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Stonewalled by Seawall: New York Decision Impedes Legislative Solutions to Affordable Housing Shortage

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I. INTRODUCTION

Homelessness is increasing primarily because of a lack of affordable housing.¹ Since 1981, funding for federal housing has declined by seventy-five percent, exacerbating the problem.² Local governments³ are seeking solutions to the housing crisis by implementing innovative programs designed to preserve or create housing for the poor.⁴ The recent experience of New York City ("City"), chronicled in the recent case *Seawall Associates v. City of New York*,⁵ is a sad example of the difficulty municipalities face in trying to balance the rights of the poor against the rights of private property owners.

One important source of low-income housing is single room occupancy units ("SRO's").⁶ SRO's are low-cost residential hotels, rooming houses, or converted apartment buildings in which people rent single, furnished rooms.⁷ SRO's contain shared bathroom and kitchen facilities, and often include management services, such as twenty-four-hour desk service, telephone switchboards, linens, and

1. Of 27 cities surveyed by the U.S. Conference of Mayors, every city cited the lack of housing affordable by low-income people as the main cause of homelessness. U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES: 1989, at 2 (1989); see also NATIONAL COALITION FOR THE HOMELESS, HOMELESSNESS IN THE UNITED STATES: BACKGROUND AND FEDERAL RESPONSE—A BRIEFING PAPER FOR CONGRESSIONAL CANDIDATES 74 (1988) [hereinafter NATIONAL COALITION].

2. Since 1981, the federal budget for subsidized and public housing programs has been cut from \$32 billion to \$7.5 billion. NATIONAL COALITION, *supra* note 1, at 75. But see Ellickson, *The Homelessness Muddle*, 99 PUB. INTEREST 45, 54 (1990) (arguing that "[f]ederal spending on low-income housing programs actually increased sharply during the 1980s" because the Reagan administration simply shifted funding from one low-income housing program to another).

3. Municipalities must wrestle with the growing problem of homelessness because there is no federal constitutional right to housing. See, e.g., *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) ("Absent a constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial functions."). The Housing Act of 1937 and the Brooke Amendment have conferred benefits upon tenants that "are sufficiently specific and definite to qualify as enforceable rights." *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 432 (1987). Although these laws provide a low-cost housing initiative for the few who qualify, *id.* at 420, they do not grant a right to housing itself.

4. See *infra* notes 355-499 and accompanying text for a discussion of some of these programs.

5. 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989).

6. Werner & Bryson, *A Guide to the Preservation and Maintenance of Single Room Occupancy (SRO) Housing* (pts. I & II), 15 CLEARINGHOUSE REV. 999, 1000 (1982). SRO's provide more than an inexpensive room for the single working poor. They provide management, security, independence, and society while being conveniently located to community services. C. HOCH & R. SLAYTON, *NEW HOMELESS AND OLD* 155-62 (1989).

7. Werner & Bryson, *supra* note 6, at 1000.

housekeeping.⁸ From 1970 to 1982, abandonment and gentrification⁹ wiped out, by some estimates, 1,116,000 SRO's, over half of the nation's stock.¹⁰ From 1974 to 1989, New York City alone lost over 100,000 units.¹¹ By and large, the City's loss resulted from its previous policy that encouraged the destruction of SRO's in the belief that they were substandard housing.¹² The City's J-51 tax abatement, along with rising property values, gave developers an incentive to renovate or demolish SRO's.¹³ However, by limiting tenant eviction, rent control laws made it difficult to capture the tax abatement.¹⁴ Consequently, in anticipation of later development, many owners illegally coerced tenants to move and then let the units stand vacant.¹⁵ As a result, the number of SRO's available for rental rapidly decreased while homelessness increased.

Beginning in 1982, the City changed its policy in order to "fore-

8. *Id.*

9. Gentrification describes the process whereby rundown, but often occupied neighborhoods, are "reclaimed" for residential use by high-income owners/tenants. Low-income residents are displaced while land values in the surrounding areas rise, causing a further spread of the phenomenon. Hopper, Susser & Conover, *Economies of Makeshift: Deindustrialization and Homelessness in New York City*, 14 URB. ANTHROPOLOGY 11, 12 (1985). See generally Marcuse, *Gentrification, Abandonment, and Displacement: Connections, Causes, and Policy Responses in New York City*, 28 WASH. U.J. URB. & CONTEMP. L. 195 (1985) (noting that gentrification displaces low-income individuals and increases pressures on housing and rents); Comment, *Displacement in Gentrifying Neighborhoods: Regulating Condominium Conversion Through Municipal Land Use Controls*, 63 B.U.L. REV. 955 (1983) (explaining that gentrification displaces tenants who can no longer afford to live in newly refurbished neighborhoods).

10. Hopper & Hamberg, *The Making of America's Homeless: From Skid Row to New Poor, 1945-1984*, in CRITICAL PERSPECTIVES ON HOUSING 23 (R. Bratt, C. Hartman & A. Meyerson eds. 1986).

11. Brief of Defendants-Intervenors-Appellees at 1, *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (No. 20891/86), *cert. denied*, 110 S. Ct. 500 (1989) [hereinafter Intervenor's Brief].

12. Municipal Respondents' Brief at 3, *Seawall* (No. 20891/86) [hereinafter Municipal Respondents' Brief]. SRO's are still considered substandard housing, but City policy has changed to recognize that substandard housing is better than sleeping on the streets. *Id.*

13. NEW YORK, N.Y., ADMIN. CODE § J51-2.5 (1979) (Local Laws No. 77) (repealed 1983) provided a tax exemption for the renovation of SRO's. See *Replan Dev. v. Department of Hous. Preservation & Dev.*, 70 N.Y.2d 451, 454, 517 N.E.2d 200, 201, 522 N.Y.S.2d 485, 486 (1987), *appeal dismissed*, 485 U.S. 950 (1988).

14. "[U]nder rent control and rent stabilization laws, the vacating of dwelling units by their occupants occurs usually by death, changed circumstances causing a willingness to move, or through a negotiated buy-out for significant consideration." Brief of Plaintiff-Appellants *Seawall Associates* at 52, *Seawall* (No. 20891/86) [hereinafter *Seawall Brief*]. Landlords seeking the tax benefits or profits that would accrue from replacing SRO's with other housing often used coercive tactics to pressure tenants to leave. Municipal Respondents' Brief, *supra* note 12, at 4.

15. Municipal Respondents' Brief, *supra* note 12, at 4.

stall the loss of SRO's"¹⁶ and address tenant harassment problems.¹⁷ It repealed the J-51 tax abatement¹⁸ and passed anti-eviction¹⁹ and anti-harassment laws.²⁰ Still, the number of SRO's continued to decline.²¹ In 1985, the City declared that the loss of SRO's constituted a "serious public emergency" and placed an eighteen-month moratorium on their demolition or conversion to allow time to study the housing crisis.²² City studies reflected a correlation between the loss of SRO's and an increase in homelessness.²³ In 1987, realizing that only 52,000 SRO's remained,²⁴ the City passed Local Law No. 9.²⁵

Local Law No. 9 extended the moratorium on the demolition

16. *Id.* at 4-5 (quoting *Replan*, 70 N.Y.2d at 457, 517 N.E.2d at 203, 522 N.Y.S.2d at 488).

17. *Id.*

18. *Replan*, 70 N.Y.2d at 454, 517 N.E.2d at 201, 522 N.Y.S.2d at 486. The J-51 tax abatement was repealed on June 30, 1983, retroactive to June 1, 1982. *Id.*

19. NEW YORK, N.Y., ADMIN. CODE § 26-521 (1982) (Local Laws No. 56) imposed criminal sanctions for unlawful evictions. Local Law No. 56 also provided funding for a special housing unit to prosecute illegal harassment of SRO tenants. *See* Intervenor's Brief, *supra* note 11, at 7.

20. NEW YORK, N.Y., ADMIN. CODE § 27-198 (1983) (Local Laws No. 19) conditions permits to demolish or convert SRO's on certification of no harassment for the previous three years. *See* Municipal Respondents' Brief, *supra* note 12, at 5. Otherwise, no permit may be issued for three years. *Id.*

21. Municipal Respondents' Brief, *supra* note 12, at 5.

22. In enacting Local Law 59, the City Council declared that the loss of SRO's constituted a serious public emergency:

The Council hereby finds and declares that a serious public emergency exists . . . caused by the loss of single room occupancy dwelling units housing lower income persons; . . . that many of such occupants are elderly and infirm persons of low income who are incapable of finding alternative housing accommodations; that a considerable number of such persons have become part of a growing homeless population; that the intervention of the city government is necessary to protect such housing stock by imposing a moratorium on conversions, alterations and demolitions of single room occupancy multiple dwellings; that during such moratorium the department of housing preservation and development . . . shall arrange for the preparation of a study to determine the best means of making available single room occupancy dwelling units and other housing for low income persons . . .

New York, N.Y., Local Laws No. 59, § 1 (1985); Municipal Respondents' Brief, *supra* note 12, at 6.

23. Municipal Respondents' Brief, *supra* note 12, at 6 (citing Blackburn, Single Room Occupancy in New York City (Feb. 1986) (study conducted for and available from Urban Systems Research & Engineering, New York, New York). This phenomenon also has been documented in other cities. *See* Huttman, *Homelessness as a Housing Problem in an Inner City in the U.S.*, in AFFORDABLE HOUSING AND THE HOMELESS 159 (J. Friedrichs ed. 1988).

24. Brief for Appellants 459 West 43rd Street Corp. at 30, *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (No. 20891/86), *cert. denied*, 110 S. Ct. 500 (1989) [hereinafter 459 West Brief].

25. Municipal Respondents' Brief, *supra* note 12, at 8.

and conversion of SRO's for an additional five years.²⁶ Further, it imposed obligations on SRO owners to rehabilitate and make every SRO in their building habitable, and to rent the units at rent-controlled rates ("rent-up" or "anti-warehousing" provision).²⁷ The City tried to strike a balance between the competing interests of the poor and the private property owners by including three escape mech-

26. Initially, Local Law No. 22 of 1986 extended the moratorium through the end of 1986. *Seawall*, 74 N.Y.2d at 99-100, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544. Local Law No. 22 also imposed affirmative rental and rehabilitation obligations on SRO owners along with monetary penalties for noncompliance. *Id.* On a constitutional challenge, Local Law No. 22 was declared invalid under the due process clause. *Seawall Assocs. v. City of New York*, 134 Misc. 2d 187, 510 N.Y.S.2d 435 (Sup. Ct. 1986), *later proceeding*, 138 Misc. 2d 96, 523 N.Y.S.2d 353 (Sup. Ct. 1987) (invalidating Local Law No. 9, which replaced Local Law No. 22), *rev'd*, 142 A.D.2d 72, 534 N.Y.S.2d 958 (App. Div. 1988), *rev'd*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989). The court held that in requiring the creation of tenancies, "Local Law No. 22 places petitioners in a business, forces them to remain in that business and refuses to allow them to ever cease doing business These regulations impose an unreasonable and arbitrary scheme and frustrate plaintiff's property rights without due process of law." *Id.* at 197, 510 N.Y.S.2d at 443. Without perfecting an appeal, the City passed Local Law No. 9. *Seawall*, 74 N.Y.2d at 100, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544. Under Local Law No. 9, owners could not convert, demolish, or alter SRO's for five years. New York, N.Y., Local Laws No. 9, § 7 (Nov. 5, 1987). The City moratorium could renew for additional five-year periods if the City found that the serious public emergency continued to exist. *Id.*

27. Subdivision 27-2151[a] was referred to as the "rent-up" or "anti-warehousing" provision. It provided:

[A]n owner of a single room occupancy multiple dwelling . . . shall have a duty (1) to make habitable and maintain in a habitable condition all single room occupancy dwelling units and (2) to rent such habitable single room occupancy dwelling units to bona fide tenants . . . at rents no greater than the rent authorized by law.

NEW YORK, N.Y., ADMIN. CODE § 27-2151[a] (1987).

In addition, as an inducement to comply with subdivision 27-2151[a], subdivisions 27-2152[d] and [e] provided:

d. For purposes of this section there shall be a rebuttable presumption that an owner has violated the provisions of subdivision a of section 27-2151 if a single room occupancy dwelling unit is not occupied by a bona fide tenant for a period of thirty days or longer.

e. 1. An owner who violates the provisions of subdivision a of section 27-2151 shall be subject to a civil penalty of five hundred dollars for each single room occupancy dwelling unit cited in the notice and order issued pursuant to subdivision a of this section. In addition, an owner who fails to comply with the order within the time specified in the order . . . shall be subject to a civil penalty of two hundred fifty dollars per day for each dwelling unit to be calculated from a date ten days after service of the order to the date of compliance therewith.

Id. § 27-2152[d]-[e][1].

anisms in Local Law No. 9: the buy-out,²⁸ the replacement,²⁹ and the hardship³⁰ provisions. The buy-out provision allowed owners to seek exemption from the law by paying \$45,000 per unit to a housing fund.³¹ The replacement provision allowed owners to replace SRO's with dwelling units affordable to persons of low and moderate income prior to issuance of a building permit.³² The hardship provision exempted owners who could prove that they could not earn a "reasonable rate of return"³³ from the rental of SRO units. Local Law No. 9 defined "reasonable rate of return" as eight and one-half per-

28. *Id.* § 27.198.2[d][4][a][i]. Under the buy-out provision, the conversion, alteration, and demolition prohibitions did not apply if:

Prior to issuance of a permit for work which would otherwise by [sic] prohibited [hereunder,] the owner of such single room occupancy multiple dwelling . . . provide[d] for the replacement of the single room occupancy dwelling units which would be altered, converted or demolished by paying to the single room occupancy housing development fund company . . . for each dwelling unit which would be altered, converted or demolished as a result of the work, forty-five thousand dollars or such other amount which the commissioner of housing preservation and development determines by regulation would equal the cost of creating a dwelling unit, other than an apartment, to replace such single room occupancy dwelling unit.

Id.

29. *Id.* § 27.198.2[d][4][a][ii]. Under the replacement provision, the conversion, alteration, and demolition prohibitions did not apply if:

Prior to issuance of a permit for work which would otherwise be prohibited [hereunder,] . . . the owner replace[d] the single room occupancy dwelling units which would be altered, converted or demolished as a result of such work elsewhere within the city by providing dwelling units affordable to persons of low and moderate income "Replacement" shall include but not be limited to the acquisition of an existing multiple dwelling or the creation of such dwelling units either by the construction of a new multiple dwelling or the substantial rehabilitation of an existing multiple dwelling. "Multiple dwelling" shall include but not be limited to a "single room occupancy multiple dwelling."

Id.

30. *Id.* § 27.198.2[d][4][b][i]. The hardship provision provided as follows:

The amount of the payment required to be made or the number of dwelling units required to be provided [under the buy-out or replacement provisions] . . . may be reduced in whole or in part by the commissioner of housing preservation and development if such commissioner determines that the owner has established:

(i) that there is no reasonable possibility that such owner can make a reasonable rate of return unless the property is altered or converted in a manner prohibited [hereunder] . . . or demolished

Id.

31. *Id.* § 27.198.2[d][4][a][i]. If 50% or more of the units were occupied as of January 20, 1987, however, the owner could not use the buy out provision and had to provide replacement units instead. *Id.*

32. *Id.* § 27.198.2[d][4][a][ii]. The law allowed owners to replace units either by new construction or by substantial rehabilitation of existing buildings. *Id.* Replacement units were not limited to SRO's. *Id.*

33. *Id.* § 27.198.2[d][4][b][i].

cent of the assessed value of the property as an SRO.³⁴

Seawall Associates and other owners of buildings containing SRO's (collectively "Seawall") sought an injunction and declaration that Local Law No. 9 was an unconstitutional taking of their properties.³⁵ The trial court held that the anti-warehousing provisions were unconstitutional and that the buy-out, replacement, and hardship provisions enlarged the constitutional infirmities because they were "tantamount to extortion."³⁶

The City appealed and the appellate division unanimously reversed, holding that Local Law No. 9 was "intended to accomplish the legitimate governmental goal of preventing homelessness . . . and [did] not deny the plaintiffs the opportunity to earn a reasonable rate of return on their property."³⁷ The Court of Appeals of New York reversed, holding Local Law No. 9 facially invalid both as a physical taking, because it interfered with an owner's rights to possess and to exclude others,³⁸ and as a regulatory taking, because the moratorium and anti-warehousing provisions required property owners to put their properties to public use without compensation.³⁹

In analyzing the issues raised in *Seawall*, Section II of this Comment sets forth an historical perspective of the takings jurisprudence, by both defining and differentiating between physical and regulatory takings. Section III discusses *Seawall*'s holding and reasoning. Section IV analyzes *Seawall* and argues that the New York Court of Appeals unreasonably has extended both the physical and regulatory takings doctrines and has jeopardized the City's ability to provide access to affordable housing for the poor by striking Local Law No. 9 on a facial challenge. Section V describes innovative housing programs in other municipalities, predicting that many of the programs would be invalid under *Seawall*'s analysis. Section VI concludes that in order to preserve housing for the poor, courts should reject *Seawall*'s reasoning and overcome the impulse to invalidate innovative

34. *Id.* § 27-198.2[d][4][b][iii]. The assessed value generally represents 45% of the property's fair market value. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 114 n.13, 542 N.E.2d 1059, 1070 n.13, 544 N.Y.S.2d 542, 553 n.13, *cert. denied*, 110 S. Ct. 500 (1989).

35. *Seawall*, 138 Misc. 2d 96, 523 N.Y.S.2d 353 (Sup. Ct. 1987), *rev'd*, 142 A.D.2d 72, 534 N.Y.S.2d 958 (App. Div. 1988), *rev'd*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989).

36. *Id.* at 108, 523 N.Y.S.2d at 361.

37. *Seawall*, 142 A.D.2d 72, 87, 534 N.Y.S.2d 958, 968 (App. Div. 1988) (citation omitted), *rev'd*, 138 Misc. 2d 96, 523 N.Y.S.2d 353 (Sup. Ct. 1987), *rev'd*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989).

38. *Seawall*, 74 N.Y.2d 92, 106, 542 N.E.2d 1059, 1065, 544 N.Y.S.2d 542, 548, *cert. denied*, 110 S. Ct. 500 (1989).

39. *Id.* at 115, 542 N.E.2d at 1070-71, 544 N.Y.S.2d at 553-54.

programs on facial challenges. Finally, the Appendix in Section VII sets forth a checklist for drafting creative programs that have a greater likelihood of surviving constitutional challenges.

II. HISTORICAL ANALYSIS OF THE TAKINGS CLAUSE

The fifth and fourteenth amendments to the United States Constitution⁴⁰ limit the government's ability to interfere with private property interests. The fifth amendment provides that "private property [shall not] be taken for public use, without just compensation."⁴¹ The United States Supreme Court repeatedly has observed that the fifth amendment's purpose is to "bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."⁴² The fifth amendment is made applicable to the states by the fourteenth amendment to the United States Constitution.⁴³

Takings cases can be divided into two lines of authority: permanent physical occupation cases (also called *per se* takings) and regulatory takings cases.⁴⁴ A physical taking occurs when the government causes a *permanent* physical occupation upon private property, either directly or by authorizing others to do so.⁴⁵ If the Court finds that the government's action causes a permanent physical occupation, it "uniformly ha[s] found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit

40. The *Seawall* court rested its holding on both the fifth amendment of the United States Constitution and article I, section 7, of the New York State Constitution. *Id.* at 115-16, 542 N.E.2d at 1071, 554 N.Y.S.2d at 554. However, the court's takings analysis rested almost exclusively on the United States Constitution. The court noted that "[i]n view of this holding, we need not decide the extent to which, if at all, the protections of the 'Takings Clause' of the New York State Constitution differ from those under the Federal Constitution." *Id.* at 116 n.15, 542 N.E.2d at 1071 n.15, 544 N.Y.S.2d at 554 n.15. This Comment is limited to the takings clause of the United States Constitution.

41. U.S. CONST. amend. V.

42. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 260 (1978).

43. *See Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 235-41 (1897).

44. Note, *Rethinking the Physical Takings Test: An Expanded Notion of Property Rights—Seawall Associates v. City of New York*, 5 ST. JOHN'S J. LEGAL COMMENTARY 103, 105-06 (1989).

45. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). For a discussion of *Loretto*, see *infra* notes 57-82 and accompanying text. *See also* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967) ("The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, never deny compensation for a physical takeover.").

or has only minimal economic impact on the owner,"⁴⁶ and compensation is required.⁴⁷

A regulatory taking, on the other hand, typically involves a governmental interference so excessive that it deprives the owner of all beneficial or economic use of the property, placing the burden of a public benefit disproportionately on one or a few property owners.⁴⁸ Regulatory taking cases may involve *temporary* physical invasions of private property.⁴⁹ To determine whether the regulation causes a taking for which compensation would be required, the Court engages in "an ad hoc inquiry in which several factors are particularly significant—the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the government action."⁵⁰ If, on balance, the Court determines that the regulation alleviates a public harm, or "adjust[s] the benefits and burdens of economic life to promote the common good,"⁵¹ while allowing the owner to retain reasonable beneficial use, it has tended to hold that the regulation in question is *not* a taking, and therefore, that the property owner is not entitled to any compensation for loss.⁵² Thus, it is only when the regulation is seen as going "too far" that it will be considered a taking.⁵³ Subsection A discusses permanent physical occupation cases and Subsection B discusses regulatory takings cases.

46. *Loretto*, 458 U.S. at 434-35.

47. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987).

The basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, governmental action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation."

Id. (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

48. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). See *infra* Section II(B) for a discussion of the regulatory takings jurisprudence.

49. See *Loretto*, 458 U.S. at 426-35 (distinguishing between permanent physical occupations of property, which always constitute a taking, and temporary physical invasions, which are subject to the *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), balancing test).

50. *Id.* at 432 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

51. *Id.* at 426 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

52. *Id.*

53. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

A. *Permanent Physical Occupations*

Whether a court classifies a physical invasion as permanent or temporary substantially affects its analysis.⁵⁴ If a court categorizes an activity of the government as a "permanent physical occupation," it will find a per se taking and require compensation without regard to the legitimacy of the state interests involved or the economic impact of the regulation.⁵⁵ If a court deems an activity to be a "temporary physical invasion," however, the activity does not rise to the level of a per se taking and is subjected to a balancing test discussed in Subsection B below.⁵⁶

The United States Supreme Court clarified the distinction between permanent physical occupations and temporary physical invasions in *Loretto v. Teleprompter Manhattan CATV Corp.*⁵⁷ *Loretto* addressed a New York law that required landlords to permit cable companies to place connection facilities on their buildings to facilitate tenant access to cable television.⁵⁸ Regulations entitled the landlord to a one-time, one dollar connection fee⁵⁹ which was substantially less than the fee landlords previously received from Teleprompter.⁶⁰ Relying on the law, Teleprompter installed cables on Loretto's property.⁶¹ The installation deprived Loretto of a total of one-eighth of a cubic foot of space on the roof of her building.⁶² Loretto sued, claiming that the law permitting Teleprompter's actions constituted a taking without just compensation.⁶³

The New York Court of Appeals upheld the law, finding that it served a legitimate public purpose of "rapid development of and maximum penetration by a means of communication which ha[d] important education and community aspects."⁶⁴ The United States Supreme Court reversed, holding that a permanent physical occupation authorized by the government is a taking without regard to the public interests that it may serve.⁶⁵ In so holding, the Court carefully

54. *Loretto*, 458 U.S. at 428-35.

55. *Id.* at 434-35.

56. *See infra* Section II(B).

57. 458 U.S. 419 (1982).

58. *Id.* at 421, 423 (discussing N.Y. EXEC. LAW § 828(1) (McKinney Supp. 1981-1982)).

59. *Id.* at 423.

60. Teleprompter previously paid landlords five percent of the gross revenues that it realized from the particular property. *Id.*

61. *Id.* at 421.

62. *Id.* at 443.

63. *Id.* at 424.

64. *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 143-44, 440 N.Y.S.2d 843, 852, 423 N.E.2d 320, 329 (1981).

65. *Loretto*, 458 U.S. at 426.

distinguished permanent physical invasions from temporary invasions.⁶⁶ Beginning with permanent physical invasions, the Court explained, "Where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking . . .'"⁶⁷ The logic of this characterization relies upon the Court's definition of property rights as rights of use, possession, and disposition.⁶⁸ To the extent that the government causes a permanent physical invasion, "it effectively destroys *each* of these rights."⁶⁹ The owner is forever deprived of the power to control the use of the property, resulting in a *per se* taking.⁷⁰

The Court noted that, on the other hand, a temporary physical invasion or a regulation that merely restricts the use of property is not a *per se* taking.⁷¹ For example, in *Prune Yard Shopping Center v. Robins*,⁷² the Court upheld a state constitutional requirement that handbillers be allowed to exercise free speech and petition on shopping center property even though the action constituted a physical invasion.⁷³ "Since the invasion was temporary and limited in nature, and since the owner had not exhibited an interest in excluding all persons from his property, 'the fact that [the solicitors] may have "physically invaded" [the owners'] property cannot be viewed as

66. *Id.* at 428-35.

67. *Id.* at 427 (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871)); cf. *United States v. Causby*, 328 U.S. 256 (1946) (frequent flights immediately above a landowner's property constituted a taking); *Western Union Tel. Co. v. Pennsylvania R.R. Co.*, 195 U.S. 540 (1904) (taking found when telegraph company constructed and operated telegraph lines over railroad's property); *United States v. Lynah*, 188 U.S. 445 (1902) (permanent flooding of property constituted a taking); *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 98-99 (1893) (taking found when telegraph company placed telegraph poles on the city's public streets).

68. *Loretto*, 458 U.S. at 435.

69. *Id.* The owner has no right to possess the space himself and no power to exclude the occupier from possession and use. *Id.* Even though he may retain the bare legal right to dispose of the property, "the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Id.* at 436.

70. *Id.*

71. *Id.* at 428-34. The *Loretto* Court characterized *United States v. Causby*, 328 U.S. 256 (1946), as a *per se* taking although the case was decided as a physical invasion case not rising to the level of a *per se* taking. *Loretto*, 458 U.S. at 430. In *Causby*, frequent, low-flying airline flights over the claimant's property constituted a physical invasion because it interfered with state-acknowledged property rights (air space), and destroyed its beneficial use. *Causby*, 328 U.S. at 266. The Court did not find a *per se* taking, however, because the record did not establish whether the invasion was permanent. *Id.* at 268. Apparently, *Loretto* has re-characterized the case as finding a *per se* taking.

72. 447 U.S. 74 (1980).

73. *Loretto*, 458 U.S. at 434 (citing *Prune Yard*, 447 U.S. at 84).

determinative.'"⁷⁴ Similarly, in *Kaiser Aetna v. United States*,⁷⁵ the Court held that the government's attempt to create a public right of access into a private marina was unconstitutional.⁷⁶ Because the invasion was not permanent,⁷⁷ however, the Court's decision did not rest on physical invasion grounds alone.⁷⁸ Rather, the *Kaiser Aetna* Court emphasized that the physical invasion would frustrate the owner's investment-back expectations by causing a substantial devaluation of the property, thus resulting in a taking.⁷⁹

After making the distinction between permanent and temporary invasions, the *Loretto* Court concluded that the cable statute worked a *per se* taking⁸⁰ insofar as it authorized a permanent physical occupation of cable wires and boxes on Loretto's property, rather than simply a temporary invasion or regulation of use.⁸¹ The size of the intrusion was relevant only to determine the amount of compensation due.⁸²

More recently, in *Nollan v. California Coastal Commission*,⁸³ the

74. *Id.* (quoting *Prune Yard*, 447 U.S. at 84).

75. 444 U.S. 164 (1979).

76. *Id.* at 180.

77. When discussing *Kaiser Aetna*, the *Loretto* Court noted that "[a]lthough the easement of passage, not being a permanent occupation of land, was not considered a taking *per se*, *Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of an unusually serious character." *Loretto*, 458 U.S. at 433.

78. *Kaiser Aetna*, 444 U.S. at 179-80.

79. *Id.* at 180.

80. *Loretto*, 458 U.S. at 438.

81. *Id.* at 441.

82. *Id.* at 437. In a footnote, the Court indicated the limits of its narrow holding. "If [the statute] required *landlords* to provide cable installation if a tenant so desires, the statute might present a different question . . . since the landlord would own the installation." *Id.* at 440 n.19 (emphasis added). The Court noted that:

Ownership [of the installation] would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. . . . The *landlord* would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, aesthetic, and other effects of the installation. Moreover, if the landlord wished to repair, demolish, or construct in the areas of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable.

Id. Thus, no *per se* taking occurs when an ordinance requires the owner of property to comply with its terms rather than requiring the government or a third party to enter onto property to bring it into compliance.

In *Seawall*, the City relied on this language to refute Seawall's argument that the anti-warehousing provision of Local Law No. 9 authorized a permanent physical occupation of its property. Municipal Respondents' Brief, *supra* note 12, at 24. "The anti-warehousing provision is similar to the law hypothesized by the Supreme Court in *Loretto*. The plaintiffs must rent out their SRO units but they retain the owners' right to decide which applicants to rent their rooms to. Thus, there is no physical taking." *Id.* at 58 (citation omitted).

83. 483 U.S. 825 (1987).

Court added another element to the per se takings analysis. It said that a permanent physical occupation would not cause a per se taking if the invasion was a result of a lawful condition attached to a development permit.⁸⁴ For example, if the government had the power to forbid construction of a project for a legitimate governmental purpose, "condition[ing] construction upon some concession by the owner, even a concession of property rights" would not constitute a per se taking.⁸⁵ The Court explained that "if a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not."⁸⁶ Accordingly, if the government has the power to restrict use of property, allowing the owner to overcome that restriction, even by requiring a permanent physical occupation, does not result in a per se taking.⁸⁷ To determine the validity of the regulation, the Court asks whether the government has the power to restrict use of property (i.e., whether its purpose is "legitimate") and if so, whether the legislation seems designed to achieve that purpose without depriving the owner of economically viable use of his property.⁸⁸ This test was introduced in *Nollan* and is elaborated below in connection with the Court's regulatory takings

84. *Id.* at 836.

85. *Id.* In *Nollan*, petitioners rented a beach bungalow with an option to buy conditioned upon their promise to demolish and replace it. *Id.* at 827-28. The state conditioned the building permit upon the Nollans' granting the public the right to pass across the beach portion of their property. *Id.* at 828.

86. *Id.* at 836-37.

87. *Id.*

88. *Id.* at 834. The *Nollan* Court noted that:

We have long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements. The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding that this is so—in which case the Commission unquestionably would be able to deny the Nollans their [building] 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 834-36 (footnotes and citations omitted).

tests which the Court uses when the governmental interference causes either a temporary physical invasion or a regulation on use.

B. *Regulatory Takings*⁸⁹

The Court has identified several factors that it weighs on an "ad hoc" basis when determining whether a regulation causes a regulatory taking. This Subsection first discusses *Penn Central Transportation Co. v. City of New York*, which sets forth the factors that the Court weights.⁹⁰ Next, it examines changes in the *Penn Central* test as applied to conditional land use regulations in connection with *Nollan v. California Coastal Commission*.⁹¹ Finally, this Subsection addresses the Court's flirtation with the unbundling of property rights, termed "conceptual severance" by Professor Margaret Jane Radin.⁹²

1. THE *PENN CENTRAL* FACTORS

In 1978, the Court admitted that in the takings area it essentially engages in "ad hoc, factual inquiries," and identified several factors that it considers when determining whether public action causes a regulatory taking.⁹³ As explained in *Penn Central Transportation Co. v. City of New York*,⁹⁴ the Court first analyzes the character of the governmental action, and then engages in a five-factor economic impact analysis.⁹⁵ These five factors include an analysis of (1) the economic impact of the regulation; (2) a determination whether the regulation represents a public burden that should more appropriately be shared by all, rather than shouldered by a few; (3) the reciprocity of advantage; (4) the extent to which the regulation has interfered with investment-backed expectations; and (5) the ability of the property owner to earn a reasonable rate of return.⁹⁶ The *Penn Central* case illustrates how the Court applies its factors.

In 1965, New York City adopted its Landmark Preservation

89. Commentators have characterized the regulatory takings jurisprudence as "the most haunting jurisprudential problem in the field of contemporary land-use law[,] . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 9-4, at 596 (2d ed. 1988) (quoting C. HAAR, *LAND-USE PLANNING* 766 (3d ed. 1976)).

90. 438 U.S. 104 (1978).

91. 483 U.S. 825 (1987).

92. See Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

93. *Penn Central*, 438 U.S. at 124.

94. *Id.*

95. *Id.* at 124.

96. *Id.* at 124-38.

Law.⁹⁷ The law required owners of historic sites to preserve the exterior of their buildings and to obtain approval before any structural changes could be made.⁹⁸ The owner's ability to transfer development rights from one parcel to another partially alleviated these restrictions.⁹⁹ Grand Central Terminal ("Terminal"), a 1913 beaux-art style building, was one of four hundred structures that the city singled out for landmark designation under this law.¹⁰⁰ Because Penn Central Transportation Co. ("Penn Central"), the owner of the Terminal, was facing financial difficulties,¹⁰¹ it requested approval to construct a fifty-three-story office tower on top of the Terminal to make the property profitable.¹⁰² When the city denied its building permit, Penn Central challenged the constitutionality of the law.¹⁰³

In one of its most complete discussions of the takings clause,¹⁰⁴ the Court began by analyzing the character of the landmark law. "[I]n instances in which a state tribunal reasonably conclude[s] that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests."¹⁰⁵ The Court confirmed that the state might properly make a choice between preservation of one class of property over another, depending on what it felt was of greater value to the public.¹⁰⁶ However, a use restriction is limited in that it must be "reasonably necessary to the effectuation of a substantial public purpose."¹⁰⁷ The Court found New York's Landmark Law met this purpose because it embodied a comprehensive plan to preserve structures of historic or aesthetic interest.¹⁰⁸

a. As-Applied Economic Analysis

Before turning to the economic impact of the law on Penn Central, the Court first defined "property" for takings purposes and then turned to the five individual factors. The Court explained that in

97. *Id.* at 108-09.

98. *Id.* at 111-12.

99. *Id.* at 113-14.

100. *Id.* at 111 n.12.

101. *Id.* at 141 (Rehnquist, J., dissenting).

102. *Id.* at 116-17.

103. *Id.* at 116-19.

104. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982).

105. *Penn Central*, 438 U.S. at 125 (quoting *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)).

106. *Id.* at 126.

107. *Id.* at 127.

108. *Id.* at 132.

defining property, it focuses on the entire parcel affected by the restriction—"here, the city tax block designated as the 'landmark site.'"¹⁰⁹ Therefore, the fact that the Landmark Law restricted Penn Central's ability to build above the Terminal did not cause a taking of its air or development rights because those rights were simply a small portion of the whole property.¹¹⁰ In addition, transferability of the development rights offset any interference caused by the Landmark Law.¹¹¹

Turning to the five economic impact factors, the Court first looked at the reduction in value on the property as a whole and noted that although the Law reduced Penn Central's property value,¹¹² this factor was not dispositive. Land-use regulations promoting the general welfare have been upheld in the past even though they caused a great diminution in property value.¹¹³ Second, the Court determined that the city had not singled out Penn Central to bear a public burden because four hundred other buildings had been designated landmarks as well.¹¹⁴ Third, the Court found that Penn Central was benefiting from the law because "preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole."¹¹⁵ Fourth, because the Terminal had been continuously used in the same manner for sixty-five years, the Court inferred that the law did not interfere with Penn Central's primary expectations.¹¹⁶ Finally, the Court determined that Penn Central could earn a "reasonable" rate of return because Penn Central had not argued that it could not.¹¹⁷ In sum, the Court upheld

109. *Id.* at 131. The significance of this statement will be explored further in the conceptual severance section discussed below. See *infra* notes 150-217 and accompanying text.

110. *Penn Central*, 438 U.S. at 131.

111. *Id.* at 137-38.

112. Penn Central would lose three million dollars in yearly revenues. *Id.* at 116.

113. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5% diminution in value caused by restriction on brickmaking not a taking).

114. *Penn Central*, 438 U.S. at 132.

115. *Id.* at 134-35.

116. *Id.* at 136.

117. *Id.* at 129. The Court did not explain whether "reasonable rate of return" was to be computed with regard to a percentage of the fair market value of the property, or to the assessed value of the property. Lower court cases have calculated it using the owner's investment in the property, plus taxes, expenses, improvements, and other carrying charges. See, e.g., *Northern Westchester Prof. Park v. Town of Bedford*, 60 N.Y.2d 492, 458 N.E.2d 809, 470 N.Y.S.2d 350 (1983). The claimant must prove that the purchase price did not include a premium over fair market value at the time of the purchase in anticipation of a change in zoning. *Id.* at 503, 458 N.E.2d at 814-15, 470 N.Y.S.2d at 356. Calculation of reasonable return was a crucial issue in the *Seawall* case. See *infra* notes 319-23 and accompanying text.

the landmark law because it found, under the foregoing analysis, that the law was substantially related to the promotion of the general welfare from which Penn Central also would benefit and that Penn Central could continue profitably to use its property.¹¹⁸

b. Facial Attacks

In other cases, the Court has stressed that the *Penn Central* “‘ad hoc, factual inquiries’ must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.”¹¹⁹ Otherwise, if there is no “concrete controversy concerning application of the [law] . . . on specific parcels of land,”¹²⁰ the Court is faced with a “facial attack.”¹²¹ “A facial challenge is an argument that concludes that the law at issue is a taking in *all* its applications, as to every property within the law’s ambit.”¹²² Although it repeatedly has observed that facial challenges are disfavored,¹²³ the Court nevertheless has entertained them—albeit to a limited extent.¹²⁴ When it does, the Court looks at the uses that can be made of the property in light of the restriction to determine whether the “mere enactment” of the law “denies an owner economically viable use of his land.”¹²⁵ Because it is virtually impossible to establish in the record that the challenged regulation has precluded *all* viable uses, the Court has warned that the claimant “faces an uphill battle”¹²⁶ in making a facial attack. Thus, in *Keystone Bituminous Coal Association v. DeBenedictis*,¹²⁷ for example, the Court rejected a facial attack on the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act¹²⁸ even though it deprived the owners of millions of dollars in coal because the owners failed to show that the Act “ma[d]e it commercially impracticable

118. *Penn Central*, 438 U.S. at 138.

119. *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 295 (1981); see also *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 495-96 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

120. *Virginia Surface Mining*, 452 U.S. at 295.

121. Facial challenges present no concrete controversy concerning the application of the law on specific property interests. *Id.* at 295-96.

122. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 122, 542 N.E.2d 1059, 1075, 544 N.Y.S.2d 542, 557-58 (Bellacosa, J., dissenting), *cert. denied*, 110 S. Ct. 500 (1989).

123. In *Keystone*, the Court admonished against facial challenges to statutes raising allegations of an unconstitutional taking of private property. 480 U.S. at 494 (citing *Virginia Surface Mining*, 452 U.S. at 295-96; *Agins*, 447 U.S. at 260).

124. *See id.*

125. *Id.*

126. *Id.*

127. 480 U.S. 470 (1987).

128. PA. STAT. ANN. tit. 52, § 1406.4 (Purdon Supp. 1990).

for them to continue mining their bituminous coal interests in western Pennsylvania."¹²⁹

2. THE NOLLAN TEST

In the 1987 *Nollan v. California Coastal Commission*¹³⁰ case, the Court, while reaffirming *Penn Central*, changed its emphasis on the level of scrutiny to be given to land-use regulations and reformulated the test.¹³¹ Now, in analyzing whether land use regulations constitute a taking, the Court asks two questions: (1) whether the regulation substantially advances a legitimate state interest;¹³² and (2) whether it deprives the owner of economically viable use of his land.¹³³ The Court will invalidate the restriction if it fails either test.

In *Nollan*, the claimants leased beachfront property with an option to buy conditioned upon their demolishing and replacing a pre-existing bungalow.¹³⁴ The Nollans applied for a building permit to the California Coastal Commission ("Commission"). The Commission informed the Nollans that it would condition permit approval on their granting the public an easement to walk across the beach area of their property.¹³⁵ The Nollans refused to grant the easement and sued.¹³⁶ In dicta, the Court mentioned that an outright easement requirement not conditioned on a building permit would constitute a per se taking.¹³⁷ The Court explained, however, that if the Commission had the power to deny a building permit for a *legitimate* state purpose, then conditioning the Nollans' permit on their granting an easement to achieve that same end would not be a per se taking.¹³⁸ In determining whether the regulation was valid, the Court turned to the first prong of its test and asked whether the regulation substantially

129. *Keystone*, 480 U.S. at 495-96; cf. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 (1981) (upholding a similar mining act, noting that "the Act does not, on its face, prevent beneficial use of coal-bearing lands"); Peterson, *Land Use Regulatory "Takings Revisited"* *The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 343-44 (1988) (discussing generally the problem of facial attacks).

130. 483 U.S. 825 (1987).

131. *Id.* at 834 (explaining that a "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land'" (emphasis added)). Prior to *Nollan*, the Court, for more than 25 years, had used the more deferential rational relationship test to assess the constitutionality of a state's exercise of its police power. *Id.* at 843 n.1 (Brennan, J., dissenting).

132. *Id.* at 834.

133. *Id.*

134. *Id.* at 827-28.

135. Forty-three out of sixty other coastal development permits had been similarly conditioned. *Id.* at 829.

136. *Id.* at 828-29.

137. *Id.* at 831.

138. *Id.* at 836-37.

advanced a legitimate state purpose.¹³⁹ The Court noted that "a broad range of governmental purposes and regulations" have constituted "legitimate state interest[s]."¹⁴⁰ It assumed, without analysis, that the purposes of the regulation—protecting the public's ability to see the beach, preventing congestion on the public beaches, and overcoming the public's "psychological barrier" in using the beach—were legitimate.¹⁴¹ It then confirmed that the Commission would be able to deny the Nollans a building permit outright if the Nollans' new home substantially impeded those purposes.¹⁴² The Court found, however, that conditioning the permit on an easement to pass back and forth along the beach did not serve that stated end.¹⁴³ "It [was] quite impossible to understand how a requirement [allowing] people already on the public beaches . . . to walk across the Nollans' property reduce[d] any obstacles to viewing the beach created by the new house."¹⁴⁴ Because the condition failed the first prong of the test, the Court found a taking without engaging in an economic analysis using the *Penn Central* factors.¹⁴⁵

Consequently, the change that *Nollan* introduced into takings jurisprudence is the requirement of a tighter fit between the ends and means of land use regulations.¹⁴⁶ It is unclear, however, just how

139. *Id.* at 835.

140. *Id.* at 834-35 (citing *Agins v. Tiburon*, 447 U.S. 255, 260-62 (1980) (scenic zoning); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (landmark preservation); and *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (residential zoning)).

141. *Id.* at 835. One commentator finds this assumption an inherent weakness in the Court's analysis. The "Court applied an intermediate level of scrutiny to the means the government implemented to achieve its goals and little or no scrutiny to the legitimacy of the government's objective." Comment, *The Supreme Court's Trilogy of Regulatory Takings: Keystone, Glendale and Nollan*, 38 DE PAUL L. REV. 441, 481 (1989).

142. *Nollan*, 483 U.S. at 835. "If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." *Id.* at 836-37.

143. *Id.* The Court gave a few examples of conditions that would serve the same purpose: height limitations, width restrictions, a ban on fences, or requiring the Nollans to provide a viewing spot on their property. All of these would have advanced the state's goal of providing a view of the beach to the public. *Id.* at 836.

144. *Id.* at 838.

145. This is consistent with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). See *supra* notes 57-82 and accompanying text.

In earlier 1987 opinions, the Court reaffirmed the continuing viability of the *Penn Central* economic analysis factors. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-97 (1987) (citing *Penn Central* for its economic viability test, but not employing the specific factors because the claimant failed to prove that the Subsidence Act rendered its property commercially unprofitable); *Hodel v. Irving*, 481 U.S. 704, 714 (1987) (testing the economic impact, questioning investment-backed expectations, and finding an average reciprocity of advantage).

146. *Nollan*, 483 U.S. at 843 n.1, 843-53 (Brennan, J., dissenting).

tight that fit must be. In that regard, the Court gave examples of permissible regulations that would protect the public's ability to see the beach that may assist courts in future analysis.¹⁴⁷ For example, permissible regulation would include a height limitation, a width restriction, a ban on fences, or a requirement for a viewing spot on the property for passersby.¹⁴⁸ In the context of this Comment, as long as the means "substantially advance" the purpose of the regulation, *Nollan* should not affect the legislature's ability to prohibit demolition of existing buildings to preserve the status quo of housing to prevent a further spillage of homeless persons into the streets.¹⁴⁹

3. CONCEPTUAL SEVERANCE

Professor Margaret Jane Radin believes that "conceptual severance" is a third mode of takings analysis that is gaining favor with the Court.¹⁵⁰ The following discussion will define conceptual severance and show that conceptual severance is not a separate method the Court uses to find a taking. On the contrary, the cases in which one could argue that the Court has used conceptual severance fit within the permanent physical invasion and *Penn Central* tests discussed above.¹⁵¹

The Court has characterized property rights in a physical thing as a bundle of strands encompassing the rights to use, possess, and dispose of the property.¹⁵² When governmental action causes a permanent physical invasion by placing or permitting a structure on private property, the Court deems it a taking without regard to the economic impact of the regulation or its beneficial purpose.¹⁵³ This is because the invasion does not "simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."¹⁵⁴ The owner is denied the right to possess the space himself and has no power to exclude the occupier from possession and use of that space.¹⁵⁵ Professor Radin has termed this method

147. *Id.* at 836.

148. *Id.*

149. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, cert. denied, 110 S. Ct. 500 (1989).

150. See Radin, *supra* note 92, at 1667 (Radin believes there is a trend in constitutional takings cases that favors conceptual severance.).

151. For a discussion of the permanent physical takings test, see *supra* notes 54-87 and accompanying text. For a discussion of the *Penn Central* test, see *supra* notes 93-118 and accompanying text.

152. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); see *Andrus v. Allard*, 444 U.S. 51, 65-67 (1979).

153. *Loretto*, 458 U.S. at 434-35.

154. *Id.* at 435.

155. *Id.*

of analysis conceptual severance.¹⁵⁶ She explains conceptual severance as:

delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken. . . . [T]his strategy hypothetically or conceptually "severs" from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.¹⁵⁷

With rare exception, the Court has required more than an abrogation of essential strands *alone* to constitute a taking.¹⁵⁸ Unless there is a permanent physical invasion, land use regulations are subject either to the *Penn Central* multi-factor balancing test¹⁵⁹ or to the *Nollan* test¹⁶⁰ to determine if a taking has resulted. In *Penn Central*, the Court explained that:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather *both* on the character of the action *and* on the nature and extent of the interference with rights in the parcel as a whole¹⁶¹

The Court recognizes that were it to constitutionalize the conceptual severance theory, even a small restriction on the use of property could constitute a taking.¹⁶² The case law illustrates that the Court has found a taking based on conceptual severance only in permanent physical occupation cases.

In turning to physical invasions, *Loretto v. Teleprompter Manhattan CATV Corp.*¹⁶³ provides the clearest example of the Court's use of conceptual severance. In *Loretto*, the Court held that a law forcing landlords to allow placement of television cables on their buildings for a nominal fee caused a *per se* taking.¹⁶⁴ It explained that a permanent physical occupation effectively destroys each of the

156. Radin, *supra* note 92, at 1676.

157. *Id.*

158. See *infra* notes 173-217 and accompanying text.

159. For a discussion of the *Penn Central* balancing test, see *supra* notes 93-118 and accompanying text.

160. For a discussion of the *Nollan* balancing test, see *supra* notes 130-49 and accompanying text.

161. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978) (emphasis added).

162. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987).

163. 458 U.S. 419 (1982).

164. *Id.* at 435.

rights in the owner's bundle—the rights to possess, use, and dispose of property.¹⁶⁵ The owner has no right to possess the occupied space because he cannot exclude the occupier.¹⁶⁶ He has no right to make nonpossessory use of it.¹⁶⁷ Finally, although he may retain the bare legal right to dispose of the property, the right is emptied of value because the purchaser will be unable to make use of it.¹⁶⁸ Thus, although Loretto still owned the building, the Court conceptually severed the fee simple absolute in the space occupied by the cable from the remaining property to find a taking.¹⁶⁹

The rule announced four years earlier in *Penn Central*—that property rights are not separated out for takings purposes—did not apply to the case of a permanent physical occupation because “the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation.”¹⁷⁰ However, the Court stressed that it could not question a state’s “broad power to impose appropriate restrictions upon an owner’s use of his property”¹⁷¹ in cases of landmarking and non-permanent physical invasions.¹⁷² Therefore, unless the invasion is permanent, the Court has required something more before a taking will be found on conceptual severance grounds.¹⁷³ That “something more” is that the regulation not only must restrict or abrogate an essential strand in the bundle, but also must cause a substantial economic impact, which is consistent with the *Penn Central* test.¹⁷⁴

This analysis is supported by two physical invasion cases, *Kaiser*

165. *Id.*

166. *Id.*

167. *Id.* at 436.

168. *Id.*

169. See Radin, *supra* note 92, at 1676.

170. *Loretto*, 458 U.S. at 441.

171. *Id.*

172. See *id.* at 426-35.

[T]he Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.

Id. at 426.

173. See *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980) (holding that no taking occurred because property owners “failed to demonstrate that the ‘right to exclude others’ [was] so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a ‘taking’ ”).

174. See *infra* notes 173-217 and accompanying text.

*Aetna v. United States*¹⁷⁵ and *PruneYard Shopping Center v. Robins*,¹⁷⁶ which involved restrictions on the right of possession—or an abrogation of the right to exclude others—in which the economic impact factor was determinative in the Court's holdings. In *Kaiser Aetna*, the government took private property by asserting that a private marina, created when a developer dredged a pond and connected it to the Pacific Ocean, was subject to a right of public access.¹⁷⁷ The Court viewed the governmental action as severing an easement from the property.¹⁷⁸ The Court stressed that the servitude frustrated the owner's investment-backed expectations because the developer had invested millions of dollars with governmental approval to dredge the pond.¹⁷⁹ Thus, the combination of the conceptually severed easement in the property, coupled with the substantial devaluation of the owner's investment, required compensation.¹⁸⁰

Conversely, in *PruneYard Shopping Center v. Robins*,¹⁸¹ the Court did not find a taking when state law precluded the owners of a shopping center from removing handbillers from their property.¹⁸² Conceptually, the state gave handbillers an easement over the shopping center property in order to voice political opinions.¹⁸³ Unlike *Kaiser Aetna*, however, no taking resulted because the property owners had "failed to demonstrate that the 'right to exclude others' [was] . . . essential to the use or economic value of their property."¹⁸⁴ These two opinions are entirely consistent with the *Penn Central* balancing test requiring the Court to weigh the economic impact of the restriction to determine whether the regulation precludes the owners from earning a reasonable rate of return on the property.¹⁸⁵

Similarly, two opinions discussing restrictions on the right of disposition indicate that the deciding factor in striking or upholding the governmental action is the economic impact factor. In *Hodel v. Irving*,¹⁸⁶ the Court held that abrogation of the right to pass on property at death constituted a taking.¹⁸⁷ Seeking to remedy the problem

175. 444 U.S. 164 (1979).

176. 447 U.S. 74 (1980).

177. *Kaiser Aetna*, 444 U.S. at 180.

178. *Id.*

179. *Id.* at 167-69.

180. *Id.* at 179-80.

181. 447 U.S. 74 (1980).

182. *Id.* at 84.

183. *Id.* at 77-78.

184. *Id.* at 84.

185. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131-34 (1978).

186. 481 U.S. 704 (1987).

187. *Id.* at 717.

of extreme fractionization of Indian lands, Congress passed a law providing that certain undivided fractional interests in restricted land within a tribe's reservation would escheat to the tribe.¹⁸⁸ The right to dispose of property at death was conceptually severed from the remaining property rights of use and possession, thus leaving the property owner with a life estate.¹⁸⁹ Applying a multi-factor balancing test,¹⁹⁰ the Court determined that the economic impact of this law on property owners could be substantial.¹⁹¹ Combined with the character of the governmental action—abrogation of both the rights of descent and devise—the Act worked a taking of the owners' properties.¹⁹²

On the other hand, in *Andrus v. Allard*,¹⁹³ abrogation of the right to sell eagle feathers acquired prior to the passage of conservation statutes¹⁹⁴ designed to prevent the destruction of certain bird species did not constitute a taking because the owner was left with economic value.¹⁹⁵ The Court explained that:

[A] significant restriction ha[d] been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.¹⁹⁶

In analyzing the economic impact of the regulation, the Court noted that "a reduction in the value of property is not necessarily equated with a taking."¹⁹⁷ The Court felt that Allard would be able to derive economic benefit from the artifacts—for instance, by exhibiting them

188. Indian Land Consolidation Act, Pub. L. No. 97-459, §§ 201-211, 96 Stat. 2519 (1983) (codified as amended at 25 U.S.C. § 2206 (1988)). Interests of two percent or less of the total acreage in the particular tract that had earned less than \$100 in the previous year would escheat to the tribe. *Id.* § 207.

189. *See Radin, supra* note 92, at 1673 (discussing Court's holding that disposition at death could not be abrogated).

190. The Court employed the test set forth in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), and analyzed the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action to determine whether the law worked a taking. *Irving*, 481 U.S. at 714.

191. *Irving*, 481 U.S. at 714.

192. *Id.* at 716-17.

193. 444 U.S. 51 (1979).

194. *See Eagle Protection Act* § 1, 16 U.S.C. § 668(a) (1988) (prohibiting commercial transactions in eagles or eagle parts); *Migratory Bird Treaty Act* § 2, 16 U.S.C. § 703 (1988) (prohibiting commercial transactions in any migratory birds or migratory bird parts).

195. *Andrus*, 444 U.S. at 66-68.

196. *Id.* at 65-66 (citations omitted).

197. *Id.* at 66.

for an admissions price—even though the Act prohibited sale.¹⁹⁸ Hence, the Court upheld the Act after weighing the economic impact against the restriction on disposition.¹⁹⁹

Finally, two cases discussing use restrictions show that the government's action can cause an owner to lose millions of dollars without effecting a taking. In *Penn Central Transportation Co. v. City of New York*,²⁰⁰ the landmark law caused the owner of Grand Central Terminal to lose millions of dollars in yearly revenues by restricting its ability to build in the air space above the Terminal—conceptually severing the air rights from the remainder of the parcel.²⁰¹ It did not effect a taking, however, because Penn Central could still earn a reasonable rate of return on its property, was not deprived of its investment-backed expectations, and could transfer the development rights to other parcels.²⁰² Thus, the extent of the economic diminution on the property as a whole was not significant enough for the Court to strike the law.²⁰³

Similarly, in *Keystone Bituminous Coal Association v. DeBenedictis*,²⁰⁴ the Court upheld the Subsidence Act²⁰⁵ although it deprived colliery owners of most of the support estate underlying their property.²⁰⁶ The Act required coal companies to leave a certain amount of coal in place to provide support for surface structures.²⁰⁷ The Court rejected the coal companies' argument that the Act had severed their support estate from the remainder of their property and noted that "the test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains."²⁰⁸ The coal companies facially challenged the law.²⁰⁹ Thus, although the Act conceptually severed thirty million dollars worth of coal from the remainder of the land, no taking resulted because the owners failed to show that the regulation made their property economically unviable.²¹⁰

198. *Id.*

199. *Id.* at 64.

200. 438 U.S. 104 (1978). For a discussion of the facts and analysis of *Penn Central*, see *supra* notes 93-118 and accompanying text.

201. *Penn Central*, 438 U.S. at 116.

202. *Id.* at 135-38.

203. *Id.*

204. 480 U.S. 470 (1987).

205. Bituminous Mine Subsidence & Land Conservation Act, PA. STAT. ANN. tit. 52, § 1406 (Purdon Supp. 1990).

206. *Keystone*, 480 U.S. at 497.

207. *Id.* at 476 n.6.

208. *Id.* at 497.

209. *Id.* at 499-502.

210. *Id.* Sixty-five years earlier, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922),

In *Keystone*, the Court alluded to the problem that results when property is conceptually divided into discrete segments.²¹¹ Takings jurisprudence would become a slippery slope because every land use regulation abrogates *some* property rights.²¹² The Court explained that zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property.²¹³ Under the coal companies' theory, however, "one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes."²¹⁴

the Court came to the opposite conclusion on nearly identical facts. In 1878, Pennsylvania Coal Company had deeded the surface rights to Mahon's predecessor in interest, reserving the right to remove the coal. *Id.* at 412. In 1921, the Pennsylvania legislature passed the Kohler Act, a statute prohibiting mining that caused subsidence under certain structures. *Id.* When Pennsylvania Coal served the Mahons with notice that the coal company's mining operations would soon reach a point where it would cause subsidence to the surface, the Mahons sought an injunction. *Id.* at 414. Acknowledging that Pennsylvania deemed the surface and subsurface estates as separate valuable interests, the Court held the Kohler Act an unconstitutional taking of the coal company's property because it served to protect only private interests, rather than public interests, and destroyed the economic value of the coal company's property. *Id.* at 414-15. The Court noted, "To make it commercially impracticable to mine certain coal has nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.*

In 1987, recognizing *Mahon* as adverse precedent, the Court distinguished it from the facts and statute in *Keystone* on two grounds. First, unlike the Subsidence Act, the Kohler Act served only private interests, not health or safety purposes. *Keystone*, 480 U.S. at 484. Second, unlike the Subsidence Act, the Kohler Act "made it 'commercially impracticable' to mine 'certain coal' in the areas affected by the Kohler Act." *Id.* Even though the Subsidence Act deprived the coal companies in *Keystone* of thirty million dollars worth of coal, the Court found that "there [was] no record in [*Keystone*] to support a finding, similar to the one the Court made in [*Mahon*], that the Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations." *Id.* at 485.

The *Mahon* Court engaged in a mode of analysis consistent with what is now known as the multi-factor balancing tests under either *Penn Central* or *Nollan*. *See id.* (noting that the factors that the *Mahon* Court considered relevant "have become integral parts of our takings analysis"). Recognizing that the surface and subsurface estates were two separate interests in property under state law, the *Mahon* Court held that the deprivation of the coal company's estate, when coupled with a substantial adverse economic impact, caused a taking. *Mahon*, 260 U.S. at 414-15. This is consistent with the argument advanced in this Comment that unless the governmental action causes a permanent physical occupation, the Court requires more than an abrogation of property interests *alone* to constitute a taking.

211. *Keystone*, 480 U.S. at 498.

212. *See id.*

213. *Id.*

214. *Id.* In *Penn Central*, the Court was concerned with the same slippery slope argument. It noted that property owners could not establish a taking "simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978). Otherwise, the Court reasoned, it would have erred in upholding laws restricting the

Accordingly, as the case law illustrates, the Court's use of conceptual severance to invalidate land use restrictions arguably has been limited to the permanent physical occupation cases.²¹⁵ When a restriction does not cause a permanent physical occupation, the regulation is subjected to a *Nollan* or *Penn Central* multi-factor balancing test to determine whether the character of the action—abrogation of an essential right such as use, possession, or disposition—coupled with the extent of the economic impact, causes a taking. When presented with a facial challenge, the Court determines whether the mere enactment of the law makes the property economically unviable.²¹⁶ If not, the restriction is upheld.²¹⁷

III. THE SEAWALL HOLDING AND REASONING

In *Seawall Associates v. City of New York*,²¹⁸ the New York Court of Appeals determined that Local Law No. 9 caused both a physical and a regulatory taking of Seawall's property.²¹⁹ Following the opinion's format, each line of analysis will be discussed separately below.

A. Physical Taking

The *Seawall* court held that the mandatory rental provisions of Local Law No. 9 caused a physical taking of Seawall's property.²²⁰ "[W]here, as here, owners are forced to accept the occupation of their properties by persons not already in residence, the resulting deprivation of rights in those properties is sufficient to constitute a physical taking for which compensation is required."²²¹ The court explained that the most important of the various rights of an owner is the right to exclude others from using or occupying one's space.²²² Further, in quoting from *Loretto v. Teleprompter Manhattan CATV Corp.*,²²³ the

development of air rights, and subjacent and lateral development of particular parcels. *Id.*; see Radin, *supra* note 92, at 1678 (noting that "as soon as one adopts conceptual severance, . . . [e]very curtailment of any of the liberal indicia of property, every regulation of any portion of an owner's 'bundle of sticks,' is a taking of the whole of that particular portion considered separately").

215. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (permanent physical occupation by cable television wires).

216. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

217. *Id.* at 493-98.

218. 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989).

219. *Id.* at 99, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544.

220. *Id.* at 103, 542 N.E.2d at 1063, 544 N.Y.S.2d at 546.

221. *Id.*

222. *Id.*

223. 458 U.S. 419 (1982).

Seawall court explained that an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property.²²⁴

The *Seawall* court compared Local Law No. 9's rental provisions to the mandated installation of cable television wires,²²⁵ permanent flooding from the construction of a dam,²²⁶ and the invasion of air space by continuous low flying airplanes.²²⁷ It rejected the City's argument that a physical taking requires an "actual displacement of the owner's possession" by a fixed encroachment like the television equipment or permanent flooding.²²⁸ Instead, quoting from *Nollan*, the court analogized the rental requirement to a forced public easement: "[A] physical occupation requiring just compensation results where individuals are given the 'right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.'"²²⁹

The *Seawall* court acknowledged that the Supreme Court "has not passed on the specific issue of whether the loss of possessory interests, including the right to exclude, resulting from tenancies coerced by the government would constitute a per se physical taking."²³⁰ It was confident, however, that the Supreme Court would invalidate such a regulation because, in the *Seawall* court's opinion, the "forced occupancy of one's property" is much more offensive and invasive than the navigational servitude in *Kaiser Aetna* or the installation of television equipment in *Loretto*.²³¹ Further, the *Seawall* court noted that although the Supreme Court initially did not characterize the *Kaiser Aetna* easement as a per se taking,²³² the Court recharacterized it as a per se taking in *Nollan*.²³³

The City argued that Local Law No. 9 should be upheld based on Supreme Court precedent validating housing and rental regulations even where they placed severe restrictions on an owner's use of

224. *Seawall*, 74 N.Y.2d at 103, 542 N.E.2d at 1063, 544 N.Y.S.2d at 546 (quoting *Loretto*, 458 U.S. at 436).

225. *Id.* at 102, 542 N.E.2d at 1063, 544 N.Y.S.2d at 546 (citing *Loretto*, 458 U.S. at 427).

226. *Id.* at 103, 542 N.E.2d at 1063, 544 N.Y.S.2d at 546 (citing *United States v. Lynah*, 188 U.S. 445 (1902)).

227. *Id.* (citing *United States v. Causby*, 328 U.S. 256 (1946)).

228. *Id.* at 104, 542 N.E.2d at 1063, 544 N.Y.S.2d at 546.

229. *Id.* at 104, 542 N.E.2d at 1063-64, 544 N.Y.S.2d at 546-47 (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987)). The court also compared Local Law No. 9's rental requirement to the navigational servitude in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), which required public access to a private marina. *Id.*

230. *Seawall*, 74 N.Y.2d at 104, 542 N.E.2d at 1064, 544 N.Y.S.2d at 547.

231. *Id.*

232. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

233. *Seawall*, 74 N.Y.2d at 104 n.3, 542 N.E.2d at 1064 n.3, 544 N.Y.S.2d at 547 n.3.

its property.²³⁴ The *Seawall* court distinguished cases upholding rent control and anti-eviction statutes by the involuntary nature of Local Law No. 9. Unlike Local Law No. 9, the court explained, rent control and other landlord-tenant regulations involve restrictions on existing tenancies where landlords had voluntarily put their properties to rental use.²³⁵ Local Law No. 9, however, "force[s] the owners in the first instance to subject their properties to a use which they neither planned nor desired."²³⁶

The court also found unpersuasive the City's argument that Local Law No. 9 did not cause a taking because it did not divest the property owners of all control over their properties.²³⁷ The court said that although the owners retained the right to select tenants and rental terms, it was the forced occupation of the units—not the tenants' identities or the rental terms—that resulted in a physical taking.²³⁸

B. Regulatory Taking

In the regulatory takings analysis, the *Seawall* court employed the *Nollan*²³⁹ two-part test.²⁴⁰ First, without considering the buy-out, replacement, or hardship exemptions, the court determined that the anti-demolition, rent-up, and renovation provisions of Local Law No. 9 deprived *Seawall* of economically viable use of its property.²⁴¹ Then it determined that the means used did not substantially advance the City's purpose of preventing homelessness.²⁴²

The *Seawall* court used the conceptual severance theory to determine that Local Law No. 9 denied owners economically viable use of their properties by abrogating or substantially impairing the "property owners' basic rights 'to possess, use and dispose' of their buildings."²⁴³ Coerced rentals deprived owners of possession by causing a permanent physical invasion of their properties.²⁴⁴ The rent-up requirement and the prohibition on conversion denied owners the ability to use their properties as they deemed fit or to dispose of them

234. *Id.* at 105, 542 N.E.2d at 1064, 544 N.Y.S.2d at 547.

235. *Id.*

236. *Id.* at 105, 542 N.E.2d at 1064-65, 544 N.Y.S.2d at 547-48.

237. *Id.* at 106, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548.

238. *Id.*

239. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

240. *See supra* notes 130-49 and accompanying text.

241. *Seawall*, 74 N.Y.2d at 107-10, 542 N.E.2d at 1066-68, 544 N.Y.S.2d at 548-50.

242. *Id.* at 111-12, 542 N.E.2d at 1068-69, 544 N.Y.S.2d at 551-52.

243. *Id.* at 108, 542 N.E.2d at 1066, 544 N.Y.S.2d at 549 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

244. *Id.*

"for any sums approaching their investments."²⁴⁵

Analyzing Local Law No. 9's effect on the property as a whole,²⁴⁶ the court contrasted the effect of Local Law No. 9 with the effect of the Landmark Law upheld in *Penn Central*. The court noted that the Landmark Law, unlike Local Law No. 9, "denied the owner of Grand Central neither the continued full use of its property nor a reasonable return on its investment."²⁴⁷ It also contrasted Local Law No. 9 with the Subsidence Act in *Keystone*. Although the Subsidence Act reduced the total amount of coal that could be mined, the court noted that, unlike Local Law No. 9, it "did not interfere with the owners' rights to continue to mine coal profitably."²⁴⁸

Finally, the court rejected the City's argument that Local Law No. 9's economic effect must be assessed by "comparing the value of the rights [to be] affected or abrogated with the value of the total 'bundle' comprising the owners' property interests."²⁴⁹ Instead, the court noted that permanent abrogation of one of the property rights, "without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking."²⁵⁰ It based this assumption on two cases: *Hodel v. Irving*,²⁵¹ in which the permanent abrogation of the right to devise property constituted a taking;²⁵² and *Nollan v. California Coastal Commission*,²⁵³ in which an easement of passage "could constitute a taking despite the minimal impact on the total value of the owners' property."²⁵⁴ The court concluded that whether the abolished or impaired property rights are considered alone, as in

245. *Id.*

246. In its conclusion, the *Seawall* court indicated that it was relying on its *Penn Central* and *Keystone* analogies to support an economic analysis of Local Law No. 9's effect on the property as a whole. See *id.* at 110, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551.

247. *Id.* at 108, 542 N.E.2d at 1066, 544 N.Y.S.2d at 549. The *Seawall* court also pointed out that *Penn Central* had not been deprived of pre-existing air rights because they were transferable. *Id.* at 108 n.8, 542 N.E.2d at 1066 n.8, 544 N.Y.S.2d at 549-50 n.8.

248. *Id.* at 109, 542 N.E.2d at 1067, 544 N.Y.S.2d at 550. In *Keystone*, the owners could profitably engage in mining because they were only prevented from extracting two percent of their coal. *Id.* at 109 n.9, 542 N.E.2d at 1067 n.9, 544 N.Y.S.2d at 550 n.9.

249. *Id.* at 109-110, 542 N.E.2d at 1067, 544 N.Y.S.2d at 550.

250. *Id.*

251. 481 U.S. 704 (1987).

252. *Seawall*, 74 N.Y.2d at 110, 542 N.E.2d at 1067, 544 N.Y.S.2d at 550 (citing *Hodel*, 481 U.S. at 715-17).

253. 483 U.S. 825 (1987).

254. *Seawall*, 74 N.Y.2d at 110, 542 N.E.2d at 1067, 544 N.Y.S.2d at 550 (citing *Nollan*, 483 U.S. at 831-32). The *Seawall* court also cited various law review articles discussing the conceptual severance theory. See Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1592-93 (1988); Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1627-28 (1988); Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 356-57 (1988); Radin, *supra* note 92, at 1674-78.

Hodel and *Nollan*, or are compared with the values of the properties as a whole, as in *Penn Central* and *Keystone*, the conclusion is the same: The effect of Local Law No. 9 "is unconstitutionally to deprive owners of economically viable use of their properties."²⁵⁵

Next, the *Seawall* court turned to the second part of the *Nollan* test and asked whether the burdens imposed by Local Law No. 9 substantially advanced legitimate state interests.²⁵⁶ In holding that they did not, the court emphasized that the end sought by Local Law No. 9—alleviating the critical problems of homelessness—was of the greatest societal importance.²⁵⁷ It could not agree, however, that "imposing the burdens of the forced refurbishing and rent-up provisions on the owners of SRO properties *substantially* advances the aim of alleviating the homelessness problem[.]"²⁵⁸

The City argued that "by increasing the availability of SRO units[,] the antiwarehousing and moratorium measures [would] provide more low-cost housing, . . . [thus] alleviating homelessness."²⁵⁹ The court, however, found the relationship between means and ends "indirect at best and conjectural."²⁶⁰ Unlike the Landmark Law in *Penn Central*,²⁶¹ which had the direct effect of saving a landmark, the *Seawall* court could not agree that Local Law No. 9 would actually ameliorate the homelessness crisis.²⁶² The SRO units were not earmarked for the homeless or potentially homeless and the City's own study showed that a ban on SRO conversion or demolition would do little to resolve the homelessness crisis.²⁶³ The connection between the means and the ends was thus too weak to justify imposing virtually the entire cost of the program on a small segment of society, the SRO property owners.²⁶⁴

Finally, after determining that Local Law No. 9 was unconstitutional, the *Seawall* court determined that the buy-out,²⁶⁵ replace-

255. *Seawall*, 74 N.Y.2d at 110, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551.

256. *Id.* at 110-11, 542 N.E.2d at 1068-69, 544 N.Y.S.2d at 551-52.

257. *Id.* The court noted that the City claimed that the purpose of Local Law No. 9 was to prevent homelessness. *Id.* at 111 n.10, 542 N.E.2d at 1068 n.10, 544 N.Y.S.2d at 551 n.10.

258. *Id.* at 111, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987)).

259. *Id.*

260. *Id.* at 112, 542 N.E.2d at 1069, 544 N.Y.S.2d at 552.

261. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 109-15 (1978).

262. *Seawall*, 74 N.Y.2d at 111-12, 542 N.E.2d at 1068-69, 544 N.Y.S.2d at 551-52.

263. *Id.* at 111, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551.

264. *Id.*

265. NEW YORK, N.Y., ADMIN. CODE § 27.198.2[d][4][a][i] (1987); see *supra* notes 28 & 31 and accompanying text.

ment,²⁶⁶ and hardship exemptions²⁶⁷ could not "mitigate the invidious effects of the law" to make it "constitutionally acceptable."²⁶⁸ "In effect, the City . . . is saying no more to the owners than that it will not do something unconstitutional if they pay the City not to do it."²⁶⁹ Such a ransom would be "'an out-and-out plan of extortion.'"²⁷⁰

IV. ANALYSIS OF *SEAWALL*

A. *Physical Taking*

In holding that Local Law No. 9 constituted a physical taking, the *Seawall* court's reliance on *Loretto* was misplaced; consequently, its conclusion was erroneous. As explained in Section II of this Comment, *Loretto* holds that only *permanent* physical occupations of property authorized by the government constitute per se takings²⁷¹—that is, the analysis is done without regard to the public purpose or economic impact of the law.²⁷² Other cases involving temporary, albeit substantial, physical invasions were not takings under *Loretto*'s bright line rule.²⁷³

The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking. . . . [S]uch temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.²⁷⁴

Further, *Loretto* stressed that its bright line rule was "nar-

266. NEW YORK, N.Y., ADMIN. CODE § 27.198.2[d][4][a][ii] (1987); see *supra* notes 29 & 32 and accompanying text.

267. NEW YORK, N.Y., ADMIN. CODE § 27.198.2[d][4][b][i] (1987); see *supra* notes 30 & 33-34 and accompanying text.

268. *Seawall*, 74 N.Y.2d at 113-15, 542 N.E.2d at 1069-70, 544 N.Y.S.2d at 552-53.

269. *Id.* at 113, 542 N.E.2d at 1069, 544 N.Y.S.2d at 552.

270. *Id.* at 114, 542 N.E.2d at 1070, 544 N.Y.S.2d at 553 (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (quoting *J.E.D. Assocs. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981))).

271. See *supra* notes 57-82 and accompanying text.

272. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 435, 441 (1982).

273. The *Loretto* Court explained that although *Kaiser* involved a "government intrusion of an unusually serious character"—requiring public access to a private marina—it was not a taking per se because it was not permanent. *Id.* at 433; see also *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (state law requiring shopping centers to permit individuals to exercise free speech and petition rights on their property not a taking because "the invasion was temporary and limited in nature . . . [and] the fact that [the solicitors] may have 'physically invaded' [the owners'] property cannot be viewed as determinative").

274. *Loretto*, 458 U.S. at 435 n.12.

row,"²⁷⁵ and that it did not affect the "substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property"²⁷⁶ or landlord-tenant relations.²⁷⁷ "States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails."²⁷⁸

Nollan did not change this result.²⁷⁹ In dicta, the Court said that if the Commission required the Nollans to convey an easement outright—not conditioned on a building permit—to give persons the "right to pass to and fro, so that the real property may continuously be traversed," a permanent physical occupation occurs.²⁸⁰ *Nollan* concerned an actual permanent conveyance of property, not a land use restriction or a physical invasion of a temporary nature.²⁸¹ In the absence of a permanent physical occupation or a conveyance of a property interest, a court must engage in *Nollan*'s two-part test and ask whether the governmental action substantially advances a legitimate state purpose without denying the owner economically viable use of its property.²⁸²

In *Seawall*, the mandatory rent-up provisions of Local Law No. 9, unlike an easement, did not cause a permanent physical occupation of Seawall's property because Local Law No. 9 was not "permanent in its individual application or in its limited . . . duration."²⁸³ Also,

275. *Id.* at 441.

276. *Id.*

277. *Id.* at 440.

278. *Id.*

279. In *Nollan*, the Commission required the Nollans to record a deed restriction granting an easement for the public to pass along their beachfront as a condition of building a larger house on their property. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 828 (1987). Because the condition was not substantially related to a legitimate public purpose, the Supreme Court's two-part test did not save the condition from being unconstitutional. *Id.* at 838-42; see *supra* notes 139-49 and accompanying text.

280. *Nollan*, 483 U.S. at 832.

281. *Id.* at 832 & n.1. Arguably, at least, *Seawall* is therefore distinguishable as Local Law No. 9 could be characterized as merely a use restriction.

282. *Id.* at 834 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

283. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 123, 542 N.E.2d 1059, 1076, 544 N.Y.S.2d 542, 559 (Bellacosa, J., dissenting), *cert. denied*, 110 S. Ct. 500 (1989). Local Law No. 9 was to expire in five years unless extended prior to its expiration if the serious public emergency resulting from the loss of SRO's persisted. New York, N.Y., Local Laws No. 9, § 7 (Mar. 6, 1987). Even so, the *Seawall* court held that "[u]nder *First Lutheran* . . . where, as here, the governmental action resulted in a per se taking, the offending action constitutes a taking for whatever time period it is in effect." *Id.* at 106 n.5, 542 N.E.2d at 1065 n.5, 544 N.Y.S.2d at 548 n.5 (citing *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987)). In *First Lutheran*, the Supreme Court held that compensation must be paid even for temporary takings. *First English Evangelical Lutheran Church v. Los*

Seawall Local Law No. 9 gave several methods to exclude others. It could exercise the buy-out option,²⁸⁴ the replacement option,²⁸⁵ or apply for a hardship exemption if it could not earn a reasonable rate of return on the assessed value of its property as an SRO.²⁸⁶ Finally, Seawall was able to make use of all of its property by renting it out as SRO's.²⁸⁷ Therefore, because Local Law No. 9 did not violate either the bright line test of permanent physical occupation—a permanent occupation of property—or the concerns underlying *Loretto's* rule—permanent deprivation of the ability to use, possess, or dispose of the property—²⁸⁸ the Court should not have held Local Law No. 9 a per se taking.²⁸⁹

Angeles County, 482 U.S. 304, 322 (1987). The problem with *Seawall's* analogy is that the Supreme Court did not determine that a per se taking had occurred in *First Lutheran*. *Id.* at 313. The Court assumed a taking only for the purpose of reaching the remedial question. *Id.* The Court noted:

We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that denial of all use [of *First Lutheran's* property] was insulated as a part of the State's authority to enact safety regulations.

Id.

Seawall argued persuasively that Local Law No. 9 should be viewed as permanent since rent control ordinances also were enacted as "temporary" measures and are still in effect 46 years later. Reply Brief of Plaintiff-Appellant Seawall Associates at 27 n.19, *Seawall* (No. 20891/86) [hereinafter *Seawall* Reply Brief].

284. NEW YORK, N.Y., ADMIN. CODE § 27.198.2[d][4][a][i] (1987); see *supra* notes 28 & 31 and accompanying text.

285. NEW YORK, N.Y., ADMIN. CODE § 27.198.2[d][4][a][iii] (1987); see *supra* notes 29 & 32 and accompanying text.

286. NEW YORK, N.Y., ADMIN. CODE § 27.198.2[d][4][b][i] (1987); see *supra* notes 30 & 33-34 and accompanying text.

The Supreme Court has not defined "reasonable rate of return" in numerical terms. The City patterned Local Law No. 9's hardship provision, however, after rent control ordinances which allow landlords to "evict tenants to withdraw [a] building from the housing market if the landlord is not able to earn an 8 1/2% return on the building's assessed value." Municipal Respondents' Brief, *supra* note 12, at 43 (citing NEW YORK, N.Y., ADMIN CODE § 26-408[b](5)(a)); see also Intervenor's Brief, *supra* note 11, at 39. These rent control ordinances have withstood constitutional challenges. See, e.g., *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 409 N.E.2d 948, 431 N.Y.S.2d 475 (1980), *appeal dismissed*, 449 U.S. 1119 (1981).

287. The *Loretto* Court noted that it was not questioning the "substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Thus, as long as the restriction imposed does not mandate permanent physical occupation, no per se taking occurs because the owner can still use his property.

288. *Loretto* stressed that the reason a permanent physical occupation is so serious is because the property owner forever loses the right to make use of the property. *Id.* at 436.

289. *But cf.* Note, *supra* note 44, at 115-25 (arguing that property owners should applaud the *Seawall* opinion for discarding the traditional physical takings test that too often fails to protect private property owners by focusing on actual physical encroachments rather than the owner's intangible rights of possession, exclusion, and dominion).

B. Regulatory Taking

In its regulatory takings analysis,²⁹⁰ the *Seawall* court departed from settled Supreme Court jurisprudence in two ways: by utilizing the conceptual severance mode of analysis, and by invalidating Local Law No. 9 on a facial attack.²⁹¹ In addition, the court's over-broad characterization of the purpose of the law was result-oriented.²⁹²

1. ECONOMIC ANALYSIS

In beginning its economic analysis, the *Seawall* court first looked solely at the anti-warehousing and anti-demolition provisions to determine whether Local Law No. 9 denied Seawall economically viable use of its property.²⁹³ Separating out the hardship provision that guarantees a "fair minimum return"²⁹⁴ from the rest of the law makes it easy to find Local Law No. 9 unconstitutional, but this approach is inconsistent with the Supreme Court's prior opinions. For example, this is not the method employed by the Supreme Court in *Penn Central*.²⁹⁵ When Penn Central challenged the Landmark Preservation Law as an unconstitutional taking of its property, the Court looked at the law as a whole.²⁹⁶ It did not determine first that the law was unconstitutional by denying Penn Central the right to build on top of Grand Central Terminal and then decide the law was valid because

290. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 107-10, 115 & n.14, 542 N.E.2d 1059, 1065-68, 1071 & n.14, 544 N.Y.S.2d 542, 548-51, 554 & n.14, *cert. denied*, 110 S. Ct. 500 (1989).

291. Regarding facial attacks, the Court has stated that "'the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary.'" *Id.* at 121, 542 N.E.2d at 1075, 544 N.Y.S.2d at 557 (Bellacosa, J., dissenting) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 451 U.S. 264, 294-95 (1981)); *see also supra* notes 119-29 and accompanying text.

Regarding conceptual severance, the Court has stated that "'[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.'" *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978); *see also* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-98 (1987) (quoting *Penn Central*, 438 U.S. at 130-31); *supra* notes 150-217 and accompanying text.

292. *See infra* notes 331-42 and accompanying text.

293. *Seawall*, 74 N.Y.2d at 108, 542 N.E.2d at 1066, 544 N.Y.S.2d at 549. After the *Seawall* court determined that the anti-warehousing and anti-demolition provisions constituted a taking, it asked whether the buy-out, the replacement, or the hardship provisions saved it. *Id.* at 113, 542 N.E.2d at 1069, 544 N.Y.S.2d at 552.

294. *Id.* at 125, 542 N.E.2d at 1077, 544 N.Y.S.2d at 560 (Bellacosa, J., dissenting).

295. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *supra* notes 93-118 and accompanying text.

296. *Penn Central*, 438 U.S. at 123-38; *see* Petition [of Municipal Respondents] for Writ of Certiorari to the New York State Court of Appeals at 17, *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989) (No. 89-388).

Penn Central could transfer the restricted development rights to other buildings.²⁹⁷

Next, the *Seawall* court employed the conceptual severance method to determine that Local Law No. 9 deprived Seawall of economically viable use of its property by abrogating the rights to possession, use, and disposition.²⁹⁸ Apparently, the *Seawall* court believed that Local Law No. 9 gave the renting public a permanent easement to occupy and use the SRO properties—indefinitely severing all rights in the properties but the bare title from the owner.²⁹⁹ The *Seawall* court was correct that a permanent deprivation of these rights would constitute a taking.³⁰⁰ Local Law No. 9, however, was not permanent,³⁰¹ and the buy-out, replacement, and hardship options³⁰² preserved the owner's rights to possess, use, and dispose of its property. Thus, the *Seawall* court expanded the use of the conceptual severance test beyond anything that the Supreme Court had done,³⁰³ flying in the face of the Court's continual admonitions against it.³⁰⁴

Nonetheless, the *Seawall* court's analysis clearly illustrates that its use of conceptual severance was not inadvertent. It rejected the City's argument that in analyzing economic impact, the Supreme

297. The Supreme Court analyzed the provisions of the Landmark Preservation Law as a whole. *Penn Central*, 438 U.S. at 123-38.

298. *Seawall*, 74 N.Y.2d at 107-10, 542 N.E.2d at 1066-68, 544 N.Y.S.2d at 549-51. Coerced rentals deprived Seawall of its right to possession. *Id.* at 108, 542 N.E.2d at 1066, 544 N.Y.S.2d at 549. The *Seawall* court reiterated its per se takings analysis for this proposition. *Id.* Local Law No. 9 abrogated the right to use because it denied Seawall the right to demolish, alter, or convert the property. *Id.* It abrogated the right to dispose because, by prohibiting redevelopment and mandating rental, Local Law No. 9 "impairs the ability of owners to sell their properties for any sums approaching their investments." *Id.*

299. *See id.* at 104, 542 N.E.2d at 1064, 544 N.Y.S.2d at 547 (comparing the physical invasion in *Seawall* to the navigational servitude in *Kaiser Aetna* and the permanent physical occupation in *Loretto*).

300. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

301. New York, N.Y., Local Laws No. 9, § 7 (Mar. 6, 1987), provided as follows:

Subdivisions a and c of section 27-198.2 of the administrative code shall expire and shall have no further force or effect on the fifth anniversary date of the effective date of local law number one of nineteen hundred eighty-seven and on the anniversary date of such local law occurring in every fifth year thereafter unless within the thirty day period prior to such anniversary date a local law has been enacted based upon a finding that the serious public emergency described in section one of such local law continues to exist.

As mentioned earlier, however, Seawall argued that Local Law No. 9 should be viewed as permanent because the City also had enacted rent control ordinances as "temporary" measures, which still are in effect 46 years later. *See Seawall Reply Brief, supra* note 283, at 27 n.19.

302. For a discussion of the buy-out, replacement, and hardship options, see *supra* notes 28-34 and accompanying text.

303. For a discussion of conceptual severance generally, see *supra* notes 150-217 and accompanying text.

304. *See supra* note 291.

Court has required that the value of the rights taken be compared with the value of the bundle as a whole.³⁰⁵ Instead, the *Seawall* court relied on *Hodel v. Irving*³⁰⁶ for the proposition that “[t]he rights to use and to possess have been abolished and, without regard to the value of the owners’ remaining interests in their buildings, that would be sufficient [to constitute a taking].”³⁰⁷ Thus far, the Supreme Court has not used conceptual severance in this manner.

As explained earlier, the Supreme Court’s use of conceptual severance to invalidate land use restrictions has been limited to the permanent physical occupation cases.³⁰⁸ When a restriction does not cause a permanent physical occupation, the regulation is subjected to a *Penn Central* multi-factor balancing test to determine whether the character of the action—abrogation of an essential right such as use, possession, or disposition—coupled with the extent of the economic impact, causes a taking. When presented with a facial challenge, as here, a court must determine whether the mere enactment of the law makes the property economically unviable.³⁰⁹ If economic value remains, the restriction must be upheld.³¹⁰

Here, Local Law No. 9’s hardship provision guaranteed Seawall an eight and one-half percent return on the assessed value of its property,³¹¹ which normally should be enough to sustain a facial challenge. Consequently, although Local Law No. 9 caused a physical invasion of Seawall’s property, because the invasion was not permanent, the *Seawall* court should not have deemed it a taking without proof on an as-applied basis that the law made the property economically unviable.³¹²

Perhaps realizing the thin thread on which its opinion rested, the

305. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 109-10, 542 N.E.2d 1059, 1067-68, 544 N.Y.S.2d 542, 550-51, *cert. denied*, 110 S. Ct. 500 (1989). This is interesting when considering that the Supreme Court repeatedly has held that property is not to be separated into discrete segments, but rather analyzed as a whole. *See Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978)).

306. 481 U.S. 704 (1987).

307. *Seawall*, 74 N.Y.2d at 110, 542 N.E.2d at 1067-68, 544 N.Y.S.2d at 550-51.

308. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *see also supra* notes 158-62 and accompanying text.

309. *See, e.g., Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

310. *Id.* at 493-98.

311. *See* NEW YORK, N.Y., ADMIN. CODE § 27-198.2[d][4][b] (1987).

312. The *Seawall* court notes that it is not determining whether Local Law No. 9 frustrates reasonable investment-backed expectations because “[s]uch a factor . . . would be relevant to a challenge to the regulation as applied to particular owners, not a facial challenge.” *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 107 n.6, 542 N.E.2d 1059, 1066 n.6, 544 N.Y.S.2d 542, 549 n.6, *cert. denied*, 110 S. Ct. 500 (1989).

Seawall court bolstered its argument with more traditional reasoning. Unfortunately, its conclusions do not follow from its analysis. In analyzing Local Law No. 9's effect on the property as a whole, the court contrasted it with the Landmark Preservation Law in *Penn Central*.³¹³ In doing so, it noted that Local Law No. 9 was unlike the Landmark Preservation Law because *Penn Central* could continue fully to use its property and could earn a reasonable rate of return, while *Seawall* could not.³¹⁴ Curiously, these factors—use and reasonable rate of return—do not make Local Law No. 9 unlike the Landmark Preservation Law. In fact, a deeper analysis shows the similarity in the laws and leads one to believe that, based on *Penn Central*, Local Law No. 9 should have been upheld.

First, in analyzing continued full use, *Penn Central* could continue to use its property as a railroad terminal as it had for sixty-five years.³¹⁵ Similarly, *Seawall* could continue—in fact, was compelled—to use its property as an SRO.³¹⁶ Second, neither property owner wanted simply to continue the present use. *Penn Central*, like *Seawall*, wanted to enhance its property.³¹⁷ Both parties were precluded from doing so, however, because they were placed under repair and preservation obligations.³¹⁸ Third, although *Penn Central* conceded that it could earn a reasonable rate of return,³¹⁹ the *Seawall* court failed to make a like determination regarding Local Law No. 9's effect on *Seawall*.³²⁰ It failed to do so because in a facial attack such as that presented, there are no facts in the record for an economic analysis.³²¹ If it had analyzed the hardship provision along with the restrictive portions of the law, in the absence of any empirical evidence that the provision failed to work, the *Seawall* court would have had to concede that the hardship provision guaranteed *Seawall* an eight and one-half percent return on the assessed value of its property,³²² enough to

313. *Id.* at 108, 542 N.E.2d at 1066, 544 N.Y.S.2d at 549.

314. *Id.* at 108-10, 542 N.E.2d at 1066-68, 544 N.Y.S.2d at 549-51.

315. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136 (1978).

316. *Seawall*, 74 N.Y.2d at 108, 542 N.E.2d at 1066, 544 N.Y.S.2d at 549.

317. *Penn Central*, 438 U.S. at 116-17.

318. *Id.* at 111-12; *Seawall*, 74 N.Y.2d at 99, 542 N.E.2d at 1060-61, 544 N.Y.S.2d at 543-44.

319. *Penn Central*, 438 U.S. at 130.

320. *Seawall*, 74 N.Y.2d at 99, 542 N.E.2d at 1061, 544 N.Y.S.2d at 544.

321. *Id.* at 115 & n.14, 542 N.E.2d at 1071 & n.14, 544 N.Y.S.2d at 554 & n.14.

322. *Id.* at 101, 542 N.E.2d at 1062, 544 N.Y.S.2d at 545. The *Seawall* court does point out, however, that it is unlikely that *Seawall*'s property will produce less than eight and one-half percent of the assessed value, even though it is subject to rent control and stabilization. *Id.* at 114 n.13, 542 N.E.2d at 1070 n.13, 544 N.Y.S.2d at 553 n.13. This is because the assessed value typically is 45% of the fair market value. *Id.* Although this return seems stringent, the City patterned Local Law No. 9 after the City's rent control and stabilization

defeat a facial attack.³²³

Next, in analyzing Local Law No. 9's effect on the property as a whole, the *Seawall* court distinguished it from the Subsidence Act in *Keystone*.³²⁴ The court noted that the Subsidence Act allowed owners to continue to mine coal profitably although it reduced the amount they could mine.³²⁵ However, it noted, Seawall was denied the sole use for which investment properties are purchased—commercial development.³²⁶ This is a curious statement in view of the fact that investors regularly purchase rental properties for rental use. Indeed, these properties were suited for at least one investment use—rental of SRO's. Additionally, the reasonableness of a purchaser's expectations in purchasing property is undermined when the purchaser enters into a field the City regulates heavily.³²⁷ Arguably, Seawall knew, or should have been aware, when it purchased the SRO's both that the City regulated SRO use and that it had been searching for solutions to abate their removal from the market.³²⁸ Indeed, the *Seawall* court's economic analysis should have taken into account the fact that Seawall probably purchased the SRO's at reduced prices that reflected the market uncertainty regarding future SRO development.³²⁹

Finally, in making its economic analysis, the *Seawall* court should have considered the buy-out, replacement, and hardship provisions as escape mechanisms that would have allowed Seawall to use

laws, see Intervenor's Brief, *supra* note 11, at 48, which were found to be constitutional in *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 409 N.E.2d 948, 431 N.Y.S.2d 475 (1980). The Supreme Court has never defined the benchmark for "reasonable rate of return." See *Penn Central*, 438 U.S. at 130 (assuming, without analysis, that Penn Central could earn a reasonable rate of return).

323. A facial attack merely asks whether the law necessarily denies the owner economically viable use of his land, rather than whether the operation of the law *in practice* has that effect. See *supra* notes 119-29 and accompanying text. To prove a taking, Seawall should have demonstrated that an eight and one-half percent return would not be sufficient in its particular case. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-97 (1987) (explaining that economic impact analysis must be conducted with respect to specific property); *Penn Central*, 438 U.S. at 129-38 (discussing economic impact factors in determining on an as-applied basis whether a regulation constitutes a taking).

324. *Seawall*, 74 N.Y.2d at 109, 542 N.E.2d at 1067, 544 N.Y.S.2d at 550.

325. *Id.*

326. *Id.*

327. See, e.g., *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."); Peterson, *supra* note 129, at 346 ("[T]he reasonableness of these expectations is undermined when a series of government enactments have controlled the development of land for a period of time prior to purchase, especially if those enactments have been periodically amended.").

328. See *supra* notes 6-25 and accompanying text.

329. Brief of Amici Curiae, Community Action for Legal Services at 39, *Seawall* (No. 20891/86).

the property in the manner it desired. Instead, the *Seawall* court facially invalidated Local Law No. 9 without examining the real economic impact on Seawall.³³⁰

2. ENDS/MEANS ANALYSIS

The *Seawall* court's analysis aptly shows that a law's validity is directly related to how a court characterizes its purpose. The *Seawall* court's analysis as to whether Local Law No. 9's means were substantially related to a legitimate state purpose was result-oriented in assuming that the purpose of Local Law No. 9 was to alleviate or to cure homelessness.³³¹ It criticized the City's studies³³² for failing to show that the law "would . . . resolve the homeless crisis,"³³³ and found that "the nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem

330. If the *Seawall* court had performed an as-applied economic analysis, it likely would have found that some SRO owners would be denied a reasonable rate of return on their investment, but many certainly would not. See *Seawall*, 142 A.D.2d 72, 88, 534 N.Y.S.2d 958, 968 (App. Div. 1988) (upholding Local Law No. 9 while urging some owners who would appear to have a meritorious argument for hardship relief to apply for a hardship exemption), *rev'd*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989).

331. See *Seawall*, 74 N.Y.2d at 111, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551. Notably, nearly every brief characterized Local Law No. 9's purpose differently. In its caption to part two of the *Nollan* test, the City described the law's purpose as preventing homelessness. Municipal Respondents' Brief, *supra* note 12, at 31. It then expanded that purpose by stating that Local Law No. 9 "prevents a further increase in homelessness among current SRO tenants by barring the destruction or conversion of SRO's." *Id.* at 32. Intervenor's Brief, *supra* note 11, at 51. Seawall described the law's purpose as "aiding the homeless." Seawall Brief, *supra* note 14, at 44. Appellants, 459 West 43rd Street Corp., argued that Local Law No. 9 was "intended to extract from the SRO owners substantial cash contributions to build housing units which will be affordable to citizens of modest means." 459 West Brief, *supra* note 24, at 35. Later, it described the law's purpose "to solve the problem of homelessness." Reply Brief for Appellants 459 West 43rd Street Corp. at 15, *Seawall* (No. 20891/86). Anbe Realty charged the City with using the SRO law as an attempt to solve the homelessness crisis and asked whether "the statutes' proponents [could] assure us that the streets and public places of New York City will be cleared of derelicts if this Court upholds the SRO law?" Brief of Plaintiff-Appellant Anbe Realty Co. at 28, *Seawall* (No. 20891/86). With so many options, it is not surprising that the *Seawall* court chose a "purpose" to meet its ends of finding Local Law No. 9 unconstitutional. Tellingly, the *Seawall* court noted that other purposes possibly advanced by the law need not be analyzed. *Seawall*, 74 N.Y.2d at 111 n.10, 542 N.E.2d at 1068 n.10, 544 N.Y.S.2d at 551 n.10. One wonders whether this is because, had the court chosen another "purpose," that purpose would be substantially advanced by Local Law No. 9.

332. The City's studies were encompassed in Blackburn, Single Room Occupancy in New York City (Feb. 1986) (study conducted for and available from Urban Systems Research & Engineering, New York, New York).

333. *Seawall*, 74 N.Y.2d at 111, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551. The Blackburn study emphasized that "an effective policy of housing the homeless would require the City to acquire housing units from private owners and redistribute them to nonprofit agencies." Brief of Amicus Curiae, Pacific Legal Foundation at 10, *Seawall* (No. 20891/86).

of homelessness is indirect at best and conjectural.”³³⁴ The City, however, *never* claimed that Local Law No. 9 would *cure* homelessness. It enacted Local Law No. 9 to prevent a further increase in homelessness due to the loss of SRO units.³³⁵ The City’s study was consistent with this goal, recommending “a major effort by the city to preserve SRO’s.”³³⁶

Further, in holding that Local Law No. 9 “would do little to resolve the homeless crisis,” the *Seawall* court misused the *Nollan* test.³³⁷ The nexus test does not require Local Law No. 9 to *solve* the homelessness crisis. Rather, the law must be substantially related to solving the problem.³³⁸ In other words, if it contributes a step in the right direction, the law should meet the nexus test. In this regard, the court’s concern that SRO’s were not earmarked for the homeless or potentially homeless³³⁹ makes no difference. As long as the result of the law’s operation was that the stock of SRO’s remained constant and more people would not become homeless, the law achieved its purpose.

Property owners posed similar concerns regarding replacement units. Because Local Law No. 9 did not require replacement units to be SRO’s,³⁴⁰ they argued that the replacement provision bore no relation to the preservation of SRO’s.³⁴¹ But, the City purposely provided flexibility in constructing replacement units.

In this difficult area of creating low-cost housing, it would be counterproductive to tie the [Housing] Commissioner’s hands by overly detailed instruction. Because no one can foresee what type of housing can be acquired or what site will be found in which zoning district, the law properly establishes only general guidelines.³⁴²

334. *Seawall*, 74 N.Y.2d at 112, 542 N.E.2d at 1069, 544 N.Y.S.2d at 552.

335. *See supra* note 331.

336. Municipal Respondents’ Brief, *supra* note 12, at 6.

337. *Seawall*, 74 N.Y.2d at 111, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551. In *Nollan*, the Supreme Court recognized that a land use regulation would not effect a taking if it “substantially advance[s] a legitimate state interest.” *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987); *see also* *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) (noting that a use restriction may constitute a taking if not “reasonably necessary to the effectuation of a substantial government purpose”). The Court does *not* require the regulation to *solve* the problem that it was designed to alleviate.

338. *Nollan*, 483 U.S. at 834.

339. *Seawall*, 74 N.Y.S.2d at 111, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551.

340. *Seawall* Reply Brief, *supra* note 283, at 37-38; 459 West Brief, *supra* note 24, at 35-38.

341. 459 West Brief, *supra* note 24, at 36-37.

342. Municipal Respondents’ Brief, *supra* note 12, at 39 (citing NEW YORK, N.Y., ADMIN. CODE § 27-198.2[d][4][a][ii] (1987) (providing that replacement units must be affordable to persons of low and moderate income)). Accordingly, the operation of Local Law No. 9 allowed, but did not require, SRO owners to replace the units with SRO’s.

Ironically, a more restrictive law—one requiring owners to rent to the homeless and construct SRO's for replacement units—might have withstood challenge because the court might have viewed it as directly related to curing homelessness.

Finally, the *Seawall* court determined that in equating the cure of homelessness with dollars, the exorbitant rates for the buy-out provisions prove that the obligations placed on a few property owners are the type of burdens that should be borne by the City as a whole.³⁴³ There were seven thousand property owners similarly burdened.³⁴⁴ Notably, the *Seawall* court did not try to distinguish the Landmarks Law in *Penn Central*³⁴⁵ which designated four hundred³⁴⁶ out of over four million buildings in New York City³⁴⁷ as landmarks. Noting that landmarking was part of a comprehensive plan to preserve structures of historic or aesthetic interest, the Supreme Court held the landmark law constitutional.³⁴⁸ Similarly, as the *Seawall* court stated, "the end sought to be furthered by Local Law No. 9 is of the greatest societal importance—alleviating the critical problems of homelessness."³⁴⁹ Thus, Local Law No. 9 should have been upheld as a com-

343. *Seawall*, 74 N.Y.2d at 112, 542 N.E.2d at 1069, 544 N.Y.S.2d at 552. For example, at \$45,000 per unit, it would cost 459 West 43rd Corp. \$9,720,000 to buy out its 216 units. 459 West Brief, *supra* note 24, at 33. Sutton East would pay \$1,395,000 to buy out its 31 units. Brief for Plaintiff-Appellants Sutton East-86 at 50, *Seawall* (No. 20891/86). *Seawall Associates* would have to pay approximately \$5,000,000. *Seawall Reply Brief*, *supra* note 283, at 37. Even though these amounts seem extraordinary, and have even been described as a "ransom," 459 West Brief, *supra* note 24, at 31-32, the selling price of similarly developed real estate in New York City shows that the buy-out provisions are reasonable.

The site of an SRO . . . was redeveloped after its owner exercised his option to "buy out" a 51 unit SRO building at a cost of \$2,295,000. A 57 story luxury tower is standing in its place and the developer is currently offering cooperative apartments for sale at prices ranging from \$462,000 to \$4,500,000.

Intervenor's Brief, *supra* note 11, at 64 n.30.

However, Local Law No. 9 does contain one real deficiency. The rent-up provisions require owners to fill available space, creating tenancies protected by rent control and eviction laws. An owner who later decides to exercise his buy-out option would not only have to pay the \$45,000 per unit to free up each unit, but also would have to negotiate with existing tenants to terminate legal tenancies created by Local Law No. 9. Thus, the owner could end up paying substantially more than \$45,000 per unit to purchase his freedom under Local Law No. 9. Additionally, the possibility of tenant hold-outs exists. The owner conceivably could be forced to remain in the SRO rental business far longer than the framers of Local Law No. 9 likely intended. *Seawall Brief*, *supra* note 14, at 53-54.

344. N.Y. Times, Dec. 14, 1989, at A18, col. 5.

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

346. *Id.* at 132.

347. In his dissent, Justice Rehnquist exclaimed, "Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people." *Id.* at 147 (Rehnquist, J., dissenting).

348. *Id.* at 132-38.

349. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 111, 542 N.E.2d 1059, 1068, 544 N.Y.S.2d 542, 551, *cert denied*, 110 S. Ct. 500 (1989).

prehensive plan to prevent a further increase in homelessness by preserving SRO's.

C. Conclusion

If other jurisdictions choose to follow *Seawall*, municipalities' abilities to fashion innovative programs to meet the housing crisis could be seriously jeopardized. Laws requiring rental of units to the poor, even if only temporarily, would be invalidated as per se takings.³⁵⁰ Restrictions on housing demolition or conversion, even those providing hardship exemptions, may be invalidated on conceptual severance grounds. Also, notwithstanding the Supreme Court's admonition in *Keystone*, *Seawall* encourages courts to entertain *facial*, as opposed to "as applied," challenges in cases raising allegations of unconstitutional takings of private property.³⁵¹

Facial invalidation is perhaps the most damaging aspect of the *Seawall* opinion. As our nation faces a housing crisis which has been all but ignored by the federal government,³⁵² local legislatures need flexibility to create innovative solutions. Facial invalidation thwarts these efforts before policymakers have time to determine if the program works. In both *Nollan* and *Penn Central*, the Supreme Court focused on the economic viability and means/ends analyses. This approach allows the reviewing court to assess the actual impact of the ordinance in light of a specific factual record. Moreover, this approach presupposes that experimental programs, like Local Law No. 9, will have at least some time to work. Otherwise, courts will have no factual basis for determining whether the law has any positive effect on the problem it was designed to address, and whether it causes specific properties to become "economically unviable." Requiring this type of as-applied analysis neither guarantees that creative programs will be constitutional nor that they necessarily will solve complex social problems. It merely requires property owners to *prove* their inability to earn a reasonable rate of return, so that promising programs to solve such problems are not scrapped on the basis of unsubstantiated fears. The City enacted Local Law No. 9 after seri-

350. Other courts have upheld anti-warehousing and anti-demolition provisions in laws designed to preserve low-income housing. See *Help Hoboken Hous. v. City of Hoboken*, 650 F. Supp. 793 (D.N.J. 1986) (upholding law requiring landlords to rent vacant apartments to tenants); see also *Terminal Plaza Corp. v. City of San Francisco*, 177 Cal. App. 3d 892, 223 Cal. Rptr. 379 (Dist. Ct. App. 1986) (upholding city ordinance requiring residential hotel owners to provide relocation assistance to residents prior to conversion of hotel to any other use).

351. For a discussion of facial attacks, see *supra* notes 119-29 and accompanying text.

352. See *supra* note 2.

ous consideration and research into the problem of increasing homelessness in New York City.³⁵³ To invalidate the law before it has a chance to work, or before property owners prove any economic damage, critically chills legitimate City efforts to solve a pressing social problem.

V. ANALYSIS OF ALTERNATIVE PROGRAMS IN LIGHT OF *SEAWALL*

Seawall is not a Supreme Court opinion.³⁵⁴ Therefore, it is binding only on New York courts. However, courts often look to sister states for persuasive reasoning in matters of first impression. This Section attempts to predict arguments that, *Seawall* suggests, may be made under the federal takings clause³⁵⁵ to invalidate other programs designed to preserve, create, or require rental of low-income housing. It presents a summary discussion of preservation programs, anti-warehousing ordinances, anti-displacement measures, and linkage programs³⁵⁶ in light of *Seawall* to determine whether *Seawall*'s extensions of the takings jurisprudence will have any negative impact on their constitutionality.³⁵⁷ Generally, the format that follows sets forth the provisions of the particular ordinance, predicts the results of a takings challenge under the Supreme Court's jurisprudence, and then compares that result with an anticipated result under *Seawall*'s analysis, involving the use of conceptual severance on a facial attack.

353. See *supra* notes 6-25 and accompanying text.

354. The Supreme Court denied certiorari. *Seawall Assocs. v. City of New York*, 110 S. Ct. 500 (1989).

355. The takings argument is just one of several arguments a plaintiff could advance to invalidate a program imposing restrictions or fees on developers or landowners. See *Help Hoboken Hous. v. City of Hoboken*, 650 F. Supp. 793 (D.N.J. 1986) (challenging ordinance as violation of due process and equal protection, as void for vagueness, and as violating federal antitrust laws); *Terminal Plaza Corp. v. City of San Francisco*, 177 Cal. App. 3d 892, 223 Cal. Rptr. 379 (Dist. Ct. App. 1986) (challenging ordinance as invalid tax, violation of substantive due process and equal protection, adopted without proper environmental review or statutory authority); *Bonan v. City of Boston*, 398 Mass. 315, 496 N.E.2d 640 (1986) (challenging ordinance as adopted without proper statutory authority); *San Telmo Assocs. v. City of Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (1987) (challenging ordinance as invalid tax).

356. Linkage programs are not limited to housing programs. They may require developers to provide affordable housing, low-income housing, job training or related community services. M. STEGMAN & J. HOLDEN, *NONFEDERAL HOUSING PROGRAMS* 58 (rev. June 12, 1987). This discussion, however, is limited to housing programs.

357. Although states are free to disregard *Seawall*, owners and developers will likely argue that an analysis similar to *Seawall* should be applied to invalidate their state's ordinances.

A. *Preservation Programs*³⁵⁸

1. THE ORDINANCE

In 1979, the Board of Supervisors of the City and County of San Francisco enacted a moratorium on the demolition or conversion of residential hotel units.³⁵⁹ The moratorium was a response to a serious housing shortage for low-income and elderly residents caused by the conversion of residential hotels to tourist hotels or condominiums.³⁶⁰ In 1981, the Board replaced the moratorium with a permanent regulation known as the Residential Hotel Unit Conversion and Demolition Ordinance.³⁶¹ The regulation's stated objective is to alleviate "the adverse impact on the housing supply and on displaced low income, elderly and disabled persons resulting from the loss of residential hotel units through their conversion and demolition."³⁶²

The ordinance requires owners of residential hotel units to obtain a permit prior to conversion of the property to any other use.³⁶³ The permit is conditioned upon the owner providing relocation assistance to hotel residents and making a one-for-one replacement of the units being converted in one of three ways: the owner must either construct new units, renovate existing units, or pay a fee to the city's Residential Hotel Preservation Fund.³⁶⁴ The California Court of Appeals upheld the ordinance against several challenges.³⁶⁵

The San Francisco ordinance is similar to New York's Local Law No. 9, but distinguishable in one very important respect. It does not mandate continuous residential rental of vacant units at rent-controlled rates.³⁶⁶ Arguably, it was this anti-warehousing provision that New York property owners found most offensive and which caused the *Seawall* court to find Local Law No. 9 both a per se and a regulatory taking. On a takings challenge, the California appellate court

358. Plaintiffs have challenged at least two municipal ordinances designed to preserve low-income housing in state courts. One was invalidated as an illegal tax. *San Telmo Assocs. v. City of Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (1987). The other was upheld as a proper preservation measure. *Terminal Plaza Corp. v. City of San Francisco*, 177 Cal. App. 3d 892, 223 Cal. Rptr. 379 (Dist. Ct. App. 1986).

359. *Terminal Plaza*, 177 Cal. App. 3d at 898, 223 Cal. Rptr. at 381.

360. *Id.*

361. SAN FRANCISCO, CAL., ADMIN. CODE, ORDINANCE No. 330-81, ch. 41 (1981).

362. *Id.* ch. 41, § 41.2.

363. *Id.* ch. 41.

364. *Terminal Plaza*, 177 Cal. App. 3d at 898, 223 Cal. Rptr. at 381. The required fee would be 40% of the construction cost of the number of units converted. *Id.*

365. See *supra* note 355.

366. The ordinance "specifically permits a residential hotel to rent any vacant residential unit to tourists during the designated tourist season, May 1 to September 30." *Bullock v. City of San Francisco*, 221 Cal. App. 3d, 1072, 1081, 271 Cal. Rptr. 44, 47 (Dist. Ct. App. 1990).

correctly held that the San Francisco ordinance did not cause a per se taking because there was no permanent physical invasion of the property.³⁶⁷ Although it did not find a regulatory taking either,³⁶⁸ the case was decided prior to *Nollan*.³⁶⁹ While the court did express concerns about the disproportionate burden placed on select property owners, it ultimately deferred to the legislature's judgment.³⁷⁰ In light of *Nollan*, and the analysis in *Seawall*, would the California ordinance now be found to work a taking?

2. ANALYSIS UNDER SUPREME COURT JURISPRUDENCE

Under *Nollan*, a California court first would determine whether the San Francisco ordinance substantially advances a legitimate state purpose.³⁷¹ In *Terminal Plaza Corp. v. City of San Francisco*,³⁷² a California appellate court found that the purpose of the ordinance was to maintain a healthy supply of rental housing³⁷³ and that it "serves a legitimate governmental interest . . . by means reasonably and directly related to its goals."³⁷⁴ Assuming that the city can substantiate a nexus between the demolition or conversion restrictions and the alleviation of the housing shortage for low-income and elderly residents, *Nollan*'s substantial relationship test would be satisfied.³⁷⁵

In that event, the court would undertake an economic analysis,

367. *Terminal Plaza*, 177 Cal. App. 3d at 911, 223 Cal. Rptr. at 390. The ordinance only affected economic use. *Id.* at 912, 223 Cal. Rptr. at 390.

368. Terminal failed to offer evidence that it was not receiving a reasonable rate of return on its investment from operation of the property as a residential hotel. *Id.* at 912, 223 Cal. Rptr. at 391. Nor did it prove that the market value of the property was diminished because of the ordinance. *Id.* In light of the fact that Terminal retained the right to sell or trade its property, and to use it in the same manner that it had prior to the enactment of the ordinance, the property remained economically viable. *Id.* "[I]n any event, a land use regulation which merely decreases the value of property does not constitute a compensable taking." *Id.*

369. *Terminal Plaza* was decided in 1986. *Nollan* was decided in 1987. In fact, in *Nollan*, the Court chastised California courts in general for upholding laws where no nexus could be shown. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 839-40 (1987).

370. The court noted:

We are concerned that the ordinance places a disproportionate share of the burden of providing low cost housing upon residential hotel property owners, rather than fairly dispersing the cost of conferring such a social benefit upon society as a whole. But we cannot intrude upon the legislative decision-making process by substituting our views for the wisdom of the Board.

Terminal Plaza, 177 Cal. App. 3d at 912, 223 Cal. Rptr. at 391.

371. For a discussion of the first prong of the *Nollan* test, see *supra* note 139 and accompanying text.

372. 177 Cal. App. 3d 892, 223 Cal. Rptr. 379 (Dist. Ct. App. 1986).

373. *Id.* at 909, 223 Cal. Rptr. at 389.

374. *Id.* at 910, 223 Cal. Rptr. at 389.

375. The Supreme Court specifically stated that the nexus was more than a pleading requirement. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987).

the second part of the *Nollan* test.³⁷⁶ If the court applied Supreme Court jurisprudence, the law likely would be valid. In *Terminal Plaza*, the California appellate court already rejected Terminal's argument for application of the conceptual severance theory by refusing to equate Terminal's property rights "with a 'bundle of sticks,' " which Terminal claimed had been destroyed by the ordinance.³⁷⁷ Instead, the court, in an as-applied economic analysis, weighed the *Penn Central*³⁷⁸ balancing factors and determined that the ordinance did not destroy economic use because Terminal could continue to use its property in the same manner that it had before enactment of the ordinance.³⁷⁹ Further, Terminal failed to prove that the ordinance frustrated its investment-backed expectations or that it could not earn a reasonable rate of return.³⁸⁰ In sum, a court following the Supreme Court's analysis likely would uphold the San Francisco ordinance on both a facial and an as-applied attack, even in light of *Nollan*.³⁸¹

3. ANALYSIS UNDER SEAWALL

In view of *Terminal Plaza*'s rejection of conceptual severance, it is unlikely that a California court would both revisit the issue in a later challenge to the ordinance's validity and adopt *Seawall*'s conceptual severance analysis. If a California court were to do so, however, it might invalidate the ordinance on a facial attack³⁸² by finding that the ordinance abrogates two essential property rights: the rights of use and disposition.³⁸³ The ordinance abrogates the right of use because owners cannot develop their property without paying a fee or constructing replacement units.³⁸⁴ It abrogates the right of disposition because as long as the units are burdened with the restriction, the

376. See *id.* at 834 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

377. *Terminal Plaza*, 177 Cal. App. 3d at 911, 223 Cal. Rptr. at 390.

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

379. *Terminal Plaza*, 177 Cal. App. 3d at 912, 223 Cal. Rptr. at 391.

380. *Id.*

381. The court did not perform a facial attack analysis, which under Supreme Court jurisprudence would inquire whether the "mere enactment" of the law made Terminal's property economically unviable. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987) (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)). For a discussion of facial attacks, see *supra* notes 119-29 and accompanying text. Nevertheless, the ordinance likely would survive a facial attack because the court found that Terminal was able to sell its property, use its property in the same manner as before the restriction, or convert its property upon compliance with the restrictions, and that Terminal had not shown a reduction in market value. *Terminal Plaza*, 177 Cal. App. 3d at 911-12, 223 Cal. Rpt. at 390-91.

382. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 108-10, 542 N.E.2d 1059, 1066-68, 544 N.Y.S.2d 542, 549-51, *cert. denied*, 110 S. Ct. 500 (1989).

383. *Id.* at 110, 542 N.E.2d at 1067, 544 N.Y.S.2d at 550-51.

384. *Terminal Plaza*, 177 Cal. App. 3d at 898, 223 Cal. Rptr. at 381. *The Terminal Plaza*

law impedes the owner's ability to sell the property.³⁸⁵

One might argue that *Seawall's* analysis should not apply because the San Francisco ordinance, unlike Local Law No. 9, does not abrogate the right of possession because it does not require property owners to rent their vacant units on a continuous basis.³⁸⁶ Therefore, the ordinance abrogates only two essential sticks in the bundle of property rights—not three. Although *Seawall* involved abrogation of three essential sticks in the bundle—use, possession, and disposition³⁸⁷—the *Seawall* opinion implies that abrogation of just one stick in the bundle would be enough to cause a taking.³⁸⁸ Thus, an owner of residential hotel units could argue that abrogation of *two* essential sticks—use and disposition—would constitute a taking under *Seawall*.³⁸⁹ If a court agreed, validity of the ordinance would be questionable under a *Seawall* analysis, and a facial attack using conceptual severance would be possible. Just the opposite result would obtain, however, under the Supreme Court's analysis in *Nollan*.

B. Anti-Warehousing Programs

1. THE ORDINANCE

In 1986, the City Council of Hoboken, New Jersey, determined that Hoboken was experiencing a low-income rental housing shortage.³⁹⁰ It found that the housing emergency was exacerbated by owners warehousing available affordable housing units which kept them from the rental market.³⁹¹ The city responded by enacting an

court did not discuss whether the development rights were transferable, a factor which could save the law under a *Penn Central* analysis. See *supra* note 111 and accompanying text.

385. See *Seawall*, 74 N.Y.2d at 108, 542 N.E.2d at 1066, 544 N.Y.S.2d at 549.

386. In *Seawall*, the court found that the anti-warehousing provision allowed persons not yet in possession to occupy the SRO units, thereby abrogating *Seawall's* right to possession. *Id.* at 106, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548.

387. *Id.* at 107-10, 542 N.E.2d at 1066-68, 544 N.Y.S.2d at 549-51.

388. *Id.* at 110, 542 N.E.2d at 1067, 544 N.Y.S.2d at 550 ("[T]he permanent abrogation of one of those rights, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking.").

389. This is a weak argument because every zoning regulation or nuisance law limits use and disposition to some extent. See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning law caused 75% diminution in property value); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibition on brickmaking caused 87.5% diminution in property value). *Seawall* really turns on the abrogation of possession issue, which is the major factor distinguishing it from other takings cases. See *supra* note 386.

390. "[T]he elimination of a substantial portion of the existing affordable rental housing stock, and insufficient new construction of affordable rental housing . . . have caused a substantial and increasing shortage of rental housing affordable by families of low and moderate income." *Help Hoboken Hous. v. City of Hoboken*, 650 F. Supp. 793, 796 (D.N.J. 1986).

391. *Id.*

ordinance which requires owners to re-rent apartment units, at rent-controlled rates, within sixty days of a vacancy.³⁹² The ordinance provides a maximum \$500 daily fine if owners fail to rent or obtain a waiver,³⁹³ and it exempts owners who plan to convert their buildings to condominium or cooperative ownership.³⁹⁴

2. ANALYSIS UNDER SUPREME COURT JURISPRUDENCE

Property owners facially attacked the ordinance as a taking in *Help Hoboken Housing v. City of Hoboken*.³⁹⁵ The *Help Hoboken* decision was issued before the Supreme Court's *Nollan* decision. Consequently, the *Help Hoboken* court, on a substantive due process challenge, asked whether the restrictions imposed on property owners were rationally related,³⁹⁶ rather than substantially related,³⁹⁷ to the purposes of the ordinance. The purpose of the law was to "protect the rights of tenants during the present affordable housing crisis,"³⁹⁸ both by requiring rental of vacant units and by giving tenants the right to purchase a condominium or cooperative at prices specified in the ordinance.³⁹⁹ The court noted that the rent-up provisions furthered the purposes of "keep[ing] more units occupied in the short term,"⁴⁰⁰ and that the interrelationship with the rent-control laws "seem[ed] to be a rational way to protect the tenants' state-granted right to buy their units in the event of condo or co-op conversion."⁴⁰¹ Today, under *Nollan*, the court would require a tighter nexus between the means and ends of the law by asking whether the restrictions imposed on property owners are *substantially related* to the purposes

392. Hoboken, N.J., Ordinance V-51, Ordinance Prohibiting the Withholding of Certain Residential Units from the Rental Housing Market Within the City of Hoboken (June 18, 1986).

393. *Id.* The Rent Levelling Board can grant a waiver for maintenance and improvement reasons or if the landlord wishes to keep a unit vacant for occupation by a member of his or her family. *Help Hoboken*, 650 F. Supp. at 795-96.

394. The owner must give the tenant a 60-day notice of the intent to convert, advise the tenant of the right to purchase a unit, and file a plan of conversion with the city. *Id.* The ordinance also exempts owner-occupied buildings of four or fewer units and buildings participating in "an affordable housing project." *Id.*

395. 650 F. Supp. 793, 797 (D.N.J. 1986). The court noted that the claim was premature because the ordinance had never been enforced. *Id.* at 798.

396. *Id.* at 799.

397. For a discussion of the first prong of the *Nollan* test, inquiring whether the restrictions imposed upon property owners are substantially related to the purposes of the law, see *supra* note 139 and accompanying text.

398. *Help Hoboken*, 650 F. Supp. at 796.

399. *Id.*

400. *Id.*

401. *Id.*

of the law.⁴⁰² In that regard, city studies and surveys, although not constitutionally required, would be helpful to substantiate this nexus.⁴⁰³ Assuming that a court would find a substantial relationship between the rent-up and tenant purchase provisions and alleviation of the housing emergency, the ordinance likely would be constitutional because it already has survived a facial challenge.

In *Help Hoboken*, a New Jersey federal district court upheld the ordinance on a facial attack, finding that landlords "ha[d] not been deprived of all 'economically viable' use of their property"⁴⁰⁴ because "landlords . . . remain free to rent their apartments to paying tenants,"⁴⁰⁵ and could remove their buildings from the rental market by filing a plan of conversion to condominium or cooperative ownership with the city.⁴⁰⁶ Because the ordinance had not yet been enforced,⁴⁰⁷ the court did not address whether the ordinance, as applied to particular developers who desired to convert their properties to *commercial* use, would work a taking. The court rejected claims, however, that the "ordinance [would] interfere with the investment-backed expectations of Hoboken redevelopers,"⁴⁰⁸ holding that in the absence of a concrete dispute, "[l]oss of future profits [is] . . . a 'slender reed upon which to rest a taking claim.'" ⁴⁰⁹ Thus, even though the ordinance required landlords either to rent their property, pay a fine, or file a plan of condominium or cooperative conversion with the city, no taking resulted.⁴¹⁰ By the same token, the ordinance is weak because it allows rental properties to be upgraded to condominium or cooperative ownership. Thus, it would do little to alleviate the low-income rental housing crisis or displacement resulting from removal of rental housing from the market. This phenomenon, referred to as gentrification, has been documented as actually aggravating displacement.⁴¹¹

402. See *supra* note 139 and accompanying text.

403. *Nollan* does not specifically require studies, but states that the nexus between ends and means is to be "more than a pleading requirement." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987).

404. *Help Hoboken*, 650 F. Supp. at 798 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 (1981) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980))).

405. *Id.*

406. *Id.* The property owners' real claim was that once the units were rented, they would be subject to rent control laws. *Id.* The court disposed of this claim by noting that the landlords were free to attack the constitutionality of those laws. *Id.* at 798 n.6.

407. *Id.* at 798 ("[P]laintiff's claim is at best premature . . . [b]ecause the ordinance has never been enforced . . .").

408. *Id.*

409. *Id.* (quoting *Andrus v. Allard*, 444 U.S. 51, 66 (1979)).

410. *Id.*

411. For a discussion of the gentrification phenomenon, see sources cited *supra* note 9.

3. ANALYSIS UNDER *SEAWALL*

A comparison of the Hoboken ordinance with Local Law No. 9, however, shows that as to owners desiring to convert their properties to *commercial* use, rather than to cooperative or condominium ownership, the Hoboken ordinance could work both a permanent physical occupation and a regulatory taking under *Seawall*.⁴¹² First, mandated rental of the units by tenants not already in possession would constitute a taking under *Seawall*'s permanent physical occupation theory.⁴¹³ Second, under a regulatory takings analysis, a New Jersey court, utilizing a conceptual severance analysis on a facial challenge, could find that the rights of use, possession, and disposition are abrogated as they were in *Seawall*.⁴¹⁴ The right of use is abrogated because the ordinance does not allow property owners to demolish, alter, or convert their properties to commercial use, although they can convert to condominium or cooperative ownership.⁴¹⁵ The right of possession is abrogated because the ordinance forces owners to re-rent their vacant units.⁴¹⁶ Finally, the right of disposition is abrogated because by prohibiting commercial redevelopment and mandating rental, the Hoboken ordinance likely "impairs the ability of owners to sell their properties for any sums approaching their investments,"⁴¹⁷ assuming they purchased the properties for a premium in anticipation of redevelopment.⁴¹⁸ Abrogation of these three essential "sticks" in the bundle of property rights would constitute a regulatory taking

412. The ordinance only allowed owners to convert to condominium or cooperative ownership and required landlords to give tenants the right "to purchase ownership in the premises at a specified price." *Help Hoboken*, 650 F. Supp. at 796.

413. The court based *Seawall*'s permanent physical occupation holding on the rent-up provisions alone. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 102-06, 542 N.E.2d 1059, 1062-65, 544 N.Y.S.2d 542, 545-48, *cert. denied*, 110 S. Ct. 500 (1989). The *Seawall* trial court distinguished the anti-warehousing provision of *Help Hoboken* from Local Law No. 9 because the ordinance in the *Help Hoboken* case allowed owners to remove their buildings from the residential market. *Seawall*, 138 Misc. 2d 96, 106, 534 N.Y.S.2d 958, 968 (Sup. Ct. 1987), *rev'd*, 142 A.D.2d 72, 534 N.Y.S.2d 958 (App. Div. 1988), *rev'd*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989). However, the New York Court of Appeals did not even consider whether exemptions allowing owners to remove their buildings from the burden of the ordinance would save it from a per se taking. *Seawall*, 74 N.Y.2d at 102-06, 542 N.E.2d at 1062-65, 544 N.Y.S.2d at 545-48.

414. See *supra* notes 243-45 and accompanying text.

415. *Seawall*, 74 N.Y.2d at 108, 542 N.E.2d at 1066, 544 N.Y.S.2d at 549.

416. *Id.*

417. *Id.*

418. The *Help Hoboken* opinion states that the plaintiff, an unincorporated association of developers, attacked the law claiming that "the passage of th[e] ordinance will interfere with the investment-backed expectations of Hoboken redevelopers." *Help Hoboken Hous. v. City of Hoboken*, 650 F. Supp. 793, 798 (D.N.J. 1986). The court, however, summarily dismissed the claim for "[l]oss of future profits," *id.* (quoting *Andrus v. Allard*, 444 U.S. 51, 66 (1979)), refusing to entertain it "until a concrete dispute, focusing on a specific instance of an

under *Seawall*'s conceptual severance theory.⁴¹⁹

Notably, a court following the *Seawall* court's analysis could invalidate the Hoboken ordinance under the conceptual severance theory, whereas a New Jersey federal district court—following Supreme Court jurisprudence—did not.⁴²⁰ The *Help Hoboken* court applied the correct test for a facial challenge—whether “mere enactment” of the law “denies an owner economically viable use of his land”⁴²¹—and upheld the law.⁴²² Because owners are free to rent to paying tenants and can seek exemption by conversion to condominium or cooperative use, their property remains economically viable.⁴²³ According to the *Help Hoboken* court, any other claim, such as a claim that the ordinance prohibits conversion to *commercial* use, would have to be made on an as-applied basis. Consequently, the unwarranted extension of facial attacks and conceptual severance by *Seawall* could adversely affect another innovative program—one substantially similar to Local Law No. 9—before giving it chance to work.

C. *Anti-Displacement Programs*

As the following discussion will illustrate, anti-displacement measures, if reasonable, would likely survive both an analysis under Supreme Court jurisprudence and an analysis under *Seawall*'s conceptual severance theory. Therefore, it may be the type of program a city should consider enacting, assuming the city has the power to do so.⁴²⁴

1. THE ORDINANCE

In 1985, the City of Seattle enacted its Housing Preservation Ordinance to “provide relocation assistance to low-income persons displaced by demolition or change of use.”⁴²⁵ Section 9 of the ordi-

enforcement of [the] ordinance, [was] before the court.” *Id.* (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)).

419. *See Seawall*, 74 N.Y.S.2d at 107-10, 542 N.E.2d at 1065-68, 544 N.Y.S.2d at 548-51.

420. *Help Hoboken*, 650 F. Supp. at 798.

421. *Id.*

422. *Id.* at 796-97.

423. *Id.*

424. *See infra* notes 511-12 and accompanying text.

425. SEATTLE, WASH., MUNICIPAL CODE § 22.210.020(B)(1) & (4) (1985), *invalidated by* R/L Assocs. v. City of Seattle, 113 Wash. 2d 402, 404, 780 P.2d 838, 839 (1989). An earlier case invalidated another section of this ordinance restricting the demolition of low-income housing as an illegal tax. *See San Telmo Assocs. v. City of Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (1987).

nance limited eviction⁴²⁶ and section 10 required owners to assist in relocating displaced tenants.⁴²⁷ In 1986, R/L Associates ("R/L") purchased a house that had been rented to low-income tenants since 1982.⁴²⁸ It obtained a demolition permit that the city revoked when it learned that R/L had not complied with the ordinance.⁴²⁹ On appeal, R/L contended that the ordinance effected a taking of its property.⁴³⁰ The Washington Supreme Court invalidated the ordinance as an illegal tax⁴³¹ and declined to reach the taking issue.⁴³²

2. ANALYSIS UNDER SUPREME COURT JURISPRUDENCE

If a developer challenged an ordinance like Seattle's preservation ordinance on takings grounds, it is unlikely that it would constitute a taking under either a *Nollan* or a *Seawall* analysis. First, the city designed the ordinance to provide relocation assistance to low-income persons displaced by demolition and conversion of rental units.⁴³³ The Supreme Court recently has recognized that "during a housing shortage, the social costs of dislocation of low-income tenants can be severe."⁴³⁴ Accordingly, alleviating tenant hardship through relocation likely would be considered a legitimate state interest. The ordinance would substantially advance that interest because a payment requirement furthers the goal of alleviation of dislocation. Second,

426. Section 22.210.090 (Section 9) provides that tenants cannot be evicted during the 180-day period prior to application for a demolition license unless an enumerated good cause exists. A tenant evicted in violation of this section is entitled to relocation assistance. SEATTLE, WASH., MUNICIPAL CODE § 22.210.090 (1985), *invalidated by R/L Assocs.*, 113 Wash. 2d at 404, 780 P.2d at 840.

427. Section 22.210.100 (Section 10) requires owners to assist in relocating low-income tenants by either relocating them to comparable housing or making an in lieu payment not to exceed \$2,000. The amount of the payment depends on the tenant's income. SEATTLE, WASH., MUNICIPAL CODE § 22.210.100 (1985), *invalidated by R/L Assocs.*, 113 Wash. 2d at 404, 780 P.2d at 840.

428. *R/L Assocs.*, 113 Wash. 2d at 404, 780 P.2d at 840.

429. *Id.* at 405, 780 P.2d at 840.

430. *Id.* at 406, 780 P.2d at 840. R/L also claimed that the ordinance was an invalid exercise of the city's police power to regulate the development of land, the same reason the San Telmo court struck the demolition restriction. *Id.* at 406 & n.1, 780 P.2d at 840 & n.1; *see San Telmo Assocs. v. City of Seattle*, 108 Wash. 2d 20, 24, 735 P.2d 673, 675 (1987).

431. *R/L Assocs.*, 113 Wash. 2d at 409-10, 780 P.2d at 842. The court's decision rested on a state statute providing that "[n]o county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings." *Id.* at 406, 780 P.2d at 840-41. The court held that the payment of relocation assistance is an indirect charge on development and thus, is facially invalid. *Id.* at 409, 780 P.2d at 842.

432. *Id.* at 410, 780 P.2d at 842.

433. *Id.* at 404, 780 P.2d at 839.

434. *Pennell v. City of San Jose*, 485 U.S. 1, 1 n.8 (1988). The Court upheld an ordinance allowing hearing officers to consider tenant hardship when approving a rent increase proposed by the landlord. *Id.*

under an economic impact analysis, property owners may be unable to claim that a maximum \$2,000 payment per tenant⁴³⁵ renders their property economically unviable.⁴³⁶ The merits of this argument would depend on the size of the existing development.

3. ANALYSIS UNDER SEAWALL

Under *Seawall's* conceptual severance analysis, an owner could argue that a burden on development rights is a taking of an essential "stick" in the bundle of his property rights.⁴³⁷ However, it is unlikely that a court would invalidate the law based on a burden on, or even an abrogation of, developments rights alone. The Supreme Court already has held such a result untenable in *Penn Central Transportation Co. v. City of New York*,⁴³⁸ where it upheld the Landmark Preservation Law even though the law restricted Penn Central's ability to alter or develop Grand Central Terminal.⁴³⁹ Although the Seattle ordinance does not provide for transferability of development rights, as the Landmark Preservation Law did in *Penn Central*, the economic impact of the Seattle ordinance on the property is not comparable to the economic impact of the Landmark Law on Penn Central. Penn Central lost millions of dollars in yearly revenues⁴⁴⁰ while property owners subject to an ordinance like the Seattle ordinance would face a one-time \$2,000 per tenant fee.⁴⁴¹ Thus, assuming that the property remains economically viable, an ordinance like the Seattle ordinance likely would be valid under either traditional Supreme Court analysis or *Seawall's* analysis.

D. Linkage

A number of American cities have developed "linkage programs"⁴⁴² to provide much needed low-income housing. Contributions by developers to a local governmental fund in return for certain desired governmental actions, including the issuance of subdivision approval, the granting of a special or conditional use permit, an

435. *R/L Assocs.*, 113 Wash. 2d at 404, 780 P.2d at 840.

436. For a discussion of economic analysis, see *supra* notes 109-18 and accompanying text.

437. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989).

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

439. *Id.* at 138; see also *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding zoning although restricting development).

440. *Penn Central*, 438 U.S. at 116.

441. *R/L Assocs. v. City of Seattle*, 113 Wash. 2d 402, 404, 780 P.2d 838, 840 (1989).

442. This discussion is limited to the housing linkage programs enacted in San Francisco, Boston, and Miami. Not all linkage programs, however, deal with housing. Some pertain to child care and employee training. See M. STEGMAN & J. HOLDEN, *supra* note 356, at 58.

amendment to a zoning map, or some other land use approval or permit are called "exactions."⁴⁴³ A linkage program is simply an innovative form of exaction, generally requiring developers of commercial space additionally to construct housing elsewhere in the community or to contribute monies for the creation of such housing.⁴⁴⁴ A percentage of the monies, usually twenty percent, is set aside for creation of this low-income housing.⁴⁴⁵ The rationale for imposing linkage obligations is to satisfy the need for housing that downtown office development generates by bringing new employees to the city.⁴⁴⁶ Policymakers believe that developers who have contributed to this need should be required to satisfy a portion of the increased housing demand,⁴⁴⁷ establishing the link between the cause of the harm and the burden imposed.⁴⁴⁸ As the following analysis illustrates, a properly substantiated linkage program with reasonable fees and a large threshold likely would survive a takings analysis. However, linkage may not be a useful tool in alleviating the housing crisis in *all* cities. Successful linkage programs usually are found only in cities with booming downtown economies.⁴⁴⁹

1. SAN FRANCISCO

a. The Ordinance

San Francisco enacted the Office Housing Production Program ("OHPP") in 1981 after the city determined that a causal connection existed between large-scale downtown development and the need for

443. Connors & Meacham, *Paying the Piper: What Can Local Governments Require as a Condition of Development Approval?*, INST. ON PLAN. ZONING & EMINENT DOMAIN § 2.02[1], at 2-2 (1986). Eighty-eight percent of all communities employ some form of exaction. Best, *New Constitutional Standards for Land Use Regulation Portends of Nollan and First English Church*, 145 HOFSTRA PROP. L.J. 145, 146 (1988).

444. The San Francisco linkage program only requires developers of new office construction to create housing or to contribute to a housing fund. M. STEGMAN & J. HOLDEN, *supra* note 356, at 64. Conversely, the Boston linkage program requires all large-scale commercial developments to contribute to a fund. *Id.*

445. *Id.*

446. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 524 (1988); see also Connors & Meacham, *supra* note 443, at 2-25.

447. Collin & Lytton, *Linkage: An Evaluation and Exploration*, 21 URB. LAW. 413, 427 (1989).

448. *Id.*

449. *Id.* at 426. Professor Rachelle Alterman believes that cities should consider linkage programs only as temporary measures. Alterman, *Evaluating Linkage, and Beyond*, LINCOLN INST. LAND POL., Feb. 1989, at 61. Alterman argues that linkage is sensitive to market changes because it taps only a narrow range of potential donors currently in a high-profit category. *Id.* at 60. The most reasonable approach is to consider linkage as a temporary solution for creating needed housing while searching for more sound permanent solutions. *Id.* at 61.

additional low- and moderate-income housing.⁴⁵⁰ The city revised the OHPP guidelines and adopted a linkage ordinance in 1985 to create the Office Affordable Housing Production Program ("OAHPP").⁴⁵¹ The OAHPP requires developers of new or substantially rehabilitated downtown office projects proposing the net addition of 25,000 or more gross square feet to provide housing⁴⁵² or contribute a fee of \$6.94 per square foot to a housing fund.⁴⁵³ The linkage fee is triggered by the 25,000 square foot threshold. Hence, if the proposed project is less than 25,000 square feet, no fee is imposed; if it exceeds 25,000 square feet, a fee is imposed on the entire net addition.

b. Analysis Under Supreme Court Jurisprudence

Although property owners have not legally challenged the housing program,⁴⁵⁴ property owners subject to it may claim that exaction fees constitute a taking. If so, a court using the *Nollan* test would first ask whether the ordinance substantially advances a legitimate governmental purpose.⁴⁵⁵ The stated purpose of the OAHPP is to provide housing for additional employees who are attracted to the city by large-scale office development.⁴⁵⁶ A court would find this to be a

450. M. STEGMAN & J. HOLDEN, *supra* note 356, at 59.

451. "Large-scale office developments in the city and county of San Francisco . . . have attracted and continue to attract additional employees to the City, and there is a causal connection between such developments and the need for additional housing in the City, particularly housing affordable to households of low and moderate income." City & County of San Francisco, Office Affordable Housing Production Program Ordinance 358-85 (July 19, 1985) (codified as amended at SAN FRANCISCO, CAL., PLANNING CODE § 313 (1990)).

452. SAN FRANCISCO, CAL., PLANNING CODE § 313.4(1), .5 (1990). If the developer elects to cause housing to be constructed, the number of units to be constructed is calculated by multiplying the net additional square footage by .000386. *Id.* § 313.5(1). Sixty-two percent of the units constructed must remain affordable to low- and moderate-income households for 50 years. *Id.* Low- and moderate-income households are defined as households with incomes less than 120% of the regional median. M. STEGMAN & J. HOLDEN, *supra* note 356, at 64.

453. SAN FRANCISCO, CAL., PLANNING CODE § 313.6 (1990). The city increased the fee from \$5.78 to \$6.94 effective January 1, 1991. Telephone interview with Olson Lee, Chief Housing Finance Officer, City of San Francisco (Jan. 29, 1991). The funds received are deposited into the affordable housing fund and are used solely to increase the supply of housing for low- and moderate-income households. SAN FRANCISCO, CAL., PLANNING CODE § 313.12 (1990). According to the December 1988 Annual Evaluation, the program has generated \$28,094,143 in contributions and has produced 5,690 housing units under the OHPP Interim Guidelines of 1985. Telephone interview with Olson Lee, *supra*.

454. Taub, *supra* note 446, at 541. Office developers unsuccessfully have challenged the hotel conversion and transit fee ordinances. *Terminal Plaza Corp. v. City of San Francisco*, 177 Cal. App. 3d 892, 223 Cal. Rptr. 379 (1986); see *supra* notes 359-65 and accompanying text.

455. For a discussion of the first prong of the *Nollan* test, see *supra* note 139 and accompanying text.

456. See *supra* note 451. Another purpose of the ordinance would be to provide housing for residents displaced by persons attracted to the city by new office employment.

legitimate state purpose based on studies that the city had conducted to document the relationship between housing needs and office development.⁴⁵⁷ The city found the following: forty percent of new office workers would seek housing in the city if it were available; a typical worker occupies 250 square feet of office space; and the average residential unit contains 1.8 employed adults.⁴⁵⁸ The information generated by these studies would substantiate the *Nollan* nexus as long as the housing fund is used to build houses for additional employees attracted to the city.⁴⁵⁹

If the ordinance passes the substantial relationship test, the second prong of the *Nollan* test requires the court to perform a multi-factor⁴⁶⁰ economic analysis.⁴⁶¹ This as-applied analysis requires the court to determine the affect of the restriction on particular properties.⁴⁶² Under the San Francisco program, once the project reaches the 25,000 square feet threshold, the linkage fee would be at least \$173,500, and could exceed one million dollars,⁴⁶³ depending on the size of the project. Because this exaction may render properties economically unviable, a court could find the San Francisco ordinance unconstitutional as applied to large development projects.

Conversely, the San Francisco linkage program likely would sur-

457. See *supra* note 451 (study prepared by Recht Housrath & Assocs.) (July 19, 1984). In this regard, a developer wishing to challenge a program should conduct its own surveys and studies to document the lack of such a relationship.

458. M. STEGMAN & J. HOLDEN, *supra* note 356, at 62-63. Studies determined that "the cost of providing affordable housing to persons attracted to large office developments is \$9.47-\$10.47 per square foot." *Id.* at 64. However, in recognition of the numerous assumptions that were made, the city halved the estimate. *Id.*

459. A court should make an equal protection inquiry into whether it is fair only to subject commercial office developers to the linkage requirements. The OAHPP excludes retail businesses, federal and state government office buildings, and office developments built on San Francisco Redevelopment Authority land. SAN FRANCISCO, CAL., PLANNING CODE § 313.3(2) (1990). As long as the city has evidence that office development employs more persons per square footage of space than other uses, however, singling out commercial office developers to bear the burden should be valid.

460. The court would apply the multi-factor balancing test set forth in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). For a discussion of this test, see *supra* notes 109-18 and accompanying text.

461. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] and owner economically viable use of his land'" (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980))).

462. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 294, 295 (1981) ("These 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances."). *Keystone* reaffirmed this principle. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

463. Once the development is over 144,100 square feet, the payment would be greater than one million dollars.

vive a facial challenge. Under Supreme Court jurisprudence, the test is whether the mere enactment of the ordinance "denies an owner economically viable use of his land."⁴⁶⁴ Here, because the ordinance provides all developers with at least 25,000 square feet of unimpeded development rights, their properties retain some commercial viability. Thus, the ordinance should be valid, unless it is virtually impossible to build an office project in San Francisco without exceeding the 25,000 square foot threshold.

A creative developer's argument, however, would be that a court should view his development rights as two separate segments. The first 25,000 square feet of unimpeded development rights would be one segment; the remaining development rights would constitute the second segment. The developer could then argue that his development rights in his second segment (the segment over 24,999 square feet) are adversely affected by a large linkage fee. As to this segment, he has no exempted threshold, and thus, no guarantee of economic viability. This argument is essentially Penn Central's argument regarding the effect of the Landmark Preservation Law on Grand Central Terminal.⁴⁶⁵ It claimed that its property should be separated into segments to determine whether air space in which it had not yet built had been taken by the Landmark Preservation Law.⁴⁶⁶ The Supreme Court rejected Penn Central's argument, holding that property rights are not separated into discrete segments.⁴⁶⁷ Instead, the court looks at the effect of the ordinance on the property as a whole.⁴⁶⁸ Similarly, a California court following Supreme Court analysis likely would uphold the linkage ordinance, based on *Penn Central*, because, viewing the developer's property as a whole, at least 24,999 square feet of unimpeded development rights remain, guaranteeing the developer some economic use of his property.

c. Analysis Under *Seawall*

A court would come to the exact same conclusion under *Seawall*'s conceptual severance analysis. Although the *Seawall* court extended conceptual severance beyond traditional bounds, it did so only where it perceived that Local Law No. 9 totally abrogated one or more of the rights to use, possession, and disposition.⁴⁶⁹ Because

464. *Keystone*, 480 U.S. at 495-96.

465. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978).

466. *Id.* at 130.

467. *Id.*

468. *Id.*

469. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 108-10, 542 N.E.2d 1059, 1066-68, 544 N.Y.S.2d 542, 549-51, *cert. denied*, 110 S. Ct. 500 (1989).

some development rights remain unimpeded under the San Francisco ordinance, namely 25,000 square feet, it is unlikely that a court following *Seawall's* analysis would extend the conceptual severance theory to subdivided individual rights. Otherwise, the concerns of the *Keystone* majority would come to fruition because allowing property to be chopped up in this manner could cause all land use regulations to be deemed takings.⁴⁷⁰ Thus, although a California court following *Seawall's* analysis might consider that abrogation of *all* development rights constitutes a taking, it probably would not extend this concept to apply only to abrogation of development rights over the 25,000 square foot threshold, assuming the property remained economically viable. In that regard, an owner would have to concede, at least on a facial attack, that he retained some economically viable use of his property by virtue of the 25,000 square foot threshold. This minimum viability is all that is required on a facial attack, and is why the Supreme Court has said that a challenger faces an uphill battle in making a facial attack.⁴⁷¹

In sum, validity of the San Francisco linkage program depends on whether the challenge is made on an as-applied basis or on a facial challenge. A developer would have a better chance of successfully challenging the ordinance on an as-applied basis if the contemplated development over 25,000 square feet is large enough so that the linkage fee "denies [the] owner economically viable use of his land."⁴⁷² Similarly, the city would reap more benefits from a linkage program by making the amount of square footage exempt from the law as large as possible so that under an as-applied economic analysis, the effect of the ordinance on the property as a whole is not disproportionate to the size of the developer's investment or planned development.

2. BOSTON

a. The Ordinance

In 1983, the Boston Zoning Commission amended its zoning code to enact a linkage program⁴⁷³ designed to capture some of the profits from substantial downtown development for use in creating

470. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987).

471. *Id.* at 495.

472. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

473. BOSTON, MASS., ZONING CODE art. 26 (1983), amended by BOSTON, MASS., ZONING CODE art. 26A & 26B (1983); see also M. STEGMAN & J. HOLDEN, *supra* note 356, at 180; Taub, *supra* note 446, at 535 n.133.

sorely needed low- and moderate-income housing.⁴⁷⁴ The linkage program requires developers to pay \$5.00 per square foot over 100,000 square feet of new or substantially rehabilitated commercial space⁴⁷⁵ as a condition precedent to obtaining a discretionary zoning change.⁴⁷⁶ The exaction applies to all large-scale real estate developments including retail, institutional, educational, hotel, and office projects.⁴⁷⁷

Property owners challenged Boston's linkage program asserting that the city lacked statutory authority to impose development exactions.⁴⁷⁸ While declining to pass on the legality of the linkage program, the Massachusetts Supreme Judicial Court suggested that the state adopt legislation to cure asserted omissions in statutory authority.⁴⁷⁹ The Boston City Council approved the program in 1986.⁴⁸⁰ Would Boston's program withstand a takings challenge?

b. Analysis Under Supreme Court Jurisprudence

Under the first prong of the *Nollan* test, a court would analyze whether the purpose of the law is substantially advanced by the means utilized to implement it.⁴⁸¹ The purpose of the program is to mitigate the impact of large-scale development on low- and moderate-income housing by requiring developers of large projects to create housing or contribute to a housing fund.⁴⁸² Prior to its enactment, the city did

474. Taub, *supra* note 446, at 535.

475. BOSTON, MASS., ZONING CODE § 26A-3(2)(a) (1986). The ordinance exempts projects under this threshold. *Id.*

476. The program applies to discretionary zoning changes such as variances, conditional use permits, exceptions, or zoning map or text amendments. *Id.* § 26A-3.

477. *Id.* § 26A-3(2)(a) (Table D).

478. *Bonan v. City of Boston*, 398 Mass. 315, 496 N.E.2d 640 (1986). The plaintiffs were property owners located adjacent to the Massachusetts General Hospital. *Id.* at 315 n.1, 496 N.E.2d at 640 n.1. The Boston Zoning Commission approved the hospital's application to designate its property as a planned development area under the linkage program. *Id.* at 318, 496 N.E.2d at 642. This amendment permitted increased density ratios for a payment of \$3.7 million over twelve years to a charitable trust fund administering the program. *Id.* at 319 n.8, 496 N.E.2d at 643 n.8. The plaintiffs challenged the ordinance as unauthorized by the city's zoning enabling statute. *Id.* at 317, 496 N.E.2d at 642. The trial court agreed and entered a final declaratory judgment on a motion to dismiss. *Id.* The Supreme Judicial Court of Massachusetts reversed on the basis that the plaintiffs lacked standing for failure to allege an actual controversy. *Id.* at 322, 496 N.E.2d at 645. The court specifically reserved the question of the legality of the linkage amendment. *Id.* at 323, 496 N.E.2d at 645.

479. *Id.* at 323, 496 N.E.2d at 645.

480. See Act of Dec. 17, 1986, Boston, Mass., City Council (Authorizing Certain Actions by City of Boston to Mitigate the Effects of New Large-Scale Commercial Real Estate Development (Linkage)); Taub, *supra* note 446, at 538.

481. For a discussion of the first prong of the *Nollan* test, see *supra* note 139 and accompanying text.

482. Article 26 states:

not conduct studies to show a nexus between fees imposed on developers and the creation of low- and moderate-income housing.⁴⁸³ Again, although these studies are not constitutionally required, they would be helpful in substantiating the nexus.⁴⁸⁴ In any event, the exaction fee would substantially meet the end of creating low- and moderate-income housing as long as the city used the fees for that purpose.

In applying the economic analysis prong of the *Nollan* test, the court likely would engage in an analysis similar to that discussed in connection with the San Francisco linkage ordinance.⁴⁸⁵ This is because Boston patterned its linkage program after the San Francisco linkage program.⁴⁸⁶ This imitation could be risky insofar as any weaknesses inherent in the San Francisco program, such as the possibility of a successful as-applied takings challenge, would affect the Boston ordinance as well.⁴⁸⁷ On the other hand, to the extent that the San Francisco program would survive a facial attack in light of the 25,000 square foot threshold which guarantees the property owner at least some economic use of his property, the Boston program would survive as well. In fact, the Boston program stands a substantially better chance of being held constitutional under *either* an as-applied or a facial economic analysis. This is because the threshold is much higher (100,000 square feet), and once this threshold is met, the

The purpose of this article is to promote the public health, safety, convenience and welfare; to prevent overcrowding and deterioration of existing housing; to preserve and increase the City's housing stock; to establish a balance between new, large scale real estate development and the housing needs of the City; and to mitigate the impacts of large scale development on the available supply of low and moderate income housing, by provisions designed to:

1. Afford review and to regulate large scale real estate development projects which directly or indirectly displace low or moderate income residents from housing units or contribute to an increase in the costs of housing.

2. Increase the availability of low and moderate income housing by requiring developers, as a condition of the grant of deviations from the Zoning Code or the grant of an amendment to the zoning map or text, to create low and moderate income housing or to make a housing contribution grant to the Neighborhood Housing Trust ("Trust").

BOSTON, MASS., ZONING CODE art. 26A (1986); see also Gallogly, *Opening the Door for Boston's Poor: Will "Linkage" Survive Judicial Review?*, 14 ENVTL. AFF. 447, 448 (1987).

483. Taub, *supra* note 446, at 538; see also Connors & Meacham, *supra* note 443, at 2-25.

484. *Nollan* does not specifically require studies but states that the nexus between ends and means is to be "more than a pleading requirement." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987). In any event, later studies should validate the ends/means nexus.

485. See *supra* notes 460-68 and accompanying text for a discussion of an economic analysis of the San Francisco linkage ordinance.

486. Collin & Lytton, *supra* note 447, at 415 (noting that linkage programs are still in their infancy and are not yet developed enough to warrant premature imitation).

487. See *supra* notes 460-63 and accompanying text.

linkage fee is imposed on only the square footage *over* that threshold. A developer of a 100,001 square foot improvement would be charged a linkage fee of only \$5.00 under the Boston program as compared to \$694,006.94 under the San Francisco program.⁴⁸⁸ Thus, it would be difficult for a property owner to claim that the Boston linkage program rendered his property economically unviable. In sum, as long as the city can overcome the *Nollan* hurdle of establishing an appropriate nexus between the purpose of the law and the burdens imposed on developers, the Boston program should withstand a takings challenge.

c. Analysis Under *Seawall*

Again, because Boston patterned its linkage ordinance after the San Francisco linkage ordinance discussed above, the result in applying *Seawall*'s conceptual severance theory to the Boston ordinance would be the same. That is, a court likely would refuse to apply *Seawall*'s conceptual severance theory to subdivided individual development rights—the segment of the property over the 100,000 square foot threshold. Hence, because the property owner has at least 100,000 square feet of unimpeded development rights, the ordinance would pass the minimum economic viability test and survive a facial challenge using *Seawall*'s conceptual severance theory.⁴⁸⁹

3. MIAMI

Miami's linkage program is designed to mitigate the perceived harm caused by commercial development next to downtown residential areas.⁴⁹⁰ Developers are given density bonuses⁴⁹¹ in exchange for contributions toward or the creation of low- and moderate-income housing.⁴⁹² They have a choice between building housing on the site or off the site, or contributing to a housing trust fund.⁴⁹³

488. Compare BOSTON, MASS., ZONING CODE § 26A-3(2)(a) (1986) with SAN FRANCISCO, CAL., PLANNING CODE, § 313.6 (1990). The greater the square footage exempted, the greater the chance that the court would find the property retained economic viability. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (noting that the Court's "test for regulatory taking requires [the Court] to compare the value that has been taken from the property with the value that remains in the property").

489. See *supra* notes 469-72 and accompanying text for an application of *Seawall*'s conceptual severance theory to the San Francisco linkage ordinance.

490. M. STEGMAN & J. HOLDEN, *supra* note 356, at 66.

491. Developers are allowed a higher maximum permissible floor/area ratio (FAR), although the square footage cannot be increased beyond 1.0 square foot of FAR in SPI-5 District and 2.75 times the gross land area in SPI-7 District. MIAMI, FLA., ZONING ORDINANCES §§ 1556.2.2, 1576.2.2 (1989); see also M. STEGMAN & J. HOLDEN, *supra* note 356, at 66.

492. MIAMI, FLA., ZONING ORDINANCES § 1556.2.2(1) (1989).

493. *Id.*

No one has challenged the program yet, probably because it resulted from a negotiated agreement between the development community and the city.⁴⁹⁴ In analyzing a takings challenge under *Nollan*, however, a negotiated agreement does not establish that the purpose of the program—mitigation of harm caused by additional development—is substantially advanced by the linkage fee.⁴⁹⁵ For example, since the created housing can be *either* within the special district *or* in a designated redevelopment area,⁴⁹⁶ developers might argue that the linkage fee is not directly related to the need for housing caused by the development.⁴⁹⁷ Because the creation of office space yields housing in the metropolitan area as a whole, however, one could argue that the location is irrelevant.

As to the economic viability prong of the *Nollan* test, it is unlikely that a court would find that the ordinance deprives a developer of economically viable use of his property. The linkage requirements apply only when the developer wants an increase in square footage over the base amount allowed by existing zoning.⁴⁹⁸ Thus, there would be some economic use of the property allowed by existing zoning and the developer would be under no compulsion to contribute toward housing.⁴⁹⁹ On the other hand, if it is virtually impossible for a developer to build in downtown Miami without deviating from existing zoning, linkage payments may make the property economically unviable on an as-applied analysis, similar to the San Francisco ordinance.

VI. CONCLUSION

Seawall extends the Supreme Court's takings doctrine in three ways: by expanding the permanent physical occupation theory to

494. M. STEGMAN & J. HOLDEN, *supra* note 356, at 66.

495. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

496. MIAMI, FLA., ZONING ORDINANCES § 1556.2.2(1) (1989).

497. In the *Nollan* case, the Court held that the easement across the beach portion of the Nollan's property did not substantially advance the purpose of creating visual access to the beach. *Nollan*, 483 U.S. at 838. Similarly, an increase in the square footage of downtown development may not necessarily cause an increased need for housing in a community redevelopment area if housing is not demolished to create the office building. This argument would apply to any linkage program.

498. M. STEGMAN & J. HOLDEN, *supra* note 356, at 200.

499. A court following *Seawall* would not invalidate this program on the economically viable use standard. There is no conceptual severance issue because the linkage requirements apply only when the developer requests a density bonus. Accordingly, the ordinance does not abrogate development rights. Similarly, the ordinance does not abrogate the right to dispose of the property because it does not impair the property's value. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989).

include mandated rentals,⁵⁰⁰ by expanding regulatory takings based on the conceptual severance theory,⁵⁰¹ and by promoting facial invalidation.⁵⁰² Programs adversely affected by these extensions are those restricting development by preservation or those mandating rental of existing buildings. According to *Seawall*, preservation programs are invalid because they abrogate use and disposition.⁵⁰³ Consequently, a court employing *Seawall*'s analysis could facially invalidate the program using the conceptual severance theory. In this manner, *Seawall* adversely affects a city's ability to initiate innovative programs to preserve a disappearing stock of low-income housing. Mandated rental programs receive especially harsh treatment under *Seawall* because they would be invalidated both as per se and regulatory takings. Thus, although sorely needed units may sit vacant awaiting redevelopment, the municipality is powerless to marshal them for rental.

Linkage programs fare the best under *Nollan* and *Seawall*, as long as the court is satisfied that the means of the law substantially advance its ends, without making the properties commercially unviable. Because studies show that the success of linkage is limited to cities experiencing a booming downtown development, however, linkage may not be the best method to create housing. In periods of slow growth, for example, linkage may do more harm than good if developers are persuaded to move elsewhere.⁵⁰⁴

Municipalities face high risk in enacting restrictive preservation programs because the United States Supreme Court recently held, in *First English Evangelical Lutheran Church v. Los Angeles County*,⁵⁰⁵ that even temporary takings mandate payment of damages.⁵⁰⁶ Nevertheless, use-restrictive measures may be the most effective short-term method to preserve housing. The Supreme Court has allowed even great burdens to be imposed on private property through use restrictions as long as the restrictions substantially advance a legitimate state interest.⁵⁰⁷ *Nollan* reaffirms this policy and merely tightens the

500. See *supra* notes 220-38 & 271-89 and accompanying text.

501. See *supra* notes 243-45 & 298-312 and accompanying text.

502. See *supra* notes 321-23 and accompanying text.

503. *Seawall*, 74 N.Y.2d at 110, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551.

504. See Collin & Lytton, *supra* note 447. The "golden goose" argument is that linkage acts as a barrier to new commercial development because firms choose to locate where they will not have to pay the increased cost represented by the housing fee. *Id.* at 426.

505. 482 U.S. 304, 322 (1987).

506. *Id.* at 321 ("[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."). The Court limited its holding to facts showing that a property owner has been deprived of all use of its property. *Id.* For a brief discussion of *First Lutheran*, see *supra* note 283.

507. For example, Penn Central lost millions of dollars in yearly revenues by enactment of

means/ends requirement that the means used must substantially advance the ends of the law.⁵⁰⁸ It requires courts to look at the basis for substantiation rather than defer to the legislative judgment.⁵⁰⁹ Accordingly, with proper substantiation and guidelines ensuring that the city has not deprived an owner of all use of his property, a housing preservation measure may be upheld.

Also, unless the restriction causes a permanent physical occupation, *Loretto v. Teleprompter Manhattan CATV Corp.*⁵¹⁰ reaffirms a state's ability to restrict the uses of property. As we face a growing homelessness crisis, innovative housing programs may be the only answer to the housing dilemma. Courts must overcome the impulse to invalidate these innovative programs on facial challenges. They should reject the *Seawall* court's extensions of conceptual severance and the resulting invalidation of innovative programs on mere facial challenges. At the very least, courts should require the burdened property owner to prove its inability to make a profit on development. In this manner, legislatures can attempt to balance society's need to house the poor against the rights of private property owners.

VII. APPENDIX: CHECKLIST FOR PROPOSED LEGISLATION

The following is a list of factors that municipalities should consider when drafting proposed legislation to preserve or create low-income housing to alleviate the homelessness crisis. This checklist incorporates suggestions or omissions noted in the alternative programs discussed in the previous Section.

A. *Power.* Courts have invalidated many exaction provisions because neither the applicable statute, constitution, nor any enabling legislation authorized municipalities to enact them.⁵¹¹ The drafter should review the state constitution, state statutes, local home rule provisions, and/or zoning laws for proper authority. The drafter should also check for provisions that limit the municipality's power to

the Landmark Preservation Law. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 116 (1978).

508. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987).

509. *Id.* As the Court noted, substantiation of the law is more than a pleading requirement. *Id.* at 841. Commentators agree that *Nollan* imposed a stricter judicial review requirement. See Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Commission*, 12 HARV. ENVTL. L. REV. 231, 242 (1988); *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 244-45 (1987). No longer will the Court simply defer to the legislature's judgment.

510. 458 U.S. 419 (1982).

511. See Collin & Lytton, *supra* note 447, at 421-22; Gallogly, *supra* note 482, at 461-65; Rose, *From the Legislatures*, 16 REAL EST. L.J. 356 (1988).

exact fees or special taxes.⁵¹²

B. *Definitions.* The ordinance should define low- or moderate-income housing so that it is truly affordable to persons of that status.⁵¹³ If the housing is defined as "affordable housing," it would be more helpful to the poor in the community because the rental or purchase price would then be tied to the person's income, not to some national average.⁵¹⁴

C. *Studies.*⁵¹⁵ The city should perform surveys or other empirical studies to substantiate the purpose of the exaction and the effect of the particular means chosen in meeting that purpose.⁵¹⁶ For example, if the city is considering linkage, it should survey downtown office

512. See *R/L Assocs. v. City of Seattle*, 113 Wash. 2d 402, 780 P.2d 838 (1989); Rose, *supra* note 511, at 356-59 (discussing forms of statutory authority and whether or not the fee might be considered a tax).

513. For example, Peter Marcuse's Model Anti-Displacement Zoning Ordinance defines "low-income household" as "[a] household earning 50% or less of the median income for households of that size in the City." Marcuse, *To Control Gentrification: Anti-Displacement Zoning and Planning for Stable Residential Districts*, 13 N.Y.U. REV. L. & SOC. CHANGE 931, app. at 946 (1984-1985). He defines a "moderate income household" as "[a] household earning 80% or less of the median income for households of that size in the City." *Id.* "Low-rent unit" is defined as "[a] dwelling unit available at a rent equal to or less than 25% of the income of a low-income household, or a unit available for sale at a real current carrying cost equal to or less than 25% of the income of a low-income household." *Id.* at 947. "Moderate-rent unit" is defined as "[a] dwelling unit available at a rent equal to or less than 25% of the income of a moderate-income household, or a unit available for sale at a real current carrying cost equal to or less than 25% of the income of a low-income household." *Id.*

514. See, e.g., SAN FRANCISCO, CAL. PLANNING CODE § 313.1(2) (1990) (The purchase price annual payment should not exceed 33% of the combined household annual net income; the rental payment should not exceed 30% of the combined annual net income.); Boston Globe, Oct. 1, 1989 ("Your Home" Special Section), at 12, col. 1 ("['A]ffordable' [housing] . . . means housing for which a tenant pays a rent that is never more than a fixed percentage—say 25 percent—of income, no matter how low that income."); see also Rykowski, *Florida's Affordable Housing Demand Far Outstrips Supply*, Miami Herald, Oct. 14, 1990, at J2, col. 5 ("Homes are considered affordable if the monthly housing payment plus utilities does not exceed 30 percent of monthly income.").

515. There are three basic tests that state courts use to analyze exactions. The strict rule or direct benefit test, the specifically and uniquely attributable test, and the rational nexus test. See Gallogly, *supra* note 482, at 467. The drafter should check individual state laws for the specific nexus requirements before conducting studies.

516. The *Nollan* Court admonished, "We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987). *Nollan* suggests that courts may require an in-depth, empirical analysis demonstrating that the argument for linkage is in fact justified. Casenote, *A Constitutional Standard of Review for Permit Conditions, Exactions, and Linkage Programs: Nollan v. California Coastal Commission*, 30 B.C.L. REV. 903, 933 (1989). The analysis should reveal in statistical terms (1) a direct relationship between the construction of office developments and an exacerbation of the city's housing shortage, (2) that linkage will alleviate it, and (3) that the imposition is not merely a way to satisfy a wholly public need unrelated to the developer's activity. *Id.*; see also Connors & Meacham, *supra* note 443, § 2.03[2], at 2-26 (noting that a court may invalidate a local government's exaction program if the government cannot show that its

workers to substantiate the number of new workers desiring housing in the immediate area.⁵¹⁷ The city should compute square footage estimates to show how many workers per square foot occupy both a development and a home. The survey could then reflect the cost of the housing and its relationship to the office or commercial development shown.⁵¹⁸ The city also should perform projections on downtown growth to ensure that linkage is a viable alternative.

D. *Purpose.* Legislators should carefully word the purpose of the law to show a direct and substantial nexus between the law and the ends it is meant to serve.⁵¹⁹ Although *Seawall* shows that such wording does not guarantee that a court will not recast its purpose in a result-oriented manner, it is nevertheless important to make this as difficult as possible by explicitly drafting a statute which describes a tight link.⁵²⁰

E. *Reciprocity.* Legislators should try to provide or describe some offsetting benefits to the property owners from the functioning of the program.⁵²¹ Again, if benefits are explicitly enumerated and/or provided, it becomes more difficult for a court to invalidate the law without addressing them.

F. *Alleviate the Economic Burden.* Legislators should try to mitigate the economic burden of the law on property owners. For example, they should consider offering transferable development rights in the case of a restriction on demolition, conversion, or building.⁵²² Further, giving tax rebates for each unit built of low-income or

shortage of low- or moderate-income housing is attributable in part to construction of downtown buildings, and that the exaction funds will be used to alleviate that pressure).

517. Surveys of downtown workers could determine where they presently live, where they lived before they began working downtown, how much they pay for rent, their income level, the reason for accepting their current job, when they located to the area, and why.

518. For example, San Francisco determined "that the cost to provide affordable housing to persons attracted to large office developments . . . is \$9.47-\$10.47 per square foot." SAN FRANCISCO, CAL., PLANNING CODE § 313.2 (1990). In recognition of several assumptions made in the program, this cost was halved. *Id.*

519. For example, the San Francisco Office Affordable Housing Production Program preamble states: "'Large-scale office developments in the city and county of San Francisco . . . have attracted and continue to attract additional employees to the City, and there is a causal connection between such developments and the need for additional housing in the City, particularly housing affordable to households of low and moderate income.'" *Id.*

520. New York City characterized Local Law No. 9's purpose as preventing a further increase of homelessness by preserving the existing stock of SRO's. Municipal Respondents' Brief, *supra* note 12, at 8. The *Seawall* court characterized it as a method to prevent or cure homelessness. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 111-13, 542 N.E.2d 1059, 1068-69, 544 N.Y.S.2d 542, 551-52, *cert. denied*, 110 S. Ct. 500 (1989).

521. The *Penn Central* Court noted that landmark preservation benefitted the owners of Grand Central Terminal "both economically and by improving the quality of life in the city as a whole." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 134 (1978).

522. The *Penn Central* Court noted that even though the transferable development rights

affordable housing would provide an incentive to create housing.

G. *Earmarking Funds*. The city should earmark the funds received to be spent exclusively for the claimed purpose.⁵²³ If the purpose of the law is to create affordable or low- and moderate-income housing, the city should consider establishing a housing trust.⁵²⁴ This would defeat any claim that the fees are used as general revenue and, thus, constitute a tax.

H. *Fairness*. Drafters must keep fairness considerations in mind when deciding which development projects to include within the restriction. For instance, the drafter should question whether there is a demonstrable reason to exclude public buildings, universities, or retail establishments from the law.⁵²⁵ If so, that reason should, again, be explicitly stated. If not, then these types of buildings should be included within the restriction. The drafter must also consider that negotiated agreements may be deemed unfair if they "treat similar projects differently (depending on whether a rezoning is necessary) [or] different projects similarly (as long as they require rezoning, they are hit with a linkage obligation)."⁵²⁶

I. *Resale Restrictions*. Drafters should place resale restrictions in the deed to ensure that houses built or subsidized with housing trust fund monies remain affordable. Otherwise, linkage funds may be spent for naught when properties are quickly transferred and removed from the low-income market.⁵²⁷

J. *Community Support*. Any innovative program will be controversial. The municipality should generate community support by proposing ideas to the interested developers or property owners so that they may submit suggestions prior to putting the program in final form. The municipality should give the public a chance to develop and submit alternative programs, give suggestions for changes, and make economic or legal comments. Whether these suggestions are

may not have afforded just compensation, they undoubtedly mitigated whatever financial burden the Landmark Law imposed. *Id.* at 137.

523. See Alterman, *supra* note 449, at 45.

524. See Rosen & Kuta, *Housing Trust Funds: The Legal Challenge*, 1989 A.B.A. SPEC. COMM. ON HOUSING & URB. DEV. 1.

525. San Francisco's linkage ordinance is limited to new office buildings. It exempts all retail businesses, federal and state government office buildings, and office developments built on San Francisco Redevelopment Authority land. M. STEGMAN & J. HOLDEN, *supra* note 356, at 64. In contrast, Boston's program imposes linkage requirements on all large-scale commercial real estate developments, including retail businesses, institutional, educational, hotel, and office developments. *Id.* at 64-65.

526. *Id.* at 69.

527. *Id.* at 57. Similarly, rental housing created or subsidized by the fund should be restricted so that the property can be rented only to a low-income person.

ultimately adopted or not, it is important to try to get a sense for the community feeling on the issue. Also, the city may want to fund a project for a local law school to develop a program, thus transferring the drafting of the mechanics of the plan out of the hands of those who might be seen as having a conflict of interest or favoring persons or entities responsible for large campaign contributions.

K. *Flexibility*. Programs should be flexible enough to give housing credits or exemptions to developers engaged in projects creating low- or moderate-income housing.⁵²⁸ The developer should be able to make a choice among available alternatives. For example, in a linkage program, the developer should be able to choose among creating housing, restoring housing, or paying an in-lieu fee.⁵²⁹ Also, developers may be more amenable to the program if fees can be made in payments over several years.⁵³⁰ The problem with this option is that it may take a long time for the city to build up a source of revenue to create the needed housing.

L. *Hardship Provisions*. The ordinance should exempt a developer from the restrictions or fees upon proof that he cannot make a reasonable rate of return on the property.⁵³¹ The calculation of reasonable rate of return should be realistic and *explicit* in the law. For example, the *Seawall* court felt that Local Law No. 9's hardship provision was illusory because it was based on the assessed value of the property as an SRO, and not the current fair market value considering other possible uses.⁵³² Thus, cities may want to adopt the approach of other New York courts and calculate reasonable rate of return based on a percentage of the purchase price plus taxes,

528. Of course, this provision may run the risk of being arbitrary. For example, the linkage program may cover the downtown area, with housing to be created within one mile of the district. If the developer creates housing outside of this district, the "link" between the means and ends might not be met, although one could argue that the entire metropolitan area was affected. To resolve this objection, the program should provide that housing credits or exemptions would be given only for low- or moderate-income housing created by other projects in the same area covered by the ordinance.

529. San Francisco's ordinance provides these options. M. STEGMAN & J. HOLDEN, *supra* note 356, at 63.

530. Boston's program allows downtown developers to make their payments over a seven-year period. *Id.* at 65.

531. The Supreme Court has not defined "reasonable rate of return." In *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the court assumed that Penn Central could make a reasonable rate of return, but did not define it. *Id.* at 129 n.26. In *Seawall*, the court indicated that an 8.5% return on the assessed value as an SRO was not a reasonable return. *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 114 n.13, 542 N.E.2d 1059, 1070 n.13, 544 N.Y.S.2d 553 n.13, *cert. denied*, 110 S. Ct. 500 (1989).

532. *Seawall*, 74 N.Y.2d at 114 n.13, 542 N.E.2d at 1070 n.13, 544 N.Y.S.2d at 553 n.13.

expenses, and other carrying charges.⁵³³ Under this approach, the developer also must prove that the purchase price did not include a premium over fair market value in the expectation that the city would downzone the property.⁵³⁴

M. *Rules and Regulations.* The city should promulgate rules and regulations immediately to effectuate the ordinance's purpose. By doing so, affected persons have a way to determine their liabilities prior to purchasing property or making plans for development.

N. *Prospectivity.* The city should make the program prospective. In that way, developers or property owners could not claim that they were induced by prior city policy to purchase investment property.⁵³⁵

O. *Severability Clause.* The ordinance should contain a severability clause providing that if any section of the ordinance is found to be invalid as applied to any person, the remainder of the law and the applicability of its provisions to other persons or circumstances will not be affected. Also, the drafter should include a provision that if any section of the ordinance is found to be facially invalid, the remainder of the law will not be affected and will remain in full force and effect.⁵³⁶

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533. *Northern Westchester Professional Park Assocs. v. Town of Bedford*, 60 N.Y.2d 492, 502-03, 458 N.E.2d 809, 815, 470 N.Y.S.2d 350, 356 (1983).

534. *Id.*

535. In *Seawall*, the developers suggested that the City induced them to purchase SRO's for renovation by enacting the J-51 tax abatement and that after their investments were made, the City unfairly reversed its policy by repealing the tax abatement, enacting the moratorium on demolition and conversion, and ultimately, enacting Local Law No. 9, forcing them to refurbish and rent the units. *Seawall Brief*, *supra* note 14, at 10.

536. Severability clauses should be tested by determining if the law still would have bite if a court invalidated certain provisions. The *Seawall* court did not even discuss the severability clause of Local Law No. 9. This is probably because once the court invalidated the anti-warehousing and anti-demolition provisions, the need for the buy-out, replacement, or hardship provisions disappeared.