

# INCLUSIONARY HOUSING: CURRENT LEGAL ISSUES

1



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# ISSUE 1: RENTAL HOUSING

2



## Rental inclusionary as rent control

- ▣ *Palmer/Fifth St. Properties v. City of Los Angeles*
- ▣ Owner must be able to set the initial rent and rent upon vacancy
- ▣ **Unless** monetary or regulatory incentive; AND owner signs contract
- ▣ Result: no pure rental inclusionary
- ▣ AB 1229 vetoed

# ISSUE 1: SOLUTIONS

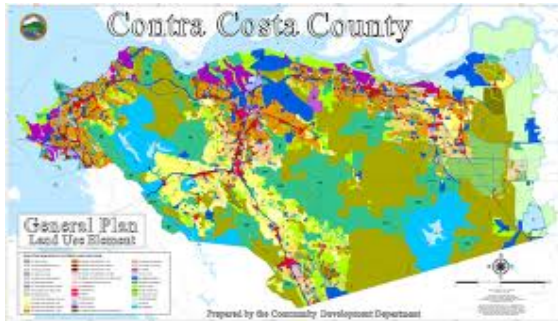
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- Rental housing impact fee
- Condo maps, initially rented:
  - ▣ Pay rental housing impact fee; or
  - ▣ Deed-restrict individual units in the event of sale.

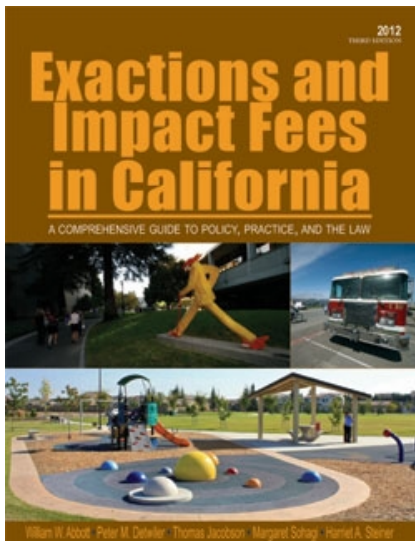
# ISSUE 2: EXACTION OR ZONING?

4



## Inclusionary: Land Use Control? Exaction?

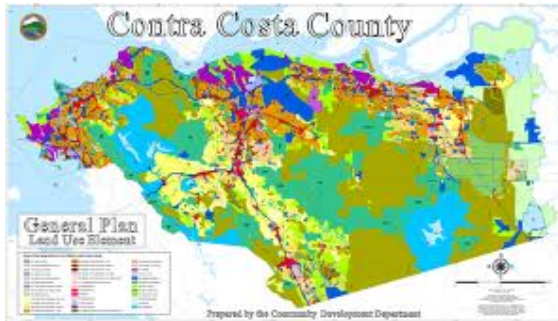
- *CBIA v. City of San Jose*
- Issue: Are inclusionary requirements like zoning or like impact fees?
- Is a nexus study needed to justify inclusionary requirements?





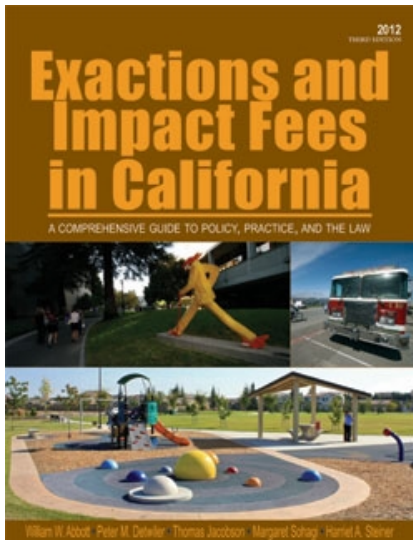
# ISSUE 2: EXACTION OR ZONING?

5



## Effect of *Koontz v. St. John's Water Mgmt. Dist.*

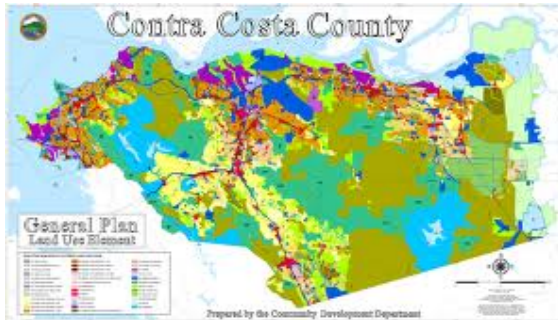
- *Nollan/Dolan* extends to:
  - Mitigation **fee** payments (+ land dedications) imposed *ad hoc*
  - Denial of permit (but not a taking)
- Open question: extension to ordinances of general application?  
Or *San Remo*?



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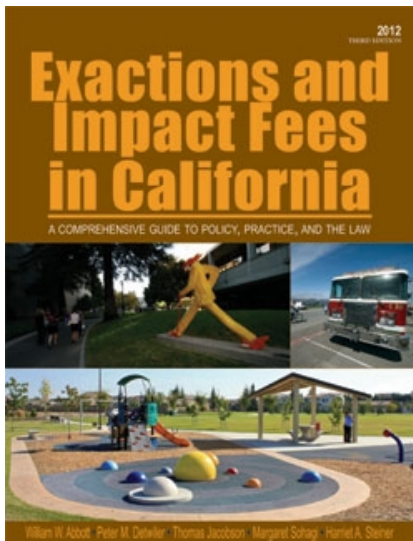
# ISSUE 2: EXACTION OR ZONING?

6



## Effect of *Koontz v. St. John's Water Mgmt. Dist.*

- Cautions in negotiating for affordable housing and other City benefits



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# ISSUE 2: SOLUTIONS

7



- Assume it is an exaction. Do a nexus study **now** to prepare for possibly unfavorable decision.
- Include an economic feasibility study.
- Allow for waivers & individual calculations.
- Be very careful in negotiating for additional benefits.

# ISSUE 3: LATE PROTESTS

8

## ***Sterling Park v. City of Palo Alto***

- Condition requiring payment of money or transfer of possessory interest in real property is an “other exaction” and may use protest provisions of MFA
- BMR in-lieu fees an “other exaction;” on-site affordable units an “other exaction” because City had option to purchase property



# ISSUE 3: SECTION 66020

9

- ❑ Must give notice of “amount of fees,” dedications, reservations or other exactions, ***including right to protest within 90 days***, at time of project approval or when fee, etc. imposed
- ❑ Suit must be filed within 180 days of City notice
- ❑ Protest must include payment under protest or “satisfactory arrangements” to perform
- ❑ Developer may continue with project in most cases

# ISSUE 3: SOLUTIONS

10

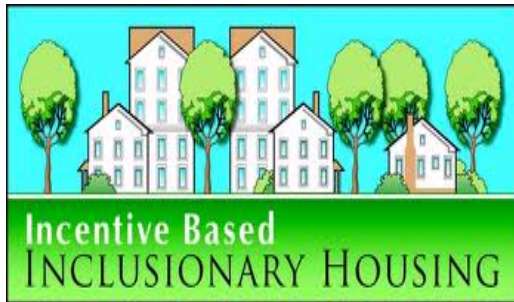
- Standard condition to all planning approvals of right to protest.
- Provide as much detail as possible at time of planning approval.
- Provide additional notice if fees increase, etc.
- Note exhaustion requirement.

## ***Question:***

- Outstanding approvals for which no notice was given.

# ISSUE 4: IZ V DENSITY BONUSES

11



## ***Latinos Unidos v. Napa County***

- Density bonuses and concessions must be given for inclusionary units



# CONTENT OF A NEXUS STUDY

12

## Impact Fees



Based on the *need created for affordable housing* by construction of market-rate housing

- Use of land
- Employment generation

*Use* must be related to *impact* (housing serving employees)

# LEGAL ISSUES: NEXUS STUDIES

13



- **Potential challenges to nexus studies and impact fees**
  - ▣ One case: *Commercial Builders v. City of Sacramento*
  - ▣ Do jobs follow housing [suburbs], or does housing follow jobs [Gold Rush]?
- | Courts have generally upheld impact fees if supported by a well constructed fee study
- Don't be aggressive



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