a percentage or proportion of the total number of dwellings to be delivered.

\textsuperscript{67} See \textit{id.} at 992–93. The court also noted the other means by which an applicant could satisfy the ordinance: payment of a fee or construction of other housing off-site. \textit{See id.} at 983. Since those alternatives were available, the court found no basis for challenging the ordinance as a taking. \textit{See id.} at 996.

\textsuperscript{68} See \textit{id.} at 996. After addressing several of the plaintiff association’s other arguments, the court reflected more broadly on its role in dealing with legislation:

\begin{quote}
As noted at the outset of this opinion, for many decades California statutes and judicial decisions have recognized the critical need for more affordable housing in this state. Over the years, a variety of means have been advanced and undertaken to address this challenging need. We emphasize that the legal question before our court in this case is not the wisdom or efficacy of the particular tool or method that the City of San Jose has adopted, but simply whether, as the Court of Appeal held, the San Jose ordinance is subject to the ordinary standard of judicial review to which legislative land use regulations have traditionally been subjected.
\end{quote}

\textit{Id.} at 1006.

\textsuperscript{69} See NPPF, \textit{supra} note 12, ¶¶ 34, 61–62.
by the development. National policy requires that local plans make “sufficient provision” for affordable housing,\(^{70}\) though this requirement is tempered by the stipulation that affordable housing contributions should not be set at levels which would “undermine the deliverability of the plan.”\(^{71}\) In particular, when local plans are examined by the Secretary of State, which they must be prior to adoption, consideration is given as to whether the affordable housing requirement is set at a level which would render development unviable (taking into account, *inter alia*, other likely contributions such as education, health, transportation, flood and water management, and infrastructure).\(^{72}\)

In London, where the affordable housing need is extremely high, the new Draft London Plan is proposing a minimum threshold requirement that between thirty-five and fifty percent of all new homes be affordable (depending on their location and source).\(^{73}\) By contrast, the recently-adopted local plan for Kirklees\(^{74}\)—where the affordable housing need is less pressing and where viability issues are in play—requires that at least twenty percent of new homes be affordable. Thus, the “requirement” to provide affordable housing within English planning law is ultimately found only in policy. There is no statutory obligation requiring its provision.\(^{75}\) A hallmark of policy—and a feature which distinguishes it from law—is that public bodies are not bound to follow it. This means that local authorities can depart from their local plans’ affordable housing requirements when circumstances demand, so long as they give adequate reasons for doing so.

The statutory test for deciding planning permission applications reflects this long-standing legal position. Although Parliament has established a “statutory

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\(^{70}\) NPPF, *supra* note 12, ¶ 20.

\(^{71}\) NPPF, *supra* note 12, ¶ 34.

\(^{72}\) See *id*.


\(^{74}\) Located in the north of England.

\(^{75}\) The incumbent Conservative government has flirted with the idea of requiring certain forms of housing by way of legislation, going so far as to legislate for the provision of “starter homes,” which are considered in national policy to be a form of affordable housing. Housing and Planning Act 2016, c. 22, § 2. However, the government has recently confirmed that it will not implement a compulsory starter homes percentage requirement. See **DEP’T FOR COMMUNITIES & LOCAL GOV’T, GOVERNMENT RESPONSE TO THE TECHNICAL CONSULTATION ON STARTER HOMES REGULATIONS** (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/589806/Government_response_to_the_starter_homes_technical_consultation.pdf.
priority” in favor of the development plan (which includes, but is not limited to, policies in the local plan), the development plan can be departed from “where material considerations indicate otherwise.”

Thus, while there is a presumption that developers will provide “policy-compliant” levels of affordable housing on residential sites, it is possible to justify delivery of affordable housing at lower levels than those set out in the local plan—or even no delivery at all—on a case-by-case basis. Arguments are often advanced that the level of affordable housing required by the local plan would render the particular development unviable and that the benefits of the proposal outweigh the harm of providing a lower level of affordable housing. Conversely, developers sometimes offer affordable housing at levels above policy-compliance in order to argue that the benefits of the proposal ought to justify granting permission in circumstances where it would ordinarily be withheld—for instance, when proposing development in the Green Belt.

Unlike in the United States, the legal mechanism ordinarily utilized in England to secure developer contributions, including for affordable housing, is known as a “planning obligation.” These obligations are entered into voluntarily by the landowner, albeit in the knowledge that, all things being equal, the

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76 Planning and Compulsory Purchase Act 2004, c. 5, § 38(6).

77 The Metropolitan Green Belt is a planning policy designation intended to control urban growth by providing that, with a few exceptions, development within a ring of countryside around major urban areas will be resisted. Approximately 12.5% of the land area in England is Green Belt. See MINISTRY OF HOUS., COMMUNITIES & LOCAL GOV’T, LOCAL PLANNING AUTHORITY GREEN BELT: ENGLAND 2017/18, at 1 (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788115/Green_Belt_Statistics_England_2017-18.pdf.

78 Planning obligations will be included either in a “section 106 agreement,” to which both the local authority and the landowner-developer(s) are party, or a “unilateral undertaking,” offered independently by the landowner-developer(s). See Town and Country Planning Act 1990, c. 8, § 106(1). Historically, local authorities or the Secretary of State were able to attach conditions to grants of permission which prevented the development from commencing until a scheme for the provision and maintenance of affordable housing had been submitted to and agreed upon by the local authority, without the need for consent from the landowner-developer. See id. § 72. This provided a mechanism whereby the decision-maker could require the provision of affordable housing (or, more specifically, to prevent the commencement of development unless the affordable housing provision is secured) if it had not been offered by the landowner-developer in advance or if the landowner-developer’s offer was considered insufficient. Recent legislation, however, has prevented the imposition of such pre-commencement conditions without the landowner-developer’s written agreement. See Neighbourhood Planning Act 2017, c. 20, § 14(1). Where the decision-maker believes a certain level of affordable housing is required in order to make the development acceptable, and where there is no planning obligation securing provision of that housing and no written agreement authorizing the attachment of pre-commencement conditions, the application will be denied.
application for planning permission is unlikely to succeed if they do not provide the requisite level of affordable housing. Planning obligations are enforceable against persons entering into them and, crucially, against successors in title as well.\textsuperscript{79} Enforcement typically occurs by way of a court injunction, and provision is ordinarily made within the planning obligation to ensure that the housing remains affordable in perpetuity.\textsuperscript{80}

\subsection*{B. Role of the English Planning System in Delivering Affordable Housing}

The planning system in England, and in particular the private sector within the planning system, now plays a critical role in the delivery of affordable as well as market-rate housing. The latest statistics are revealing:

1. In the first quarter of 2018, 131,480 (82\%) of new build dwellings were completed by the private sector, with 27,110 (17\%) being provided by housing associations and only 1,960 (1\%) by local authorities.\textsuperscript{81}

2. In 2017–18, 42,757 new build affordable dwellings were completed. That is, 27\% of all new build completions were affordable houses.\textsuperscript{82}

3. Of the 42,757 new build affordable dwelling completions in 2017–18, just over half (53\%) of new build affordable dwelling completions were provided by way of planning obligation.\textsuperscript{83} This contribution has

\textsuperscript{79} See Town and Country Planning Act 1990, c. 8, § 106(3).

\textsuperscript{80} See id. § 106(5). Planning obligations are also classified as local land charges, which would be disclosed in a title search. See id. § 106(11).


risen steadily over the last few years (44% in 2015–16; 47% in 2016–17).\textsuperscript{84}

4. The value of affordable housing units secured by planning obligations in 2016–17 was over £4 billion, representing 67% of all developer contributions. This was up from £2 billion in 2005–06, which then represented 51% of all developer contributions.\textsuperscript{85}

It has not always been this way. In the years following World War II, local authorities built a significant number of new dwellings.\textsuperscript{86} This included the provision of new affordable housing with the aid of central government subsidies. In the 1980s, however, provision of housing by local authorities reduced dramatically and has remained at a very minimal level since the 1990s (notwithstanding recent signs of a small upturn in local authority housebuilding).\textsuperscript{87} To some degree, this slack was taken up by housing associations,\textsuperscript{88} which, starting in the late 1970s, have delivered between 10,000 and 30,000 new build dwellings per year.\textsuperscript{89} Between the mid-1970s and the mid-1990s, the main mechanism for providing new affordable housing was the purchase of sites at market prices by housing associations in order to provide

\textsuperscript{84} See id.


\textsuperscript{86} See MINISTRY OF HOUS., COMMUNITIES & LOCAL GOV’T, TABLE 244: PERMANENT DWELLINGS STARTED AND COMPLETED, BY TENURE, ENGLAND, HISTORICAL CALENDAR YEAR SERIES (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790088/LiveTable244.xlsx [hereinafter TABLE 244].

\textsuperscript{87} Between 1948 and 1980, local authorities delivered over 70,000 homes per year, peaking at almost 200,000 in 1953. There was a rapid drop-off in delivery by local authorities during the 1980s, from almost 75,000 in 1980 to less than 15,000 in 1990. Between 1993 and 2014, delivery by local authorities did not exceed 1,500 (save for in 2011). Since 2014, housebuilding by local authorities has been in the low thousands. See id.

\textsuperscript{88} In broad terms, “housing associations” are organizations providing low-cost social housing on a non-profit basis for people in housing need.

\textsuperscript{89} See TABLE 244, supra note 86.
publicly-subsidized rental housing.\textsuperscript{90} This enabled new dwellings to be let at affordable, below-market rents.\textsuperscript{91}

Planning policy that supported the provision of affordable housing by the private sector was introduced in the 1980s, then with the narrow objective of delivering affordable homes in rural areas where it would ordinarily be refused, under so-called “rural exceptions” policies.\textsuperscript{92} National policy steadily developed to allow affordable housing on all larger housing sites and, by the late 1990s, planning obligations had become an important source of affordable housing provision, albeit not to the extent seen today.\textsuperscript{93} As the national policy supporting provision of affordable housing on private developments has been strengthened since 2000, and with local authorities now invariably setting minimum requirements for the delivery of affordable housing in their local plans, it is unsurprising that the planning system—particularly development contributions secured through planning obligations—now represents the most significant source of affordable housing.

\textbf{C. Legal Limits on Developer Contributions in England}

As in other areas of public law, the English courts exercise only supervisory jurisdiction over decisions made by local authorities. It is not the function of the court to form its own view about the substantive merits of those decisions. Instead, the court is restricted to examining whether the decision-maker has committed a recognizable public law error: for example, whether the procedure was unfair, whether relevant considerations were not taken into account or irrelevant considerations were taken into account, or whether the decision was irrational.\textsuperscript{94} Indeed, the courts have regularly and forcefully emphasized the limits of their jurisdiction within the planning sphere, repeating the mantra that “matters


\textsuperscript{91} See id.

\textsuperscript{92} See TONY CROOK ET AL., JOSEPH ROWNTREE FOUND., \textit{PLANNING GAIN AND AFFORDABLE HOUSING: MAKING IT COUNT 1} (2002).

\textsuperscript{93} See Burgess et al., \textit{supra} note 90, at 23 fig.3.

\textsuperscript{94} See Council of Civil Serv. Unions v. Minister for the Civil Serv. [1985] AC 374 (HL) (appeal taken from Eng.) (setting forth and classifying grounds for judicial review as illegality (unlawfulness), irrationality (unreasonableness), and procedural impropriety (unfairness)).
of planning judgment” fall solely within the domain of the decision-maker. Thus, questions such as whether the required level of affordable housing “undermine[s] the deliverability” of the local plan, whether it is justifiable for a particular proposal to deliver less affordable housing the local plan requires, and whether the provision of a large amount of affordable housing justifies granting permission for a proposal which would otherwise be denied, are all matters for the relevant local authority, not the courts.

It follows that the English courts play a very limited role in regulating the amount and nature of affordable housing required by way of developer contributions. This is true at both the policy-making level (i.e., the level of affordable housing that a local plan should require) and the decision-making level (i.e., whether planning permission should be granted or denied in light of the amount of affordable housing being offered). There are, however, a number of legal limitations on the use of planning obligations, which, as described above, are the primary means whereby developer contributions are secured in England. The main limitations are *vires*, common law considerations of materiality, statutory restrictions on materiality, European law, and Human Rights law. A brief description of each and relevant consideration of the practical degree to which they limit the provision of affordable housing via planning obligations follows.

First, planning obligations must not be *ultra vires*—that is, they must fall within the parameters set out in the statute authorizing them. The Town and Country Planning Act 1990 allows landowners to enter into obligations:

- (a) restricting the development or use of the land in any specified way;
- (b) requiring specified operations or activities to be carried out in, on, under or over the land;
- (c) requiring the land to be used in any specified way; or

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95 Tesco Stores Ltd. v. Sec’y of State for the Env’t [1995] 1 WLR 759 (HL) 780 (Lord Hoffmann) (appeal taken from Eng.) (“If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local authority or the Secretary of State.”).

(d) requiring a sum or sums to be paid to the authority . . . on a specified date or dates or periodically. 97

In practice, there is little difficulty in ensuring that planning obligations securing the provision of affordable housing come within these requirements. Affordable housing is generally provided under the Town and Country Planning Act 1990 in one of three ways:

1. On-site provision, in which a proportion of the dwellings in the new development must be affordable. 98 It is the expectation of national policy that affordable housing be provided on-site, unless alternative forms of provision can be robustly justified. 99

2. Off-site provision, in which the developer must secure provision of affordable housing on a different site, equal to the number of units they would have been required to provide on-site. 100 In this case, the planning obligation prevents development or occupation of the subject site until the off-site affordable housing has been completed.

3. Financial contribution in lieu, in which the developer must pay a financial contribution to the local authority for the provision of affordable housing. 101 In principle, the financial contribution will be the amount required to enable the local authority to build or acquire the number of affordable units that the developer would have otherwise been required to provide on-site.

It follows that it is extremely unlikely that a properly drafted planning obligation securing affordable housing would ever be deemed ultra vires.

Second, even if a planning obligation is intra vires, it must constitute a “material consideration” in order to lawfully affect a decision on whether to grant planning permission. 102 English common law has always made “a clear distinction between the question of whether something is a material consideration and the

97 Town and Country Planning Act 1990, c. 8, § 106(1).
98 See id. § 106(1)(c).
99 See NPPF, supra note 12, ¶ 62(a).
100 See Town and Country Planning Act 1990, c. 8, § 106(1)(a).
101 See id. § 106(1)(d).
weight which it should be given.” The former is a question of law; the latter is a question of planning judgment, which, as explained above, is entirely a matter for the local authority. In practice, the common law requirement of materiality has not acted as a significant restriction on developer contributions, including for the provision of affordable housing. This is because the case law has established a very low threshold for materiality in the context of planning obligations: in order for a planning obligation to be material, it must merely have “more than a trivial connection” with the proposed development. It is hard to think of a case in which the provision of affordable housing would not meet this criterion.

Third, Parliament has legislated so as to apply a more stringent statutory test for the materiality of planning obligations than that found at common law. The Community Infrastructure Levy Regulations 2010 provide that:

A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—

(a) necessary to make the development acceptable in planning terms;

(b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development.

Despite the absence of any statutory language expressly indicating that it is for local authorities, as opposed to the court, to determine whether these criteria are met, the English courts have repeatedly declined invitations to intervene on matters of planning judgment. Instead, it has been held that:

[T]he role for the [local authority] is to apply the law and to judge whether the obligation . . . meets the statutory tests. That is a matter for his planning judgment. The role of the court is to review that judgment on conventional public law principles and no more. It is not to step into the [local authority] and start exercising its

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103 Id.


105 Community Infrastructure Levy Regulations 2010, SI 2010/948, § 122(2).
own planning judgment . . . . That would be an impermissible exercise of its powers.\textsuperscript{106}

It is possible to conceive of situations in which a planning obligation providing for affordable housing would fail the statutory tests. For instance, a financial contribution in lieu of affordable housing might exceed an amount which is “fairly and reasonably related in scale and kind to the development.”\textsuperscript{107} In most cases, however, so long as the need for affordable housing in the area is clearly evidenced (as it will be in most cases through the local plan), and so long as the amount of affordable housing or financial contribution in lieu is calculated in a transparent and consistent manner, then the planning obligation will be found to meet the statutory tests. Moreover, the reluctance of the English courts to enter into the arena of “planning merits” and determine for themselves whether the statutory tests are satisfied means that the statutory criteria are not always applied by local authorities with a consistent degree of rigor.

In terms of European law (which will not apply directly to the United Kingdom if and when Brexit is completed), the Court of Justice of the European Union has held that, while imposing a requirement to provide affordable housing on economic operators constitutes a restriction of the free movement of capital, it “may be justified by requirements relating to social housing policy in a Member State as an overriding reason in the public interest.”\textsuperscript{108} The European Court held that it was for the courts of individual member states to determine whether such requirements are “necessary and appropriate to attain the objective of guaranteeing sufficient housing for the low-income or otherwise disadvantaged sections of the local population.”\textsuperscript{109}

Finally, it should be noted that the Human Rights Act 1998, which incorporated the European Convention on Human Rights (ECHR) into domestic law (and so will continue to apply if Brexit is completed), has not proven to be an obstacle to local authorities in requiring the provision of affordable housing on residential developments.\textsuperscript{110} Article 1 of Protocol No. 1 of the ECHR establishes a person’s right to “peaceful enjoyment of his possessions” and draws a distinction

\textsuperscript{106} Smyth v. Sec’y of State for Communities & Local Gov’t [2013] EWHC (Admin) 3844 [192] (Patterson J), aff’d, [2015] EWCA (Civ) 174.

\textsuperscript{107} Community Infrastructure Levy Regulations 2010, SI 2010/948, § 122(2)(c).


\textsuperscript{109} Id. ¶ 69.

between the “deprivation of property” and mere “control of use.”111 Both forms of interference “must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised.”112 However, while the former normally requires payment of compensation to avoid a breach of the Article, the latter generally does not—even if the control results in serious financial loss.113 Moreover, the English courts afford the state a “wide margin of appreciation” in relation to the planning policy and its implementation.114 There is no reported English case suggesting that the principle of requiring developers to provide affordable housing as a pre-requisite to the granting of planning permission would be a breach of Article 1 of Protocol No. 1, and it is likely that such a challenge, if it were brought, would receive short shift in either the domestic or European courts.115

As such, there are only limited legal restrictions with respect to the use of, and requirement for, planning obligations to secure the provision of affordable housing in England. This is not to say that disputes over affordable housing provision do not occur. They do. But, rather than playing out in the courts on legal grounds, these disputes primarily occur before administrative decision-makers on a plan-by-plan and development-by-development basis, and turn on merits-based arguments concerning the need for affordable housing in the relevant area and the viability of the plan or development at issue.

IV. APPLES AND ORANGES

Various local governments in the American and English planning regimes have sought to be aggressive in maximizing (within legal and political constraints) the supply of low- and moderate-income housing by way of regulation and other means exclusive of funding it themselves. There is a well-documented shortage of housing in the United States, particularly on the low-
The income end of the spectrum, the Supreme Court’s takings and substantive due process jurisprudence, combined with a legal-political culture that gives great weight to property interests, plays a significant role in assessing what state and local governments can lawfully undertake to provide for affordable housing by way of regulation.

In England, while the problem of affordable housing is, if anything, more pressing—some forty percent of young adults cannot afford even modest homes, and the need for social housing continues apace—the cause cannot seriously be attributed to legal restrictions. European, human rights, statutory, and common

116 See Bryce Covert, The Deep, Uniquely American Roots of our Affordable-Housing Crisis, NATION (May 24, 2018), https://www.thenation.com/article/give-us-shelter/ (observing that nearly half of all American renters cannot afford rent, as it is thirty percent or more of their income, and that, at any one time, there are 500,000 homeless individuals in the United States); 151 Years of America’s Housing History, NATION (May 24, 2018), https://www.thenation.com/article/americas-housing-history/ (discussing federal and some state efforts related to public housing); NAT’L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES (2017), https://nlihc.org/sites/default/files/Gap-Report_2017.pdf (presenting an expansive discussion of definitions, the status of all housing at the time, the need for more affordable housing, federal and state programs to fulfill that need, and various policy recommendations).

117 See, e.g., Justice Scalia’s majority opinion in Lucas v. South Carolina Coastal Council, which justifies differential limitations on property regulation:

It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; “[a]s long recognized, some values are enjoyed under an implied limitation, and must yield to the police power.” Pennsylvania Coal Co. v. Mahon, 260 U.S. at 413. And in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property’s only economically productive use is sale or manufacture for sale). See Andrus v. Allard, 444 U.S. 51, 66–67 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the “implied limitation” that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.


law requirements do not place any substantive restrictions on what local authorities can demand from developers by way of affordable housing. Instead, the limitations on affordable housing delivery stem primarily from social, political, and economic—rather than legal—considerations.

To assess the lawfulness of using development conditions and planning obligations to require the inclusion of low- and moderate-income housing in the jurisdictions under consideration, this paper will consider two separate categories of requirements: those imposed by general policy or legislation and those imposed on an ad hoc basis.

A. Requirements Imposed by General Legislation or Policy

In the United States, there is generally no individualized administrative review by state agencies of local plans or land use regulations before their adoption and application. American courts, on the other hand, seem unable to resist the temptation of reviewing and influencing social policy in the guise of constitutional adjudication. The traditional weapon of choice in these cases was at one time the Due Process Clause of the Fourteenth Amendment, which was applied to land use regulations in the first zoning case, Village of Euclid v. Ambler Realty Co.119 Although “substantive due process,” has been in decline since West Coast Hotel Co. v. Parrish120 and the famous “footnote 4” in United States v. Carolene Products Co.,121 the doctrine is still alive in two ways. First, notwithstanding its formal rejection of substantive due process as an element of takings litigation, the United States Supreme Court still uses broad, extra-constitutional phrases like “justice and fairness” to justify intrusive review into ad hoc state and local land use decision-making, though not yet applying those terms at the policy-making level.122 Second, state courts continue to follow pre-1937

119 272 U.S. 365 (1926).
120 300 U.S. 379 (1937).
121 304 U.S. 144, 152 n.4 (1938). This footnote attempted to limit the use of substantive due process to legislation that either violates specific constitutional protections, restricts political processes, or harms “discrete and insular minorities.” Id.
122 The Supreme Court’s first two “conditions” cases, Nollan and Dolan, both referred to a passage from Armstrong v. United States, 364 U.S. 40, 49 (1960), to the effect that one of the principal purposes of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 835 n.4 (1987); Dolan v. City of Tigard, 512 U.S. 374, 384 (1994). Then there is the bold and unsupported comment regarding the special constitutional status of land under the Takings Clause as part of our “constitutional culture.” Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 (1992). In addition, there is the resurrection of the “unconstitutional conditions” doctrine in Dolan and Koontz. Dolan, 512 U.S. at 385; Koontz v. St.
federal precedent when interpreting their own state constitutional due process clauses.\footnote{123} To the extent that the doctrine is still alive, however, a landowner seeking to challenge legislation or policy on substantive due process grounds has a difficult burden.\footnote{124}

As mentioned in Part II, the United States Supreme Court has been reticent to entertain facial takings challenges to laws or policies that might, in some applications, be constitutional and valid. For example, in \textit{Keystone Bituminous Coal Ass’n v. DeBenedictis},\footnote{125} which involved mining regulations similar to those found unconstitutional in \textit{Pennsylvania Coal Co. v. Mahon}\footnote{126} except for the availability of administrative relief, the Court refused to find the regulations unconstitutional unless and until such administrative relief had actually been sought.\footnote{127} Thus, in order to be “ripe” for judicial review, an applicant must have utilized all available administrative remedies before bringing

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\footnote{123} See, \textit{e.g.}, J. Peter Byrne, \textit{Due Process Land Use Claims After Lingle}, 34 \textit{Ecology} L.Q. 471 (2007).

\footnote{124} Justice O’Connor’s opinion in \textit{Lingle v. Chevron U.S.A. Inc.} sets out this heavy burden and contrasts it with the various tests in a takings inquiry:

> Although \textit{Agins}’ reliance on due process precedents is understandable, the language the Court selected was regrettably imprecise. The “substantially advances” formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. See, \textit{e.g.}, \textit{County of Sacramento v. Lewis}, 523 U. S. 833, 846 (1998) (stating that the Due Process Clause is intended, in part, to protect the individual against “the exercise of power without any reasonable justification in the service of a legitimate governmental objective”). But such a test is not a valid method of discerning whether private property has been “taken” for purposes of the Fifth Amendment.

\footnote{125} 480 U.S. 470 (1987).

\footnote{126} 260 U.S. 393 (1922).

a takings claim to the courts. This requirement, that a land use decision be “final” before it is justiciable, is deeply rooted in American takings jurisprudence.

As set out in Part III, there is no legislative requirement for residential developments to provide affordable housing in England. Nor does national policy stipulate a uniform percentage of residential development which must be affordable. Instead, the requirement to provide affordable housing is found in planning policies promulgated at the local level. While local plans almost invariably require some degree affordable housing contribution from residential developments within their area, the amount and type of that contribution very much depends on the socio-economic characteristics of the area in question. Importantly, the “requirement” to provide affordable housing in local plans is merely a policy requirement. It does not have the force of law. While there is a statutory presumption that the policies in local plans—including those for

128 See Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). As the Court observed in that case:

As in Hodel, Agins, and Penn Central, then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although “[t]he question of what constitutes a ‘taking’ for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty,” this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Id. at 190–91 (emphasis added) (citations omitted). In Agins v. City of Tiburon, the landowner had not even applied for development before making a facial challenge to the land use regulation at issue. See 447 U.S. 255, 260 (1980). Similarly, in Penn Central Transportation Co. v. City of New York, the plaintiff railroad had neither appealed the historic designation of its property nor challenged previous development denials before bringing an unsuccessful facial challenge. See 438 U.S. 108, 115–16, 118 (1978).

129 For approximately 34 years, in addition to Williamson County’s “final decision” requirement, landowners with takings claims against state and local governments were generally required to utilize state procedures before bringing those claims in federal court. See Williamson County, 473 U.S. at 194-95. In June of 2019, however, the Supreme Court overruled this “state litigation” requirement. See Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019); Edward J. Sullivan, In the Knick of Time: The Supreme Court Provides Direct Relief to Takings Claimants, 42 ZONING & PLAN. L. REP., Oct. 2019.
affordable housing—will be applied, that presumption is rebuttable on a case-by-case basis.\footnote{See infra Section IV.B (discussing ad hoc requirements).}

Further, legal limits on the amount of affordable housing that local plans can require are more theoretical than real. It might be the case, for instance, that a policy requiring eighty or ninety percent of new homes to be affordable would run afoul of both European Union law on free movement of capital and Article 1 of Protocol No. 1 of the European Convention on Human Rights on the basis that such an imposition would be disproportionate. In reality, though, legal limitations present little, if any, difficulties for local authorities wishing to justify policies requiring significant affordable housing contributions from residential developers. Instead, disputes over those requirements involve merits-based arguments concerning the need for affordable housing in the relevant area and the impact of those requirements on the viability of the development. Meta-legal review of the kind found in the United States, where broad constitutional provisions may affect the legal viability of local planning policy, is simply not a factor.

**B. Requirements Imposed on an Ad Hoc Basis**

In America, while there is a plethora of cases in which the application of land use regulations is challenged under substantive due process, Supreme Court precedent has yet to evaluate development conditions on those grounds.\footnote{The reason for this may lie in the peculiar history of Supreme Court review of land use cases. Among the first “as applied” cases was Nectow v. City of Cambridge, in which the validity of “split lot” zoning designations was measured against a substantive due process standard. See 277 U.S. 183 (1928). While the first four American land use cases, decided between 1926 and 1928, used only substantive due process to evaluate constitutional claims, the Supreme Court did not review another land use case until 1978. See Penn Cent. Transp. Co. v. City of New York. 438 U.S. 104 (1978). By that time, substantive due process was largely unutilized, if not discredited, and the Court began to evaluate the constitutionality of land use regulations under the Takings Clause. This is not to say that substantive due process has played no role in the recent constitutional adjudication of land use disputes. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494 (1977). In Moore, the Court concluded that a local government could not define “family” for zoning purposes to prohibit a grandmother from living with her two grandsons from different parents. See id. As such, the Takings Clause was inapplicable. The case is sui generis, however, and has not been used to create a new constitutional test.} And while the Takings Clause is the current weapon of choice since Penn Central Transportation Co. v. City of New York,\footnote{438 U.S. 104 (1978).} the application of that doctrine to land use matters has hardly amounted to more than a series of “judgment calls.” In determining whether a regulatory taking has occurred, Penn Central does not
speak in terms of a checklist of elements, but rather a set of “factors” rooted in the factual circumstances of each case.\textsuperscript{133} Due to their shifting nature, the application of these factors in one case often provides little useful guidance for their application in subsequent cases.\textsuperscript{134}

In cases involving development conditions, application of the Takings Clause requires a court to determine whether there is a “nexus” between the condition itself and a legitimate ground for permit denial\textsuperscript{135} and whether the condition is “roughly proportional” to the purported harm caused by granting the permit.\textsuperscript{136} More significant is the shifting of the burden to the local government to justify conditions requiring the dedication of land under \textit{Nollan} and \textit{Dolan}, and the performance of public works or payment of money after \textit{Koontz}.

No party can be certain of the outcome in such a situation. The developer puts her development in jeopardy by challenging conditions—investing in uncertain litigation and putting future relations with the local government at risk. Local governments risk engendering civil rights claims, with the prospect of having to pay damages, attorney fees, and costs should the developer prevail. The flexibility and uncertainty of judicial review criteria make all parties uneasy.

In England, the lack of any legislative requirement to provide affordable housing necessarily means that affordable housing provision is secured on a case-by-case basis. As noted in Part I, however, securing planning permission for residential developments of ten or more dwellings will generally be contingent on a proportion of those dwellings being affordable. If a landowner-developer fails to provide a sufficient amount of affordable housing this can, and often does, justify a denial of planning permission for the development. Ordinarily, the amount of affordable housing will only be considered sufficient if it is “policy-compliant” (i.e., at a level consistent with the relevant local plan). In individual cases, however, landowner-developers may justify providing a lower level of affordable housing, particularly where it can be demonstrated that the affordable housing requirement would, when taken together with all of the other developer contributions, render the development unviable. Despite its apparent \textit{ad hoc} nature, as is borne from empirical evidence set out in Part III, affordable housing

\textsuperscript{133} See \textit{supra} note 47 and accompanying text.

\textsuperscript{134} There are, however, two “categorical” takings (i.e., circumstances under which a taking is found in almost every case): physical invasions and the denial of all viable economic use of land. \textit{See supra} notes 48–50.

\textsuperscript{135} See \textit{supra} note 51–52 and accompanying text.

\textsuperscript{136} See \textit{supra} note 53–54 and accompanying text.
provision is a central part of the English planning system. Save for small developments of fewer than ten houses, or larger developments where viability is an issue, the provision of affordable housing is virtually a pre-requisite to the granting of planning permission for residential development.

Again, the law in England plays a limited role in determining when affordable housing is required and, when it is, the requisite level and type. These are matters of planning judgment for local authorities and, on appeal, the Secretary of State for Housing, Communities, and Local Government. They are not questions that the courts will entertain. Moreover, the legal limitations on such obligations are primarily procedural in nature and, even where substantive, are easily met.

V. Conclusion

Oscar Wilde may have said it first when describing the relationship between England and America: “[W]e have really everything in common with America nowadays, except, of course, language.” Language aside, the legal systems of the two countries, while sharing a common heritage, are divergent in their views of personal, planning, and property rights and, where constitutionally permissible, have responded to the necessities of time and place (in this case, the need to provide affordable housing) in very different ways.

In the United States, constitutional objections, both perceived and actual, and the prospect of civil rights litigation, give more leverage to the landowner-developer. In particular, uncertainty over whether conditions requiring affordable housing can, consistent with the Takings Clause, be imposed at all or only in certain circumstances is a very real concern. Given the incremental, and very occasional, nature of constitutional litigation, the tendency may, at least in the short run, be to find other ways to deal with the issue. To avoid litigation and its costs (in time, funds, and uncertainty), Americans may find it easier to affirmatively incentivize developers to provide affordable housing sooner, rather than later, and in greater numbers.

England combines the legislative and executive functions through a ministerial system with ultimate parliamentary authority and fewer constitutional

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137 Such as the requirement to comply with section 106 of the Town and Country Planning Act 1990. See supra Section III.C.


139 OSCAR WILDE, THE CANTERVILLE GHOST (1887).
constraints. Thus, policy may be implemented more quickly, and the allocation of costs and benefits is primarily a political, social, and economic calculus, rather than a legal one. The accepted discretionary nature of planning permission adds another level of flexibility to the process and provides local governments with more leverage to negotiate with developers over affordable housing than they possess in the United States. Much, then, will depend on the government of the day, as well as the individual decision-maker.

In an era of population growth, cash-strapped local governments, and a desperate need for shelter, the problems associated with providing affordable housing are not going away anytime soon. Both England and the United States have apparent similarities in their legal systems; however, their approaches to providing sufficient affordable housing have widely divergent limitations and social and political expectations. Oscar Wilde’s comment is thus applicable to affordable housing, as well: we have a common need to secure the provision of affordable housing, but our legal language to achieve that end is a study in cacophony.