



Journal of
Affordable Housing
& Community Development Law

VOLUME 29, NUMBER 3
2021

From the Editor-in-Chief

Stephen R. Miller v

From the Chair

Dan Rosen vii

Letters to Regulators

Jill Goldstein, Glenn Graff, Forrest Milder, Brad Tomtishen & B. Susan Wilson 361

From the Reading Room

Between Jacob(s) and Moses: Ed Logue, Urban Redevelopment Lawyer
Saving America's Cities: Ed Logue and the Struggle to Renew
Urban America in the Suburban Age
Reviewed by *Michael Allan Wolf* 381

Digest of Recent Literature

Theresa Omansky, Trevor Warren, Rachel Gillan, Patrick Jenkins, Kyle Slominski & Grant Patton 397

Organizational Profile: The Inclusive Communities Project

Demetria McCain 405

Articles

The Race Conversation About Housing
Antoinette M. Jackson 413

Disasters Do Discriminate: Black Land Tenure
and Disaster Relief Programs
Lesley Albritton & Jesse Williams 421

Race, Place, and Housing in Los Angeles
Shashi Hanuman & Nisha Vyas 449

Building a More Equitable Land Use Regulatory System:
Toward a Twenty-First-Century Zoning Enabling Act
Brian J. Connolly & David A. Brewster 493

Excluded and Evicted: The Impact of Mass Incarceration
on Access to Housing for Black and Latinx Tenants
Sarah Carthen Watson 503

The Harms of Liminal Housing Tenure: Installment Land Contracts and
Tenancies in Common
Sarah Schindler & Kellen Zale..... 523

Race and Housing: The Great Betrayal Revisited and Repaired.
Two Proven Approaches and a New Proposal for Low-Income
Homeownership
Jessica Grobman-Morales, Anthony R. “Andy” Parrish, Jr. & Carol L. Zeiner 535

“Don’t Blame Stokely Carmichael”: The Need
for Federal Fair Housing Leadership
Heather R. Abraham 555

**FORUM ON AFFORDABLE HOUSING
AND COMMUNITY DEVELOPMENT LAW**

EDITORS

Editor-in-Chief

STEPHEN R. MILLER
University of Idaho College of Law
514 W Jefferson Street
Boise, Idaho 83702
millers@uidaho.edu

Associate Editors

EMILY J. BLUMBERG
Klein Hornig LLP
Washington, D.C.
eblumberg@kleinhornig.com

PAUL BOUDREAUX
Stetson University College of Law
Gulfport, FL 33707
boudreaux@law.stetson.edu

SARA SILVERSTEIN FERRARA
Klein Hornig LLP
Washington, D.C.
sferrara@kleinhornig.com

JARED NICHOLSON
Northeastern University School of Law
Boston, MA 02115
ja.nicholson@northeastern.edu

MATT ROSSMAN
Case Western Reserve University School of Law
11075 East Boulevard
Cleveland, Ohio 44106
matthew.rossman@case.edu

Senior Editor

TIM IGLESIAS
University of San Francisco
2130 Fulton Street
San Francisco, California 94117
iglesias@usfca.edu

Managing Editor

JULIE ROBERTS FURGERSON
American Bar Association
Washington, D.C.
julie.furgerson@americanbar.org

Forum Manager

DAWN R. HOLIDAY
American Bar Association
Chicago, Illinois
dawn.holiday@americanbar.org

The *Journal of Affordable Housing & Community Development Law* is the official publication of the Forum on Affordable Housing & Community Development of the American Bar Association, with three issues per year. It is targeted toward attorneys and other housing and community development specialists. It provides current practical information, public policy, and scholarly articles of professional and academic interest.

Disclaimer: The opinions expressed in the articles published in the *Journal of Affordable Housing & Community Development Law* are those of the authors and do not reflect those of the American Bar Association or the Forum on Affordable Housing and Community Development Law.

Membership: For information about membership in the Forum, please contact the ABA Service Center, 321 North Clark Street, Chicago, Illinois 60654-7598, 1-800-285-2221, FAX 312-988-5528, or visit americanbar.org.

Back Issues: Back issues are available for \$15 per copy plus \$3.95 shipping and handling charges. Contact ABA Service Center, 321 North Clark Street, Chicago, Illinois 60654-7598, 1-800-285-2221, FAX 312-988-5528, or ShopABA.org.

Member Address Changes: Send your member number and new address to coa@americanbar.org or change online at www.americanbar.org.

Permission to reprint: Requests to reproduce portions of this issue should be addressed to Contracts, Copyrights & Policies, American Bar Association, 321 North Clark Street, Chicago, Illinois 60654-7598, FAX 312-988-6030, or e-mail copyright@americanbar.org.

© 2021 American Bar Association.

Journal of Affordable Housing & Community Development Law (ISSN 1084-2268 (print); ISSN 2163-0305 (online)) is published as a membership benefit by the American Bar Association, 321 North Clark Street, Chicago, Illinois 60654-7598. Attorneys who are not members of the American Bar Association and nonlawyers may contact HeinOnline. mail@wshein.com, (800) 828-7571 (or (716) 882-2600) for digital subscription options and information. **Postmaster:** Send address changes to Affordable Housing Member Records, American Bar Association, ABA Service Center, 321 North Clark Street, Chicago, IL 60654-7598.

From the Editor-in-Chief

Stephen R. Miller

In the aftermath of the 1968 riots that rocked American cities, the Kerner Commission made the country confront how housing issues were at the core of racial conflict. The Commission's report warned, "Our nation is moving toward two societies, one black, one white—separate and unequal." The Commission further warned, in the language of the day, that "[w]hat white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it." Despite the passage of the Fair Housing Act later in that year, much of the racial inequity rooted in housing choice called out in the Kerner Commission report remains today, embedded deeply in complex property institutions that are always slow to change, and change even more slowly when resisted.



Stephen Miller

Since the 1960s, issues in race and housing have largely proceeded a steady simmer: never going cold, occasionally boiling over. The death of George Floyd in the summer of 2020, however, brought a new reexamination of American race relations, and that included a renewed interest in race and housing. This new national attention to racial issues coalesced with events in the housing world that may well make this a time for meaningful change.

I'd point to the following as evidence that this time is different. In scholarship, Raj Chetty's big data analysis of the Moving to Opportunity study confirmed that the neighborhood where a person grows up has long-lasting implications. The importance of neighborhood effects had been long-postulated since at least the Chicago College of Urban Planning in the early twentieth century, but Chetty's work gave a certainty to the hypothesis. Similarly, the publication of Richard Rothstein's *The Color of Law* made accessible to the general public the ways that property institutions have been marshaled throughout the twentieth century to affect black Americans housing choices. Matthew Desmond's *Evicted* similarly opened the general public's eyes to the abuse of eviction laws that disproportionately affected communities of color.

In federal policy, two flashpoints over the last decade rise to the top. The first is the Obama administration's effort to give teeth to a long-neglected prong of the Fair Housing Act (FHA), which required communities to "affirmatively further" housing options for those classes covered by the Act. While technically on the books since the FHA's passage in 1968, little effort was made to enforce the requirement until the promulgation of the Affirmatively Furthering Fair Housing Rule in December, 2016, just as the

Obama administration left office. The incoming Trump administration at first delayed the rule's implementation and later promulgated changes that largely eliminated the AFFH Rule. The Biden administration seems almost certain to revive it.

Another prong of the FHA has received a similar back-and-forth treatment. In *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the U.S. Supreme Court held that a disparate impact claim was cognizable under the FHA. However, the Trump administration promulgated rules that made it difficult to make such a disparate impact claim. Those rules also seem certain to be revisited by the new Biden administration.

At the local level, it is not without some irony that Minneapolis—the city where George Floyd was killed by police—has been leading the country in a reckoning with the legacy of how single-family zoning districts have led to a racially segregated community. Minneapolis also led the way in eliminating its single-family districts and openly discussed the racial implications—and origins—of such zoning in its comprehensive plan. As of this writing, the city is still implementing such zoning changes to make its development patterns more equitable, a challenge that many other cities have similarly taken up.

Following these threshold moments in scholarship, as well as federal and local policy, this issue of the *Journal* enters the conversation on race and housing at a pivotal time. Readers will find here ideas both on how to forge new paths, as well as histories of the paths taken thus far. These articles tell stories of race and housing in communities as disparate as Los Angeles and Miami, as well as disaster recovery along the Carolina coast. Our book review profiles the history of race and housing in New Haven, Boston, and New York. Our organization profile features the Inclusive Communities Project's work in Dallas. By looking at local histories and solutions, a national framework for addressing race and housing begins to take form.

A second set of articles takes up broader structural reform. These include an argument for a new state zoning enabling act, reform of risky mortgage products, housing for the formerly incarcerated, and a proposed future for the next iteration of the AFFH Rule. In addition, long-time Forum leader Toni Jackson also weighs in on the big picture and a call to action. As always, this issue also features our Literature Digest, which profiles a number of excellent reports and resources on this topic.

Those looking to seize the moment and make change will find a wealth of ideas in this issue, for which we owe a huge debt of gratitude to our many contributors. Thank you.

Stephen R. Miller

January 2021

From the Chair

Dan Rosen

It is a privilege to serve as Chair of the Governing Committee the American Bar Association Forum on Affordable Housing & Community Development and to help introduce this collection of scholarship and commentary on race and housing.

Persistent, legalized, institutional racism is a central, existential challenge to our field and to the communities in which our members practice and live. As the local and national studies in this journal remind us, this issue has been true throughout our country's history. None of us should be surprised by these truths, nor should we need to be reminded of their consequences. The events of 2020, however, have brought the role of race in the country's past and present housing policy forward with an urgency that is difficult to ignore. With this collection, the editorial board of the *Journal of Affordable Housing & Community Development Law* and its contributors have made a lasting contribution to the work of the Forum.

I commend this entire issue to our members as a way to help inform our understanding and our way forward. There are rich treatments of a range of communities and a range of solutions. I am, personally, struck by two pieces framing the challenges and urgency of this moment.

Michael Allen Wolf's review of *Saving America's Cities: Ed Logue and the Struggle to Renew Urban America in the Suburban Age* calls our attention to the power and limits of housing and community development law. Ed Logue was trained as a lawyer and played a central role in some of the most pioneering urban renewal efforts from the 1950s through the 1980s. He shaped the programs with which many of us in the field engage every day. Whether we work with developers, cities, housing authorities, resident groups, investors, lenders, or others, we all are part of a system that shapes and reshapes communities every day. Professor Wolf's review helped me reflect upon my own reaction to the book: Logue was a "flawed protagonist," whose career speaks to the potential, as well as the limits, of this work.

In "The Race Conversation About Housing," Toni Jackson issues a call to arms and a call to conversation. As a former Chair of the Forum's Governing Committee and experienced practitioner, Toni is well aware of the practical challenges and limits of the field. She steps forward and speaks directly to the rawness of these topics and the difficulty of addressing them in a professional setting. She reminds us of the dangers of silence, the realities of rage, and the complexities of concepts such as "choice" and "equity." Finally, Toni urges us, both as individuals and as a group, to have difficult conversations and to seek creative solutions. I hope the Forum and its members can be a part of both during my tenure in 2021 and beyond.



Dan Rosen



LETTERS TO REGULATORS

*Jill Goldstein, Glenn Graff, Forrest Milder,
Brad Tomtishen & B. Susan Wilson*

December 28, 2020

Dillon J. Taylor
Attorney
Department of the Treasury
Internal Revenue Service
1111 Constitution Avenue NW., Room 5107,
Washington, DC 20224
dillon.j.taylor@irscounsel.treas.gov

**Re: Comments on Notice of Proposed Rule Making, Section 42 Low-
Income Housing Credit Average Income Test Regulations
REG-119890-18, RIN: 1545-BO92**

Dear Mr. Taylor:

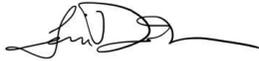
Thank you for promulgating the proposed regulations addressing the average income test (the "*Average Income Test*") for low-income housing tax credit ("*LIHTC*") projects provided in Section 42(g)(1)(C). In response to the Internal Revenue Service (the "*IRS*" or "*Service*") and the Department of Treasury ("*Treasury*") request for comments on the proposed regulations, we submit this letter. The persons signing below are the primary authors of this letter. We would also like to acknowledge the assistance of Judy Crosby of Kutak Rock LLP, Nicholas Anderson of Lathrop GPM LLP and Angela Christy of Faegre Drinker Biddle & Reath LLP. While we are all active members of the Tax Credit and Equity Financing Committee (the "*Committee*") of the American Bar Association's Forum on Affordable Housing and Community Development Law (the "*Forum*"), and while we have consulted with other members of the Committee and the Forum, this request is not made on behalf of the Forum and has not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, it should not be construed as representing the position of the Association.



Jill Goldstein
Kutak Rock LLP
Member of the Forum's Govern-
ing Committee and Member Tax
Credit and Equity Financing
Committee



Glenn Graff
Applegate & Thorne-Thomsen,
P.C.
Former Chair and Co-Chair of the
Tax Credit
and Equity Financing Committee
and
Member of the Forum's Governing
Committee



Forrest Milder
Nixon Peabody LLP
Former Chair of the Forum
Member of the Tax Credit and
Equity Financing Committee



Brad Tomtishen
Tomtishen Aoun PLLC
Co-Chair of the Tax Credit and
Equity Financing Committee



B. Susan Wilson
Enterprise Housing Credit Invest-
ments LLC
Co-Chair of the Tax Credit and
Equity Financing Committee

Overview

We wish to thank the Department of Treasury and the Internal Revenue Service for promulgating the proposed regulations addressing the average income minimum set-aside for the low-income housing tax credit. This provision was added in 2018 and guidance will help remove uncertainty with respect to how the provision should be used and applied. As discussed

below, we think that there are a number of alternative approaches and considerations that should be reviewed before the proposed regulations are finalized.

Part I—Comments Regarding the General Approach of the Proposed Regulations

We include comments and suggestions on specific provisions of the proposed regulations in Part II of this letter. Prior to discussing those specific points, however, we respectfully request that the Service reconsider two aspects of the approach taken in the proposed regulations. These two aspects are at the heart of two principal concerns that we have about the proposed regulations: (i) the proposed regulations create the possibility of a complete loss of credits that was never intended, and (ii) the proposed regulations do not provide the flexibility necessary to practically administer a low-income housing project for which an average income election has been made. We believe that reconsidering the general approach of the regulations will allow the reconciliation of the Service's tax policy concerns with the need for certainty and flexibility in the administration of the LIHTC.

A. Calculation of the Average of the Imputed Income Limitations

The proposed regulations require that the average of the imputed income limitations of *the low-income units* in the project not exceed 60% of area median gross income ("*AMGI*"). We respectfully submit that this is contrary to the statute, which requires that the average of the imputed income limitations *designated* shall not exceed 60% of AMGI. IRC 42(g)(1)(C)(ii)(II). That statute further states that "[t]he taxpayer shall designate the imputed income limitation of each unit taken into account under such clause." See IRC 42(g)(1)(C)(ii)(I).

The difference between the proposed regulations and the statute is significant. First, the proposed regulations approach is based on averaging *actual rentals* of units. While this may be a worthy intention, the language of the statute simply refers to the units *designated* by the taxpayer. Second, the interpretation in the proposed regulations potentially results in a project losing all of its credits as a result of the failure of a single unit to qualify as a low-income unit.

Example 1 The taxpayer owns a 100-unit project and designates imputed income limitations as follows: 90 units at 60% of AMGI, 5 units at 40% of AMGI and 5 units at 80% of AMGI. All units are rented in compliance with their imputed income limitations (and rent restrictions) except that one of the units designated at 40% of AMGI is leased to a tenant with an income equal to 45% of AMGI. In accordance with the statute, imputed income limitations have been designated for 100 units and the average of the imputed income limitations *designated* is 60%. 99 units satisfy the limitation applicable to that unit and the minimum set-aside is met. Under the proposed regulations, there are only 99 low-income units and the average of the imputed income limitations of *the low-income units* is 60.2% and the requirement of the average income set-aside is not met and the project does not qualify for LIHTC on any unit.

As the preamble recognizes, this result cannot possibly be intended by the statute. Accordingly, the proposed regulations propose various mitigation actions. The preamble discusses, and the proposed regulations give an example of, a situation in which a unit is out of service or uninhabitable. If that is the sole concern of the Service, we believe it can be addressed in an alternate manner, as discussed below. But by describing the test as requiring the average of *the low-income units* to be 60%, the proposed regulations encompass other failures to qualify as low-income units for which the mitigation provisions are inadequate, including, most importantly, the failure to satisfy income limitations and rent restrictions.

The minimum set-aside election contained in Section 42(g) establishes the income limitations for determining if a unit is a low-income unit. The income limitation applicable to a unit is then used to determine the rent restriction. A residential unit can qualify as a low-income unit only if it meets the applicable income limitation and rent restriction. Thus, the determination of whether a unit is a low-income unit can only be made once the applicable income limitation is known.

Compare how the other set-aside tests work. Can a unit leased to a tenant with income at 55% of AMGI qualify as a low-income unit? No, if the 20-50 set-aside has been elected, but, yes, if the 40-60 set-aside has been elected. In other words, the income limitations exist before, and apart from, a determination of whether the limitations are satisfied. A unit that does not satisfy its limitation is subject to a limitation; it is circular to argue otherwise. In the example above, 100 units, not 99, have imputed income limitations *designated* and the average of those designated limitations is 60%.

The possibility of a total failure of credits is extremely unattractive to investors and will put projects using the average income election at a disadvantage to projects using the 40-60 set-aside election. In practice, we expect that investors will demand a "buffer" so that the average of the designated limitations will be below 60%. In a situation similar to Example 1, investors will likely insist that 3 or 4 units be designated at 80% of AMGI, rather than 5 units. As a result, rather than allowing an average income project to be on equal footing with a project making the 40-60 set-aside election, the average income project will have aggregate rent restrictions that are more onerous than a 40-60 project. See Example 13, for an illustration of how a buffer might be expected to work.

As noted above, the income limitations determine the rent restriction. Given the manner in which income restrictions are determined (see Revenue Ruling 2020-4), the maximum LIHTC rent that may be collected on 2 units subject to a 60% AMGI limit is the same as the rent that may be collected on 2 units with designated imputed income limitations that average to 60%. Requiring a buffer so as to assure that the failure of a small number of units will not result in the average AMGI rising above 60%, yielding a catastrophic loss of credits, will have the ironic effect of reducing the total rental income of those projects for which the flexibility offered by the average income election is most critical. By reducing the rental income of

such projects, they can support less commercial debt and thus will be less feasible.

We think that by focusing on the language chosen by Congress, the preceding problems can be avoided. Section 42(g)(1)(C)(ii)(I)-(II) provide the following:

42(g)(1)(C)

(ii) Special rules relating to income limitation

For purposes of clause (i)-

(I) Designation

The taxpayer shall designate the imputed income limitation of each unit taken into account under such clause.

(II) Average test

The average of the imputed income limitations designated under subclause (I) shall not exceed 60 percent of area median gross income.

Based on the plain language of the Section 42(g)(1)(C)(ii)(I) and the preceding discussion, we believe that the better reading of this provision is that the 60% average is computed based on the *designations* made by the taxpayer rather than having the *actual rental* of a unit possibly result in that unit not being included in the computation.

To be clear: units not in compliance would not generate current tax credits and would be subject to recapture. However, *solely* for purposes of assuring that the 60% average test had been passed, the plain wording of Section 42 providing that the taxpayer's designations should be used.

It may be that certain theoretical policy issues regarding the application of the average income set-aside may concern the Internal Revenue Service and the Department of Treasury, but we believe that such issues can be adequately addressed by application of the statute as written. We discuss these below.

First, there may be a concern that the average income set-aside could be subject to abuse. A taxpayer could ignore restrictions on units designated with income limitations below 60%, charging market rents and foregoing credits on those units while claiming credits on units designated with income limitations above 60%. This situation could be addressed with a general anti-abuse provision allowing the Service to disregard designations made in bad faith and/or requiring an annual certification made to the Service or the State Housing Credit Agency ("State Credit Agency") that the taxpayer believes, in good faith, that all designated units are in compliance with their applicable income limitations. See the discussion below for further discussion of a such an approach. A determination that designations would not be respected absent good faith attempts at compliance would provide a powerful deterrent to abusive behavior. We also note that there are enforcement mechanisms contemplated by the statute other than the loss of credits, including the restrictions in the extended use agreement that may be enforced by the State Credit Agency or any tenant.

And, we note that the market provides an alternate enforcement mechanism through the tension between interests of developers and investors in a LIHTC project—tax credits accrue to the benefit of investors while cash flow from higher rents accrues primarily to the benefit of developers.

Second, as described in the preamble and the proposed regulations, there are situations in which units could be taken out of service as a result of casualty or otherwise. Once it is determined that a unit is no longer in service or otherwise not habitable, it should be appropriate to allow re-designation of units as well as mitigation of the type described in the proposed regulations. If the regulations require an annual certificate, the instructions could provide that it would be bad faith to certify that designated units are in compliance if those units are not in service unless appropriate re-designations or mitigation has been put in place. As described below, we think it is appropriate to provide mitigation similar to the next available unit rule for casualty losses and similar events that are outside the control of the taxpayer. Another alternative discussed below would be to allow the income designations to be used for units suffering a casualty solely for the purpose of determining the average of such designations. Such units would not count for meeting the 40% minimum set-aside and standard rules relating to casualty losses would apply for the purpose of determining current tax credits or the applicability of recapture.,

Third, there appears to be an assumption in the proposed regulations that the quid pro quo for taking LIHTC on a unit with a limitation above 60% AMGI is the actual compliance of a unit that has a limitation below 60% of AMGI, so that if a unit with a limitation below 60% AMGI fails to qualify as a low-income unit, a corresponding unit (or units) with limitations above 60% AMGI must also fail to qualify for credits. We do not see any indication in the statute that is the case and we respectfully submit that the policy arguments that we provide here outweigh the policy arguments that appear to have motivated the proposed regulations. It seems unlikely that Congress intended that the consequence of noncompliance on one unit was the loss of all credits. Instead, we respectfully submit that the legislature more likely expected that regulations would be drafted to avoid total credit loss and instead substitute credit loss on one or two additional units.

Consider a simple example in which all units have designated imputed income limitations of 60% except for one unit designated at 40% AMGI and one unit designated at 80% AMGI. We contend that the quid pro quo for taking LIHTC on the 80% unit is agreeing to the lower imputed income limitation, and the corresponding rent restriction, on the 40% unit.

1. Assume that the 40% unit was rented to a tenant at 45% of median income. The 40% unit has a rent restriction based on the income limitation of 40%, so there is no economic incentive or benefit to the taxpayer of leasing the unit to an over-income tenant, while there is a significant economic loss because that unit doesn't qualify for LIHTC. Loss of credit on the 80% unit is not required to further punish the owner.

2. What if the rent restriction was not met? Why would the result be different if the owner collected an additional \$10 of additional rent from the 40% tenant (loss of credits on 2 units), as opposed to collecting an additional \$10 of additional rent from the 80% tenant (loss of credits on 1 unit)? In either case, the applicable restrictions have been breached as to one unit and the economic benefit of that breach is \$10—why should the penalty be double in one situation as compared to the other?
3. Treating a violation of the restrictions on a 40% unit differently than a violation with respect to an 80% unit can only be justified by reference to the 40-60 set-aside as a baseline. The argument must be that the 40% unit would qualify under the 40-60 test but the 80% unit would not qualify under the 40-60 set-aside without the linkage to the 40% unit. However, the statute establishes the average income set-aside as a separate set-aside, not a subset of the 40-60 set-aside. Moreover, if that is the baseline, then a 40% unit rented to a tenant at 45% of AMGI would qualify for credits under the 40-60 set-aside. Under this view, it seems that credits shouldn't be lost on two units only if only one unit would have failed to qualify under the 40-60 set-aside.

In summary, we do not believe that the statute supports the interpretation of the minimum set-aside set forth in the proposed regulations. Concerns about abuse of the provision can be addressed directly with anti-abuse or good faith provisions such as the good faith test we describe in the following section. Changes in facts, such as destruction of units can be addressed by changes in designations which, as described below, we believe should be allowed in many circumstances. In almost all cases, violations of the applicable income limitations, and the associated rent restrictions, will be inadvertent and made in good faith and will be subject to penalty through the loss of credits on those units that do not qualify as low-income units. We do not believe the statute intended, or tax policy requires, that failure to qualify one unit as a low-income unit results in the draconian remedy of loss of all credits, or even the loss of credits on one or more additional units that have qualified as low-income units.

*B. Good Faith Reliance on Taxpayer's designations allowed
and can avoid need to mitigate*

As described above, we believe that Section 42(g)(1)(C) provides that, for purposes of testing compliance with the 60% average requirement of Section 42(g)(1)(C)(ii)(II), the income designations used would be those made by the taxpayer. To address policy concerns, including potential abuse of the provision, we propose that the designations made by the taxpayer would not be respected unless the taxpayer certifies and establishes that it made a good faith effort to comply with the designations. We would propose a rule as follows:

If, during a taxable year, there is a determination that the rental of a unit does not comply with the income designation assigned to such a unit or the unit did not otherwise meet habitability or other requirements to be eligible for tax credits, for purposes of Section 42(g)(1)(C)(ii)(II) such determination shall not apply to any period before such year and Section 42(g)(1)(C)(ii)(II) shall be applied without regard to such determination if (1) the taxpayer certifies and establishes a good faith effort to comply with Section 42(g)(1)(C) and other requirements of Section 42, and (2) the failure is corrected within 1 year from the date of the determination.¹ The good faith of a taxpayer may be established by showing that the Project complies with the Available Unit Rule of Regulation 1.42-5(c)(1)(ix) and the General Public Use Rule of Regulation 1.42-9 or other criteria in the judgment of the State Housing Credit Agency. A taxpayer attempting to rely on a designation for which it purposefully did not comply would be deemed abusive and such designation would then be disregarded for purposes of determining if the project complies with the 60% average requirement of Section 42(g)(1)(C)(ii)(II).

The foregoing rule would provide for the certainty as to designations by taxpayers as prescribed in Section 42(g)(1)(C)(ii)(I), prevent taxpayers from abusing such designation and also allow for a reasonable time where such designations could be relied on while errors are corrected. Importantly, a unit not following the designation will not generate tax credits and can cause recapture even though a good faith effort was made to comply with Section 42 requirements, but the satisfaction of the minimum set-aside will not be unknowingly threatened.

Examples of the foregoing rule are below:

Example 2: Building owner designated Unit X to be a 40% unit. Subsequently, owner and tenant knowingly enter into a lease for unit X for market-based rents that are clearly in excess the applicable low-income rents for a 40% unit. The taxpayer cannot establish a good faith effort to comply with the 40% designation. As a result, the designation of the unit as a 40% unit would not be respected and the unit would not be included in the average income computation as provided in Section 42(g)(1)(C)(ii)(II). If the absence of that 40% unit caused the Project to not meet the 60% average income requirement, then the minimum set-aside would not be met unless the taxpayer timely elected to mitigate. In addition, the out of compliance unit would be subject to existing rules regarding non-qualification for credits in the current year and for recapture in prior years.

Example 3: In 2021, taxpayer places in service a new a 100-unit building which has 50 units designated at 40% and 50 units designated at 80%. On February 1, 2024 Taxpayer leases a 40% unit to a tenant that the Taxpayer

1. The one year approach is patterned after Section 42(h)(6)(J) which provides that if an extended use agreement is determined not to be in place during a taxable year, such determination does not apply to the current or prior years if the failure is corrected within one year. This approach is superior to something similar to the 90 days provided for in Regulation 1.42-5(e)(4) because tenant leases are generally 1 year in length and therefore it may not be possible to correct non-compliance in less than a year.

believes is an appropriately income qualified person. The unit was properly designated in the first credit year as a 40% unit in compliance with applicable IRS and State Credit Agency requirements. In compliance with rules established by the State Credit Agency, the Taxpayer certifies to the State Credit Agency for 2024 its good faith belief that 100% of the Project units qualified as low-income units. Unknown to the taxpayer, it had incorrectly computed the tenant's income because it had misunderstood that the tenant was paid twice a month (24 pay periods) rather than every other week (26 pay periods). As a result, the tenant's correctly computed income would have been slightly higher than the 40% income limit. On October 15, 2025 a tenant file review by the State Credit Agency discovers the error. When the tenant's lease expires on January 31, 2026, the tenant vacates the unit and is replaced with an income qualified tenant. Because the Taxpayer had made a good faith effort to insure that the tenant's income did not exceed the 40% designation in 2024, solely for purposes of calculating the 60% requirement in Section 42(g)(1)(C)(ii)(II), the 40% designation on the unit may be used and the building would not fail to meet the average income minimum set-aside. For 2025, the error was known by the end of the year, however, the noncompliance was corrected within 1 year of the determination of non-compliance and thus the taxpayer's 40% designation may be used in 2025. However, the out of compliance unit would be subject to existing rules regarding non-qualification for credits in the current and prior year and for recapture in prior years.

Example 4: On April 1, 2021 taxpayer rents a unit in a newly constructed building to a tenant that meets the 40% income requirement and the rents are within those allowed for 40% units. The unit was properly designated in the first credit year as a 40% unit in compliance with applicable IRS and State Credit Agency requirements. The architect had certified as to the completion of the unit and compliance with the project's approved plans and specifications. Unknown to the taxpayer, the unit failed to meet a State Credit Agency's accessibility requirement and thus is not considered habitable under the State Credit Agency's requirements. On February 2, 2023, the Taxpayer is notified by the State Credit Agency that the unit did not meet the accessibility requirement. Taxpayer corrected the unit on April 1, 2023. Taxpayer also establishes to the State Credit Agency its good faith belief that the unit had meet the applicable requirement. Because the Taxpayer established its good faith effort and because the unit was repaired within one year of the determination of lack of habitability, the unit's 40% designation can be included as a 40% unit for purposes of testing whether the 60% average was met in 2024 and 2025.

Example 5: On December 25, 2021 a 40% unit suffers a fire and is not habitable as of December 31, 2021. The taxpayer timely contacts the State Credit Agency and the State Credit Agency provides for a 6-month period in which to repair the unit. The taxpayer expects that it will be able to repair the unit within the time period allowed by the State Credit Agency. Because the taxpayer has arranged a reasonable repair period with the State Credit Agency and is proceeding forward on such repairs, the taxpayer has established a good faith effort to comply with the requirements to be a low-income unit and solely for purposes of Section 42(g)(1)(C)(ii)(II), the unit's designation as

a 40% unit would be allowed be used for 2021. Existing rules would apply in determining the unit's qualification for tax credits in the current and prior years and for recapture in prior years. The taxpayer then repairs the unit by June 25, 2022 and the unit is then occupied by an income eligible tenant at 40% rents for the remainder of the year. As a result, the unit's 40% designation can be used for the balance of 2022 for purposes of Section 42(g)(1)(C)(ii)(II).

C. Floating Units

The proposed regulations require that unit designations be made by no later than the end of the first year of credit period, and once made, no changes to such designations are permitted. Prop. Reg. 1.42-19(a)(3). Permanently fixing unit designations is inconsistent with other provisions of Section 42, policies and procedures of State Credit Agencies, and statutory tenant protections in a low-income housing project. For the reasons discussed below, we believe the better approach would be to allow State Credit Agencies to set policies and procedures providing for how unit designations can be changed.

i. Section 42: Section 42 does not preclude modification of unit income designations, including in connection with the 20-50 or 40-60 set-asides. Introducing a fixed designation requirement when the average income set-aside is used imposes an additional layer of compliance and management complexity for owners which we do not believe was intended by the statute. In connection with the vacant unit rule, Rev. Proc 2004-82 (Question 8) states that "where an owner simply moves a tenant from a unit in one building to a unit in another building in the same project . . . the unit that the tenant actually occupies at the end of a month at the end of each year in subsequent years qualifies as a low-income unit." Based on this IRS guidance, LIHTC unit designations were not intended to be fixed to a physical unit; instead, low-income tenants should be able to move to another unit and retain the same designation for purposes of the minimum set-aside test.

ii. Next Available Unit Rule: Proposed Regulation 1.42-15 itself contemplates changes in income designation in connection with the next available unit rule. It would not be possible to implement the next available unit rule without a change in the designation of the unit. Further, the preamble to the guidance provides in the "Alternative Mitigating Action Approach" discussion that a taxpayer may take the mitigating action of *re-designating* the imputed income limitation of a low-income unit to return the average test to 60 percent or lower in certain circumstances.

iii. State Credit Agency Guidance: In the absence of federal guidance following the passage of the Consolidated Appropriations Act, nearly every State Credit Agency has developed average income set-aside guidance and policies on income averaging in the absence of federal guidance. Most, if not all, states' policies either (i) expressly permit units to float or (ii) are silent as to whether units could float or are be required to remain fixed. State Credit Agencies are now in the awkward position of having to

adjust guidance going forward, or worse, amend existing LURAs which currently allow units to float. In the latter case, the State Credit Agency may find itself in a difficult position given that amending existing LURA's in a manner that could adversely impact tenants (see discussion below re: tenant protections) and could run afoul of tenant third party beneficiary rights under the LURA. In addition, State Credit Agency policies pertaining to the traditional 20-50 and 40-60 set aside tests have permitted units designated at different income levels to allow for the type of flexibility in the cases we have discussed below. State Credit Agencies work with developers and projects on a day to day basis and understand the need in certain cases to change unit designations in manner that does not frustrate the purposes of the LIHTC program.

iv. Tenant Protection Statutes: Various federal and state tenant protection statutes would conflict with proposed regulation's fixed designation requirement

A. *Fair Housing Act*. Fixed unit designations may in some cases create conflicts with fair housing rules. The Fair Housing Act requires that reasonable accommodations be made to allow a disabled person an equal opportunity to rent and reside in a LIHTC building unit.

Example 6: A tenant lives in a 60% fixed AMGI unit on the third floor of a building with no elevator. The tenant experiences an unexpected severe injury, requiring the tenant to be in a wheelchair. The building has a vacant accessible unit on the first floor, but the units on the first floor are only 50% AMGI units. Does the owner violate the fixed income designation rule under the average income set-aside and lose the unit as a low-income unit, or does it decline to move the tenant and risk running afoul of fair housing rules? .

B. *Violence Against Women Act* ("VAWA"). Similarly, the Violence Against Women Act may necessitate a quick unit transfer for a victim of sexual assault, domestic violence, stalking or similar crime by statutory requirement if the tenant reasonably believes they are at risk of imminent harm if they remain in their unit.

Example 7: A tenant in a 70% unit in such circumstances notifies the property manager that the tenant has been receiving threatening abusive calls and requests a switch in units under VAWA, and the only vacant units in the building are 50% units.

In either such case, the owner is stuck with the difficult choice of complying with either the average income set-aside rule or Federal tenant protection statutes. We are aware of many LIHTC projects which are targeted entirely to either disabled populations or victim of sex trafficking or violence. In the examples illustrated above, the owner cannot comply with both. The dilemma is clear.

v. Other Issues

Tenant protection concerns are most compelling as to why fixed unit designations are impractical, if not adversely impactful, for owners and tenants. However, other important challenges exist.

A. Inability to Accommodate Reasonable Tenant Requests. Property managers will not be able to grant certain customary tenant requests which they would otherwise be able to afford under any other LIHTC set-aside.

Example 8: A 70% AMGI tenant has signed a lease. The tenant tells the property manager that the tenant is averse to living on the first floor of a building based on prior experiences and requests a unit on the second floor. The only vacant units over the first floor are 30% units. The tenant's request is not protected by statute, but a property manager naturally wants to accommodate its tenants and seek to ensure that they are happy with their housing choice to the extent they are able. In this example, the tenant will either have to take a unit on the first floor against its strong preference or move to a different building. The proposed regulations should permit one unit to be swapped for the other.

B. Casualty Events. When a casualty event occurs, the unit is required to be restored and back in service by the end of the calendar year to avoid credit disallowance. If the casualty event occurs on December 30, there is no practical way that the unit will be restored by the end of the calendar year. The owner will find itself having to remove the unit to avoid credit disallowance. This seems a harsh penalty for a no-fault event. Further, what if the owner needs to relocate the tenant for a period of time over a year (if it requires that amount of time) while the unit is restored? If the only vacant unit in the building has a lower AMGI, then does the owner relocate the tenant entirely in that circumstance until the unit is restored? Or if the only open unit is a market unit, we recommend allowing the tenant to move into the market unit and have that unit be designated a low income unit with the unit that suffered the casualty becoming the market rate unit going forward. In both situations, it would seem better for the tenant to remain in the same building if possible.

C. Adding/Removing Designations. It is unclear under the rules as to whether designations can be added and removed. Proposed Regulation Section 1.42-19(b)(3)(i) states "No change to the designated imputed income limitations may be made. . . . If a designation is removed, the unit ceases to be a low-income unit." This proposed regulation clearly seems to allow a designation to be removed with the consequence that the unit is no longer a low-income unit. Does this mean that changes in designations are not allowed, but that owners may remove designations or newly designate units?

Example 9: If a 30% unit has a casualty which does not cause a failure in the minimum set-aside (and therefore mitigation is not allowed under the proposed rules), can the owner simply designate a market rate unit as a new 30% unit and then have the old 30% unit become a market rate unit? This would seem to run afoul of Proposed Regulation Section 1.42-19(b)(3) which states that designations must be made as of the end of the first year of the credit period.

Example 10: Consider Example 2 in Proposed Regulation 1.42-19(g)(2). In this example, a market rate unit is converted to a low income unit as mitigation because of the uninhabitability of a low income unit. However, the example states that once the habitability issue is corrected, both the low income unit and the converted market rate unit are low income units.

Thus, the proposed regulations would cause the project to forever lose a market rate unit. We recommend that the owner be allowed to convert one of the units to market rate when the other noncompliant unit gets back into compliance, or when the formerly market rate unit is vacant, if later.

We do not believe there is any reason not to allow the withdrawal of temporary designations, or modifications to designations as long as the owner follows State Credit Agency procedures as to how this is to be done. We believe that such an ability is an important component of the long established ability of low income projects to float which units are low income and which are not.

We recommend a reasonable middle ground approach, consistent with other Section 42 guidance. Changes to unit designations should be permitted in all events under the tenant protection examples provided above. Outside that scope, changes to unit designations should be permitted where the taxpayer demonstrates to the State Credit Agency reasonable grounds for the requested change pursuant to procedures established by the State Credit Agency. By analogy, Section 42 guidance on other matters including the next available unit rule and recent 8609 guidance/discussions with the IRS indicate that such an approach is supported. Extreme cases of inappropriate use of unit designation changes could be identified by the state State Credit Agency and such requests would be rejected. The anti-abuse rules of the Code can also address “bad-actor” activity. As we have described, there are many other instances in which a change to the unit designations is warranted and if not made, could cause unintended consequences for the owner.

In summary, our recommendations are as follows:

1. The final rule should allow changes in designations so long as (i) the changes are approved by, or made pursuant to procedures established by, the State Credit Agency, and (ii) do not have the effect of increasing the income limitation applicable to any existing tenant.
2. If the IRS is unwilling to provide that level of flexibility, the final rule should allow changes in designation (i) under the tenant protection circumstances described above, (ii) at any time to reduce the income limitations applicable to a unit, and (iii) in the case of an exchange of designations between two units that are vacant or when an existing tenant moves to a vacant unit.

Part II—Determining when mitigation, timing of mitigation and types of mitigation

A. Timing of Mitigation

The proposed regulations allow a taxpayer to elect to take mitigating actions in order to avoid failing the Average Income Test due to a non-compliance event. However, these mitigation actions need to be taken within 60 days

after the end of the year when the non-compliance event occurred. This deadline is problematic and will often render such actions ineffective.

Often, a violation is inadvertent and is not detected until after the end of the year. The discrepancy could be discovered during the annual audit, which can frequently take longer than 60 days following year end, or upon the compliance review conducted by the State Credit Agency, which have varying due dates. In either case, discovery of the non-compliance issue is likely to come more than 60 days following the end of the year the non-compliance event occurred.

We believe that the mitigation period should begin upon the discovery of the noncompliance event. The taxpayer could be required to notify the State Credit Agency of the discovery of an instance of noncompliance and the chosen course of mitigation. The notification would then be attached to the taxpayer's subsequent tax return with the average income calculation and tax credits computed reflecting the mitigation action. In addition, we believe that the mitigation period should be longer in order to properly assess and remedy the situation. We suggest that it continue until at least the earlier of the due date of the tax return with extensions or one year from the date the noncompliance event is discovered.

A mitigation period of one year from the date of the discovery is consistent with the cure period provided by Internal Revenue Code Section 42(h)(6)(J) that allows a taxpayer to correct a noncompliance event within one year of the determination of the noncompliance. We think this one-year period could be treated as grant of relief under Treas. Reg. Section 301.9100, and the taxpayer could file for the relief pursuant to and in accordance with Treas. Reg. section 301.9100-2. Such regulation already provides automatic relief for a number of different regulatory elections, and taxpayers would benefit from the implementation under a commonly understood and straightforward process. We recommend a period of one year and not a lesser period such as 90 days allowed in Regulation 1.42-5(e)(4). A period as short as 90 days may be insufficient to allow the market rate conversion mitigation to be useful as an owner may need to wait for a market rate tenant's lease to expire to allow it to then rent that unit to a low-income tenant. Therefore, we believe that the one-year period in Section 42(h)(6)(J) is more appropriate.

In addition, we believe there should be a default action for mitigation if none is elected by the end of the mitigation period. This would prevent the potentially catastrophic loss of all credits due to one unit falling out of compliance without discovery and corrective action being taken during the mitigation period. Our recommendation for the default mitigation action would be to remove sufficient units from the tax credit project in order to bring the average income of the low-income units to or below 60% AMGI. Of course, this automatic mitigation would not be necessary if our request to allow mitigation to be done up until one year after a determination that a unit is out of compliance.

Example 11: Assume that there is a ten-unit project with income designations for each unit as follows:

- 1 40%
- 2 40%
- 3 40%
- 4 60%
- 5 60%
- 6 60%
- 7 60%
- 8 80%
- 9 80%
- 10 80%

The project owner inadvertently rents unit 1 to a tenant that earned more than 40% AMGI. The taxpayer was not aware of this error and therefore failed to elect a mitigation action within the mitigation period. If the taxpayer did not mitigate within the time period provided by the proposed regulations, the average of the remaining nine units would exceed 60% and the project would fail the average income test. Had the taxpayer known of the noncompliance event, it could have chosen to remove one of the 80% units from the tax credit calculation and only claimed credits on 8 units, resulting in an average of 60%.

If the proposals described in other portions of this letter are rejected, then we recommend that the proposed regulations be revised to by default have a unit removed to reduce the number of units eligible for tax credits to result in a percentage of 60% or less. By doing so, the tax credit project would then consist of 8 units with an average income of 60%, in compliance with the Average Income Test, and no longer putting the taxpayer at risk for ineligibility for the tax credits. This default option should only apply if the owner did not elect to take other mitigating actions by the end of the mitigation period.

B. Types of Mitigation

Mitigation Strategies in the Proposed Regulations. If one of the designated units ceases qualifying as a low-income unit—for example, because it becomes uninhabitable—then the proposed regulations provide mitigation remedies that can be employed to avoid failing the minimum set-aside, and which applies depends upon the specific facts.

i. **Removing the nonqualified unit:** Technically this is not a form of mitigation because under proposed regulation 1.42-19(c)(2), mitigation is only available if necessary to avoid failing the minimum set-aside. However, this is an important mechanic that we think is worth clarifying. Under this approach, the taxpayer can simply eliminate the particular failing, designated unit from the computations, provided the remaining units continue to maintain an average of 60% of AMGI or less and such units represent at least 40% of the units in the Project. For example, if the nonqualified unit is above 60%, or if the average is already sufficiently below 60% so

that losing a below 60% unit does not cause the average of the remaining units to rise above 60%, then only the single unit would fail to generate tax credits and be subject to recapture. This is an obvious solution that makes sense.

ii. **Available FMV unit:** The first mitigation approach of the proposed regulation is that if the project has an available fair market value unit, which is either vacant or occupied by a tenant whose income matches (or is less than) the unit that went out of service, then the fair market value unit can become a new designated unit, and thereby keep the average income at the required level. If an appropriate unit is available, this is a sensible way to address the problem. Unfortunately the requirements of either having a vacant unit or a unit that is *already* occupied by an appropriately qualified tenant may render this a rarely used remedy, unless the proposed regulations extend the 60-day deadline discussed previously. As discussed above, we believe that the regulations should make clear that this is a *temporary* solution, and can be undone, or the restored unit can replace the formerly market rate unit.

iii. **"Removed" units:** The second mitigation approach of the proposed regulations related to removing a unit. Pursuant to the removed unit rule, the project can designate a matching over-60% unit for the under-60% one which no longer qualifies. This companion unit is referred to as a "removed unit," and the computation of future credits will reflect both the loss of the unqualified unit and the removed unit, although for recapture purposes the removed unit is still treated as a low-income unit since it will still need to meet the requirements of a low-income unit. See Prop. Reg. 1.42-19(g)(2) (60% average computation does not consider non-qualified unit or removed unit), Prop. Reg. 1.42-19(f)(2) (removed unit does not cause recapture). As noted previously, the removed unit must be affirmatively identified no later than 60 days after the end of the year in which the test was failed, and we have previously detailed recommendations for extending this period.

As we discussed above, and setting aside the question of whether this remedy goes beyond what is called for in the Code, the removed unit remedy may not be such a useful solution. Eliminating units which are otherwise complying with the original land use restriction agreement and the requirements of the State Credit Agency will reduce the building's applicable basis, thereby reducing annual credits. We acknowledge that it is appropriate to eliminate the nonqualifying unit but adding a removed unit to the computation has at least twice the impact. Further, we agree with the favorable treatment accorded to the units if and when they are reinstated. However, and perhaps most important, if the nonqualified and removed unit (if applicable) cause the building to fail the minimum set-aside, then we can have the catastrophic result of the building no longer qualifying for any credits.

Example 12: Project 1 has five equally sized units, and a total eligible basis of \$1 million. All five are at 60% of AMGI, and it uses the "traditional" 40-60

set aside. If unit 1 goes out of service, the applicable fraction falls to 80%, and its applicable basis falls to \$800,000.

Project 2 also has five equally sized units, and total eligible basis of \$1 million. Project 2 uses income averaging, with two units designated 40%, one designated 60%, and two designated 80%. If a 40% unit goes out of service, then the remaining units are at 65% $(40+60+80+80/4)$, and therefore, the minimum set aside test is not met. Accordingly, further steps must be taken.

The mitigation strategy in the proposed regulations would likely call for an 80% unit to be removed as well as the nonqualified unit, bringing the project back into compliance at 60% $(40+60+80/3)$, but reducing the applicable basis by *two* units to \$600,000.

Now, suppose a second 40% unit goes out of service in each project. Then, Project 1 would still have 3 of 5 units in service, and an applicable basis of \$600,000. However, Project 2 would lose not just the two *nonqualifying* 40% units, but also the two *removed* 80% units. As a result, Project 2 would “fall off the cliff,” since now the project would only have 1 out of 5, or 20% qualifying units, failing the minimum set aside requirement.

As the example illustrates, the removed unit solution is most problematic when there are a relatively small number of units in a project. If, instead of 5 units, a project had 50 units, then it could have 15 nonqualifying 40% units, plus another 15 removed 80% units and still pass the minimum set aside (because 50 less 30 is 20, and 20/50 is 40%). Furthermore, with a larger project, it is possible to have a “buffer”—have enough below 60% units so that it is not necessary to remove any of the above 60% units, even if one or more below 60% units should become unqualified.

Example 13: Project 3 has 100 units. 40 are at 40%, 30 are at 60%, and 30 are at 80%. Using income averaging, this passes the minimum set aside at 58% $((40 \times 40)+(30 \times 60)+(30 \times 80)/100)$. If eight of the 40% units became unqualified, the project would *still* qualify at 59.6% $((32 \times 40)+(30 \times 60)+(30 \times 80)/92)$, and all of the 80% units could still be included in computing qualified basis.

The problem is that this solution is plainly not as efficient as is contemplated by the Code section. **Remember** the purposes of the low income house tax credit are fully served; in the example, **100%** of the units are in compliance with the income averaging test, and yet that is not good enough. The proposed rule would effectively require the inefficient buffer, as if income averaging requires the building to pass a 40% at 58% test. Furthermore, as these examples illustrate, with smaller projects, the numbers are simply not there to provide the required buffer. Finally, the requirement of a buffer has the direct impact of reducing rental revenue of the entire project as compared to a project using the 40% at 60% minimum set-aside. As a result, projects would not be able to support as much debt and would require additional tax credits or other subsidies. We believe that in creating the average income approach, Congress was seeking to allow projects to receive the same economic rents but allow for a broader range of income targeting. We do not think Congress meant to economically penalize such projects.

C. Other Designation Issues

Ability to change unit designations. As noted above, the proposed regulations contemplate designating a formerly fair market value unit as a

low-income unit if that can solve a non-qualified unit problem. But they otherwise do not allow a change in designations. These mitigation strategies do not address other potential issues. What about tenants who are forced to relocate, or if another government program requires the designations to be changed? Or suppose a situation in which permitting an over 60% unit to be designated as a lower percentage unit (e.g., 40%) would have a far less adverse effect than removing a companion over-60% unit). Perhaps the proposed regulations did not contemplate “floating units” because the IRS thought they could be difficult to monitor and enforce. However, we observe that State Credit Agencies have been charged with assuring, and successfully addressed, compliance with the set-aside rules throughout the life of the LIHTC incentive, and we see no reason to not trust them with at role here as well.

Accordingly, we recommend that:

- (1) The IRS allow and changes in designations so long as (i) the changes are approved by, or made pursuant to procedures established by the State Credit Agency, and (ii) do not have the effect of increasing the income limitation applicable to any existing tenant.
- (2) If the IRS is unwilling to allow flexibility to that extent and believes some restrictions are required, then changes in designation should be allowed (i) at any time to reduce the income limitations applicable to a unit, and (ii) in the case of an exchange of designations between two units that are vacant or when an existing tenant moves to a vacant unit.

Part III—Other Issues

A. IRS Proposal for Next Available Unit Type Relief

We agree with the concept of being able to correct an inadvertent violation by using a remedy that would require renting the next available unit to a tenant that would bring the average into compliance.

B. Removed Units Not Low Income Units After the Credit Period

Proposed Regulation 1.42-19(f)(4) states the following:

- (4) Long-term commitment. For purposes of applying section 42(h)(6)(B)(i) to any taxable year after the credit period, removed units are not taken into account as low-income units.

We request clarification on this point, especially how the computation of the applicable fraction would be computed in order to comply with the requirement under IRC 42(h)(6)(B)(i) that the applicable fraction continue to be maintained.

Conclusion

We sincerely appreciate the significant effort of the Department of Treasury and the IRS in writing proposed regulations in this complex area. However, we respectfully believe that modifications are called for. In particular,

the proposed regulations create significant potential for projects to inadvertently fail the minimum set-aside, a risk that is much higher than with the other minimum set-asides under Section 42. The proposed regulations also significantly restrict the flexibility owners traditionally have (often with the participation of their State Credit Agency) and will likely create conflicts with other laws. Finally, the proposed regulations negatively impact the economics and financial feasibility of projects, which will cause investors to avoid projects that use income averaging.

We believe that the above issues can be avoided by (i) focusing on the statute's reference to the taxpayer making unit designations and permitting flexibility in such designations, while providing good faith and anti-abuse rules, as well as oversight by the State Credit Agency, (ii) providing for longer mitigation periods which would address real world timing issues, and (iii) continuing the long-standing tradition of allowing which units are low-income units to change or "float" from year to year by allowing the designations of units to change, generally with notice to the State Credit Agency.

Thanks very much for your consideration of these recommendations.



FROM THE READING ROOM

Between Jacob(s) and Moses: Ed Logue, Urban Redevelopment Lawyer

Michael Allan Wolf*

Saving America's Cities: Ed Logue and the Struggle to Renew Urban America in the Suburban Age

Lizabeth Cohen

Farrar, Straus and Giroux (2019)

547 pages. \$35

Introduction: A Flawed Protagonist

In *Saving America's Cities: Ed Logue and the Struggle to Renew Urban America in the Suburban Age*,¹ her thorough, fascinating, Bancroft Award-winning study of the life and work of Ed Logue, Harvard historian Lizabeth Cohen has presented a volume that should sit on every housing and community development lawyer's bookshelf. I suggest nestling this volume between Jane Jacobs's 1961 *cri de coeur*, *The Death and Life of Great American Cities*,² and Robert Caro's 1975 biographical masterpiece, *The Power Broker: Robert Moses and the Fall of New York*.³

Jacobs pulled no punches in her memorable portrayal of urban renewal's track record as of the early 1960s:

Low-income projects that become worse centers of delinquency, vandalism and general social hopelessness than the slums they were supposed to replace. Middle-income housing projects which are truly marvels of dullness and regimentation, sealed against any buoyancy or vitality of city life. Luxury housing projects that mitigate their inanity, or try to, with a vapid vulgarity. Cultural centers that are unable to support a good bookstore. Commercial centers that are lackluster imitations of standardized suburban chain-store shopping. Promenades that go from no place to nowhere and have no promenaders. Expressways that eviscerate great cities. This is not the rebuilding of cities. This is the sacking of cities.⁴

*Richard E. Nelson Eminent Scholar Chair in Local Government, University of Florida Levin College of Law. The author thanks Daniel Wolf for his invaluable support.

1. LIZABETH COHEN, *SAVING AMERICA'S CITIES: ED LOGUE AND THE STRUGGLE TO RENEW URBAN AMERICA IN THE SUBURBAN AGE* (2019).

2. JANE JACOBS, *THE DEATH AND LIFE OF AMERICAN CITIES* (1961).

3. ROBERT CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1975).

4. JACOBS, *supra* note 2, at 4.

Planners and planning theory were largely to blame for these offenses, according to Jacobs.

The chief “eviscerator” was Robert Moses, whose reputation as a city-builder suffered staggering blows from Caro’s biographical study:

When he built housing for poor people, he built bleak, sterile, cheap—expressive of patronizing condescension in every line. And he built it in locations that contributed to the ghettoization of the city, dividing up the city by color and income. And by skewing city expenditures toward revenue-producing services, he prevented the city from reaching out toward its poor and assimilating them, and teaching them how to live in such housing—and the very people for whom he built it reacted with rage and bitterness and ignorance, and defaced it.⁵

Was it even possible for an admirable figure to emerge from these devastating critiques of urban redevelopment in the middle decades of the twentieth century?

Lizabeth Cohen offers Logue as a flawed protagonist, “a figure of Greek tragedy, whose good intentions were undermined by his own fatal flaws,” chief among them being the faith that he placed “in an expert-driven activist government.”⁶ Logue’s urban redevelopment career (spanning from the 1950s to the 1980s) took him from New Haven, where his team scored more federal urban renewal funds per capita than other city in the nation; to Boston, where, after some missteps, he ultimately learned to redevelop with respect for existing structures and the needs and desires of local residents; and then to New York, where the rise and fall of his Urban Development Corporation (UDC) experiment threatened to jeopardize his reputation as a bold visionary, a collaborator, and a powerful political player.

Cohen’s portrait of Logue and the urban renewal milieu in which he operated is balanced and comprehensive. “Condemnation of urban renewal as practiced for a quarter century after 1950,” she writes, “stems in no small part . . . from the unquestioning acceptance of a distorted, oversimplified depiction of it as a decades-long, undifferentiated, and unmitigated disaster.”⁷ In contrast, Cohen’s goal, which she deftly achieves, is “to present an alternative, more nuanced history of postwar American city building that does not dismiss the federal role in renewing cities and subsidizing housing as pure folly.”⁸

The racism associated with urban renewal, the strategy’s most problematic legacy, receives Cohen’s skilled and balanced treatment as well:

Urban renewal at some moments encouraged what critics cynically labeled “Negro removal” and in other moments improved lives. The UDC, for example, insisted on substantial black participation in its projects, as workers

5. CARO, *supra* note 3, at 20.

6. COHEN, *supra* note 1, at 11.

7. *Id.* at 10.

8. *Id.*

and as residents, an admirable move that surely contributed to its growing unpopularity and ultimate defeat in New York State.⁹

White suburban resistance could foil the best integrationist plans, even those backed by ample public and private dollars. For example, Logue's modest plans for nine Westchester County suburbs ran into a brick wall of loud opposition and political pressure that culminated in state legislation taking away the UDC's power to override local zoning.

Logue's work attracted attention from a wide range of critics, including, of course, Jacobs, who labeled him "very destructive man" and "a maniac" who "thought that all should be wiped out and built new."¹⁰ Logue was on friendlier terms with fellow Yale Moses, although he "sought repeatedly to differentiate himself as less imperious and more committed to social change."¹¹ Unlike these two archetypes of the times—one a journalist by trade, the other a political scientist by training—Logue was a lawyer, and it showed. Mastery of the statutory and administrative law of housing and redevelopment was key to many of Logue's successes, but failure to appreciate the limitations of the law on the books often doomed his best-laid plans. Thus, along with the interaction of race and housing policy, the crucial theme of this journal issue, this review will also focus on the legal aspect of Logue's oeuvre. Those born in the 1960s and later have no first-hand knowledge of how significant federal dollars and tax expenditures, supplemented by ambitious state and private-sector participation, can dramatically increase the supply of affordable housing and redevelop, in positive and negative ways, large swaths of the urban landscape. For that reason, this review will provide ample details concerning Logue's successes and failures on the ground.

New Haven: Corraling Federal Funds

Logue, whose tax-assessor father of five passed away when Ed was thirteen, moved from Philadelphia to New Haven in 1938 to attend Yale on a scholarship. He mixed undergraduate study with labor-union activism before enlisting in the U.S. Army Air Forces in 1943. He served as a bombardier on seventeen missions over Italy during the last two years of the war, which "gave him a valuable bird's-eye view of European cities, teaching him to 'read' the physical layout to 'get a feeling for how a city is put together.'"¹² The GI Bill enabled Logue to continue his studies at Yale Law School, where he came under the influence of Fred Rodell,¹³ Myres

9. *Id.* at 11.

10. *Id.* at 15.

11. *Id.* at 14.

12. *Id.* at 29.

13. If Rodell is to be remembered by only one contribution to legal literature, it should be Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936) ("The average law review writer is peculiarly able to say nothing with an air of great importance. When I used to read law reviews, I used constantly to be reminded of an elephant trying to swat a fly.").

McDougal,¹⁴ and Maurice Rotival.¹⁵ He took full advantage, in and outside the classroom, of the eclectic public policy options that Yale offered its law students then and today. A short stint as a labor lawyer followed, but Logue soon hitched his career wagon to the liberal Connecticut governor Chester Bowles, serving as his labor secretary and then following Ambassador Bowles to India as a special assistant. The experience in East Asia heightened his nascent commitment to the fight against racial discrimination in the United States and opened his eyes to the role government and foundation funding could play in shaping and realizing effective community development and infrastructure improvements.

Upon his return to New Haven, Logue would have the opportunity beginning in 1954 to put these lessons into action in partnership with Democratic mayor Dick Lee. As the head of the city's redevelopment agency, Logue used Rotival's proposal to enhance access to downtown New Haven, based on the tenet that "the modern city must be oriented around the car,"¹⁶ complimenting this ambitious plan with commitments to showcasing the work of modernist architects and to encouraging community feedback.

Logue's administrative and legal expertise was a crucial component of the success of the urban renewal effort, which, according to Cohen,

required broad skills to negotiate for the resources available to cities from Washington and to oversee a wide range of initiatives on the ground. That expansive portfolio included urban planning, real estate, design, construction, management, legal matters, public relations, community organizing, and lobbying. A lawyer like Logue, who emerged from legal training at Yale school in public interest law (long before the term became popular in the 1970s) with a focus on labor and legislation, was particularly well suited to engage with the growing government bureaucracy in postwar America.¹⁷

Logue and his team became experts in the nuances of the Housing Act of 1954, which authorized and subsidized the redevelopment of "predominantly residential areas," such as downtown New Haven, "not just 'solely residential ones,'" as under previous federal legislation.¹⁸ They also tapped federal highway funds and participated in the Section 221(d)(3) program,¹⁹ subsidizing cooperatives sponsored by nonprofit organizations

14. In Logue's first-year property class, McDougal explained that his "interest is to convey how the law can achieve appropriate public policies in the utilization of real property." COHEN, *supra* note 1, at 31.

15. Cohen describes Rotival as "a charismatic and prominent modernist planner who was on the faculty at the Yale School of Art and Architecture and had developed a renewal plan for New Haven in the early 1940s." *Id.*

16. *Id.* at 53.

17. *Id.* at 85.

18. *Id.* at 116.

19. See 12 U.S.C. § 1715l(d)(3).

such as churches, community groups, and labor unions in order to enable moderate-income residents to own homes or pay below-market rents.²⁰

The urban renewal program set in motion by the partnership of Logue, who left New Haven for Boston in 1961, and Lee, who remained mayor until 1970, had its downside as well. Tens of thousands of residents were forced to relocate as a result of these ambitious plans, racial integration remained an aspiration at best, and African American residents registered damning protests about the city's failure to listen to community voices. Would Logue make the same splash (and the same mistakes) when he took his talents to a bigger stage?

Boston: Mixing New with Old

Logue was entering a minefield, because 1961 was the year that *The Death and Life of Great American Cities* appeared in print, with its devastating exposé of the tragedy of Boston's West End in the 1950s, where thousands of residents were displaced to make room for luxury apartments. For seven years, Logue headed up the controversial Boston Redevelopment Authority (BRA), drawing a hefty salary (more than the mayor and governor) and encountering challenges that tested his ample skill set and ego. Once again, federal funding—to the tune of more than \$200 million—underwrote Logue's programs, and the national press paid attention.

It was a brash legal move that cleared the way for Logue's ambitious plans for a New Boston, which he felt could only be accomplished if the BRA had the planning and redevelopment authority combined:

Given the short leash on which the state held the city, such a fundamental change in BRA structure required an amendment to Chapter 121A, the legislation by which the state had designated the BRA as the city's administrator of federal urban renewal funds. Logue made the passage of this amendment a nonnegotiable condition of accepting [Boston Mayor John] Collins's offer²¹

The amending statute passed,²² which meant that Logue—who was approved by a 3-2 vote to head up the BRA's efforts—would not have to share the credit for the program's successes or be able point fingers at others for its failures.

This time, Logue would use federal funds more effectively to leverage targeted private investment. He attempted to "use publicly funded urban renewal to jump-start private sector commitments in and around urban renewal areas," in other words, to "use that government expenditure to

20. COHEN, *supra* note 1, at 117.

21. *Id.* at 163.

22. See 1960 Mass. Acts 562 (ch. 652, § 12) ("The authority shall further have the powers and perform the duties from time to time conferred or imposed on planning boards of cities in Massachusetts by general laws applicable to Boston . . . and shall also have the powers to perform the duties conferred or imposed by statute or ordinance on the city planning board of the city of Boston . . .").

pressure businesses—long unwilling to spend money in Boston—to step up in a wholly new way.”²³

Logue’s expansive vision encompassed much more than the political boundaries of Boston. He visualized the Route 128 suburban research corridor “as nourishment for the growth of downtown lawyers, accountants, public relations firms, and the like.”²⁴ More importantly and controversially, Logue “called for metropolitan-level solutions to two of the city’s biggest social problems: the low-income housing crisis and the gross inequalities suffered by black children in Boston’s notoriously segregated schools.”²⁵ In 1966, several years before the New Jersey Supreme Court’s landmark decision in *Southern Burlington County NAACP v. Mount Laurel*,²⁶ Logue “advocated a ‘fair share’ housing program whereby Boston suburbs would each construct a small number of subsidized units, a program he called ‘scatteration’ in contrast to the current ‘concentration’ of nonwhites in segregated, resource-starved communities.”²⁷ The year before, he had the audacity to propose that thousands of students be bused from struggling Boston schools to suburban school districts. The harsh realities of legal impediments and community opposition would doom both of these metropolitan-wide solutions.

Within the city, the BRA’s ambitious agenda began to take shape, including the “Downtown Waterfront-Faneuil Hall Urban Renewal Plan” and a partnership with major retailers to revitalize the central business district. The project that drew the most attention—positive and negative—was the transformation of Scully Square, “a dense, scruffy red-light district that spread over sixty downtown acres,” into Government Center, “six superblocks . . . consisting of large-scale modernist buildings by major architectural firms.”²⁸ The many of us who find the brutalist centerpiece of the redevelopment with its windswept plaza to be vapid and uninspiring would find it hard to believe that the design Boston City Hall was actually chosen by a juried competition. Despite the controversial aesthetics, Logue’s idea of attracting private investment and development to complement publicly funded projects worked out quite well, so well, in fact, that, as Cohen notes, today most “credit for the city’s dynamic

23. COHEN, *supra* note 1, at 174.

24. *Id.* at 177.

25. *Id.*

26. *S. Burlington Cnty. NAACP v. Mount Laurel*, 336 A.2d 713, 724 (N.J. 1975) (emphasis added) (ruling that each “developing municipality” in the state “cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality’s *fair share* of the present and prospective regional need therefor”).

27. COHEN, *supra* note 1, at 177–78.

28. *Id.* at 193–94.

twenty-first-century economy belongs to the risk-taking private entrepreneurs of more recent decades."²⁹

Logue's Boston version of urban renewal featured pockets of historic preservation, such as the Sears Block and the Sears Crescent (each constructed in the first half of the nineteenth century), despite his initial opposition. His conversion to the cause even earned him a share of the credit for the spectacular success of Quincy Market, which opened years after he left Boston for New York.

When it came to neighborhood projects in Roxbury, Charlestown, and the South End, Logue's BRA did not follow the precedent set by the land clearing and resident removal of the West End. Instead, Logue attempted to meet a goal of maintaining and rehabilitating seventy-five percent of existing residences. Although Logue's agency again took advantage of the Section 221(d)(3) program, the agency still failed to relocate large numbers of dislocated residents within the same neighborhoods. Even more frustrating was community opposition to Logue's attempts to integrate—by race and class—the neighborhoods targeted for rehabilitation.

Cohen contrasts Logue's "rosy picture of neighborhood renewal as enjoying 'a broad base of citizen support' and the 'warm endorsement of most of the community's leaders, except for a few people in the local community who believe they can get some mileage by opposition,'"³⁰ with the realities on the ground:

Even beyond all the structural obstacles, Boston residents tended to reject the BRA's efforts to introduce diversity, whether they were middle-class black homeowners in Roxbury's Washington Park who resisted low-income housing as a threat to property values; or the working-class Irish in Charlestown who feared that urban renewal would open the floodgates to blacks; or low-income South Enders who equated a socioeconomic mix with the arrival of middle-class gentrifiers. Moreover, Logue's initiatives to place low- and moderate-income housing in stable neighborhoods not targeted for urban renewal failed as badly in Boston as they had in New Haven.³¹

Based on this problematic and frustrating multi-front approach, and the failures in too many other American cities during the 1950s and 1960s to rebuild with people, perhaps the mantra for urban renewal should have been "make no big plans."³²

29. *Id.* at 200.

30. *Id.*

31. *Id.* at 213.

32. See Stephen R. Miller, *Historic Signs, Commercial Speech, and the Limits of Preservation*, 25 J. LAND USE & ENVT. L. 227, 253 & n.148 (2010) (citing THOMAS S. HINES, BURNHAM OF CHICAGO: ARCHITECT AND PLANNER 401 n.8 (2d ed. 2009)) ("The origins of the 'Make No Little Plans' motto are ambiguous and difficult to document. Burnham apparently never wrote out or delivered the piece in the exact, and now famous, sequence quoted by Charles Moore in *Daniel H. Burnham, Architect, Planner of Cities*, II (Boston, 1921).").

Logue had the right idea when he teamed up with community members in crafting, selling, and executing his renewal plans. Unfortunately, the BRA was not always successful in identifying the most representative and effective partners. For example, critics of the BRA's alliance with the Washington Park Citizens Urban Renewal Action Committee "resented the ambition of urban renewal's neighborhood proponents to protect the middle-class character of Washington Park from poorer blacks spilling south into the neighborhood from Lower Roxbury and the South End."³³ Charlestown proved to be an even more difficult challenge, as vociferous public opposition found the BRA "seeking new ways of connecting directly to Charlestown residents and not relying on any one organization in this politically fragmented community."³⁴ Once again, public opposition forced Logue to give up his plans for residential racial integration, a precursor to the furor over school busing that drew national attention a few years later. Logue believed that his biggest mistake came in the North Harvard section of Allston, where opposition, much of it from students and faculty, doomed the BRA's plans to build a ten-story luxury apartment building. A consortium of religious congregations under Section 221(d)(3) shepherded a low-rise apartment complex instead.

Cohen summarizes Logue's frustration this way: "Logue had entered Boston naively waving the flag of 'planning with people,' but by the time he left, that phrase would carry much greater significance than he ever intended."³⁵ The unintended consequence of the BRA's hierarchical brand of expert-based planning was to foster "community vigilance and empowerment,"³⁶ which meant that ultimately city residents benefited from Logue's disappointment.

Like in New Haven, Logue had an effective partner and sponsor in Boston mayor John Collins, but politics can take away as well as give power. Following Collins's defeat in the 1966 Democratic U.S. Senate primary, Logue threw his hat into the ring of the 1967 mayoral election. He finished fourth in the Democratic primary, which was made even more humiliating by the frontrunner—school segregation defender Louise Day Hicks. Logue would not work with the ultimate winner of the mayoral sweepstakes, Kevin White, for, after a short stint as a visiting professor at Boston University, Logue answered the call of New York's ambitious, charismatic, liberal Republican governor, Nelson Rockefeller.

New York: *Gang Aft Agley*

As in Boston, Logue's assumption of power was accompanied by state legislation augmenting the power of the renewal agency that he was to head. The strategy behind the UDC was "to skirt the referendum problem: a state

33. COHEN, *supra* note 1, at 217.

34. *Id.* at 229.

35. *Id.* at 244.

36. *Id.*

level public benefit corporation . . . with the ability to self-finance through issuing its own tax-exempt bonds. Special state appropriations and federal housing program would supplement private-sector funding.”³⁷ But before he would even consider leading the new entity, Logue, who had learned many lessons in the trenches of two New England cities, insisted on much more: “Logue proceeded to explain that without the ability to acquire property through eminent domain, to reduce or exempt projects from local real estate taxes, and, most radically, to override exclusionary local zoning and outdated building codes, he doubted the UDC would get anywhere.”³⁸ Rockefeller and state legislators went back to the drawing board, and, in April 1968, Logue was the new CEO and president of the newly empowered UDC.

In contrast with New Deal and then Great Society urban programs driven by federal dollars and regulations, Rockefeller and Logue’s UDC cart would be led by two horses—state control and private capital. The partnership, which ended near the close of 1973 (when Rockefeller left office), would be highly productive:

Over seven years the UDC launched 117 separate housing developments for forty-nine cities and towns, comprising more than 33,000 dwelling units for 100,000 people, about a third low-income, the rest subsidized for moderate- and middle-income residents. In addition, the UDC developed sixty-nine commercial, industrial, and civic projects and three brand-new communities.³⁹

To a reader in the 2020s, these numbers and the government-led efforts that they represent seem unimaginable, especially when compared with the relative paucity of government infrastructure, housing, and urban development dollars and results at the federal and state levels.

Logue adapted to changes in federal funding, using Section 236 subsidies⁴⁰ that dramatically sliced mortgage interest payments for over ninety percent of UDC construction projects. Logue still had the magic touch, as “[t]he UDC managed remarkably to get over 60 percent of all Section 236 funding nationally, receiving at least 90 percent of New York State’s share.”⁴¹

This is not to say that it was smooth going for Logue in the Empire State. New York City mayor John Lindsay, not one to share the limelight with Rockefeller, at first balked at the notion of UDC’s “state-operated bulldozers” operating in his bailiwick.⁴² A deal was struck whereby Logue would seek the mayor’s approval before starting any city projects, which eventually included “UDC’s crown jewel: the development of two-mile-long

37. *Id.* at 256.

38. *Id.*

39. *Id.* at 270.

40. See 12 U.S.C. § 1715z-1.

41. COHEN, *supra* note 1, at 276.

42. *Id.* at 271.

Welfare Island in the middle of the East River between Manhattan and Queens as the mixed-income, pedestrian-only New Town of Roosevelt Island.⁴³ In turn, “Logue agreed to take on building sites in the South Bronx and Coney Island that the city found too difficult to develop.”⁴⁴

The UDC took pride in the relative speed and efficiency with which it could move a project from idea to reality. Logue instituted the practice of “fast-tracking,” meaning that the UDC did not have to wait until all of the funds were in hand before beginning multiple projects at the same time. When it worked, fast-tracking produced impressive, red-tape-free results. When Peter’s pocket did not have enough cash to pay Paul, however, the UDC’s days were numbered.

Schooled by his trial and error experiences in New Haven and Boston, the New York version of Ed Logue, for the most part, disavowed land clearance, embracing instead the development of land outside center cities (experimenting with an American variation of England’s post-World War II New Towns) or of existing urban renewal sites that had been cleared and then abandoned. He fought hard, as he had in the past, for a diverse mix of incomes and races in UDC housing, and, on Roosevelt Island, successfully expanded his target to include age and disability as well. Still, as in the past, broad legal authority and millions of dollars in private and public funds could be neutralized by community opposition.

In a pre-*Bakke*⁴⁵ legal milieu, the UDC engaged in overt social engineering, but again Logue’s dream met hard realities:

This UDC project [Twin Parks, in the Bronx] of more than two thousand apartments aimed to attract low- and moderate-income residents—divided, it was hoped, into a third each of whites, blacks, and Puerto Ricans—to a neutral oasis sitting on the boundary between Italian and black neighborhoods. Instead, open central plazas designed to encourage interaction became war zones for teenage gangs, forcing the UDC to install gates and other physical barriers to separate groups from one another and make other residents feel more secure.⁴⁶

Providing decent housing is an important first step for improving the lives of inner-city residents, not a magic bullet.

43. *Id.* at 272.

44. *Id.*

45. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., dissenting) (“I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner’s admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.”).

46. COHEN, *supra* note 1, at 291–92.

Logue continued his creative partnership with architects, taking pride in the “low-rise, high density” Marcus Garvey Park Village, four-story, four-unit buildings, totaling more than 600 residences, that “spread across six devastated city blocks in the Ocean Hill-Brownsville section of Brooklyn, part of a larger Model Cities area.”⁴⁷ The UDC also experimented with new construction technologies, “develop[ing] a factory to produce precast concrete components.”⁴⁸

Logue was never shy about realizing his long-standing dream of providing housing for inner-city low-income families who would relocate to middle-class suburbs. He knew that he faced significant resistance by white homeowners and by African Americans “who were increasingly attracted to Black Power and community control in place of integration.”⁴⁹ In 1972, Logue announced modest plans to construct 100 units for low-income residents in each of nine towns in Westchester County, New York. Cohen observes that “[i]t was clear that many ardent opponents feared that UDC’s Fair Share Housing was the opening crack in the zoning wall that would lead to greater development and diversity.”⁵⁰ It was Charlestown redux: “Once word of the UDC project got out, it provoked citizen outcry, large and volatile public meetings, and vigorous organization by opponents. In town after town, something like a civil war broke out.”⁵¹

This time, law proved to be Logue’s undoing. In the face of lawsuits and lobbying, Rockefeller neutralized the UDC’s preemptive authority, “declaring a moratorium on Fair Share Housing until January 15, 1973, giving towns the time to come up with their own alternative plans,”⁵² and then, in a reversal of the traditional locus of home rule, approving legislation “curtailing the UDC’s power to override local zoning in New York State’s villages and towns, while keeping it in its cities.”⁵³ Logue was left licking his wounds, while even Paul Davidoff, the popularizer of “advocacy planning,” reacted to grassroots opposition rooted in racial bias by fighting exclusionary zoning in the courts, culminating in the judicial version of fair share articulated by the Supreme Court of New Jersey in the *Mount Laurel* litigation.⁵⁴

The year 1973 would turn out to be the *annus horribilis* for Logue, for the UDC, and for those looking to the second-term Nixon administration for grants and guidance. Nixon matched Rockefeller’s moratorium with one of his own—a sweeping freeze of housing subsidies to last eighteen months until July 1, 1974. It would prove to be the opening salvo in the

47. *Id.* at 305.

48. *Id.* at 304.

49. *Id.* at 312.

50. *Id.* at 317.

51. *Id.* at 316.

52. *Id.* at 319.

53. *Id.* at 320.

54. See *supra* note 26 and accompanying text.

Republican-led war on cities that rages to this day, with attacks on sanctuary cities, slander of Democratic large-city majors, accusations of widespread voter fraud that somehow stops at the political boundaries of urban counties, and fearmongering about invasions of the suburbs by unnamed masses. Outgoing HUD Secretary George Romney pulled no punches: "The White House, he complained, was 'discriminating against central cities' in a 'hard headed, cold hearted indifference to the poor and [with] racial prejudice.'"⁵⁵

The new mantra was "New Federalism," and, in the housing and redevelopment arena, it was effectuated by revenue sharing with, and block grants to, state, not local, governments. The Community Development Block Grant (CDBG) program, instituted in 1974 to replace federal urban renewal, resulted in

little construction of new public-sector housing, reduced attention to racial inequality and poverty through federal programs like Model Cities and Community Action, wider dispersal of spending throughout the nation with less going to major cities, significant fragmentation—at times non-coordination—in urban policy and practice, and a shift in balance from the public sector through rental vouchers and subsidies to developers.⁵⁶

This shift, following on Nixon's impoundment of housing funds, put the UDC in a financial vise. When Rockefeller resigned in 1973 to make one last run at the presidency (he would come within a heartbeat when Gerald Ford named him vice president the following year), not even new injections of bond funding could save Logue and the UDC.

In part because an IRS ruling limited UDC's more lucrative commercial and industrial development to a mere ten percent of the tax-free, moral obligation bonds that it offered, creating a positive cash flow posed a constant challenge that was never overcome. Logue scrambled for another year to cobble together funding and state support to complete existing and initiate new projects, but he had already burned his bridges in Albany over the Westchester fights. In 1975, incoming Democratic Governor Hugh Carey asked for Logue's resignation. Shortly thereafter, the UDC "defaulted on \$105 million in short-term notes and . . . \$30 million worth of loans."⁵⁷ A state investigation found no fraud, but placed the blame for UDC's downfall on "one underlying contradiction: between its social mandate to build for low- and moderate-income tenants and its fiscal mandate to do so at no cost to the taxpayers."⁵⁸ This was an example of NIMBY and NFMBP—taxpayers might be strongly in favor of affordable housing, but not in my back yard or not from my back pocket! Yet, without substantial federal subsidies, ambitious experiments such as the UDC will fall short.

55. COHEN, *supra* note 1, at 323.

56. *Id.* at 325.

57. *Id.* at 332.

58. *Id.* at 339.

New York taxpayers ended up picking up the bill to complete UDC's projects, but under new leadership.

Second Act in the South Bronx

A dark period during which Logue picked up consulting work ensued, and friends and relatives were worried about a drinking problem. Salvation came from an unexpected corner of inner-city America—the then-infamous South Bronx. The former planning and redevelopment czar for the entire state was, in 1979, named the director of the South Bronx Development Office (SBDO). The non-profit, which was renamed the South Bronx Development organization in 1981 with Logue as president, “functioned as an administrative unit in the New York City Planning Department but had minimal authority, few development tools like the power of eminent domain, and little dependable funding.”⁵⁹ It turned out to be the perfect challenge for Logue’s final act.

Among other tasks, the ambitious SBDO prepared a comprehensive plan at the behest of mayor Ed Koch, convened monthly meetings of the South Bronx Economic Development Coordinating Committee “to review proposals and to try to create a one-stop development agency to attract customers,”⁶⁰ developed industrial parks, provided job training and social services, and used soil compacting to reclaim land strewn with rubble from crumbling and abandoned buildings. But it was the provision of affordable housing that, as in the past, garnered most of Logue’s attention and vast expertise.

A garden was planted in the South Bronx in the 1980s, an audacious project that in many ways fulfilled more of Logue’s dreams than the shopping district of New Haven, Boston’s Government Center, and Roosevelt Island:

In the middle of decimated Charlotte Street . . . Logue’s SBDO constructed Charlotte Gardens, a new neighborhood of ninety freestanding single-family homes with white picket fences that were heavily subsidized for purchase. It was nothing less than the suburban American dream plopped down in the middle of one of the worst neighborhoods in the city, if not the nation.⁶¹

The SBDO partnered with a nonprofit community development corporation called the Mid Bronx Desperadoes and formed close attachments to the area’s six community boards and parish priests and nuns.

The initial waiting list for the three-bedroom, one-and-a-half-bath manufactured homes exceeded two thousand, which was no surprise given that “the price tag of about \$50,000 was at least \$30,000 below the actual construction cost (and if all expenses were included, less than half the full

59. *Id.* at 352.

60. *Id.* at 360.

61. *Id.* at 362.

\$114,000 sticker price).⁶² Logue and his team rescued from the Reagan chopping block some of the remaining funds in Carter's Urban Development Action Grant (UDAG) program, took advantage of a state program that insured mortgages for first-time homebuyers in targeted neighborhoods, and received support from the Local Initiatives Support Corporation, a Ford Foundation spin-off.

Conclusion: Seeking the Will and the Way for Rebuilding

By the time Charlotte Gardens was completed, Logue was out at the SBDO. HUD Secretary Sam Pierce cut agency funds to the organization, and Logue headed back to Boston in early 1985. He spent the last fifteen years of his life teaching at MIT, volunteering his services as a community activist on Martha's Vineyard, and attending conferences and receiving awards that celebrated his achievements. Two days after his death on January 27, 2000, the headline of the obituary in the *New York Times*, the publication that once featured Charlotte Gardens on its front page, read simply and accurately, "Edward Logue, 78, Dies; Fought Urban Decay."⁶³

Logue the fighter comes to life in Cohen's sustained and highly detailed study of a life in context. He could be relentless, stubborn, and persistent as he bobbed and weaved to achieve victory, not always successfully. Cohen reveals that Logue could be hyper-competitive, demanding, and critical of his staff and the experts upon whom he relied. Moreover, she shares the important insight that he "aspired to be a paternal as well as fraternal presence"⁶⁴ in a "network of urban redevelopment experts" that was "reinforced by a powerful culture of masculinity."⁶⁵

Unquestionably, the target of Logue's drive was the decay of America's cities. He was not a city builder; he was a rebuildler, which is a different and, in many ways, a more challenging job. A decaying city suffers from neglect, abandonment, disinvestment, and disillusionment. It has seen better times, but public memories are short. It is one thing to get others to share a fresh vision of a new city on an unspoiled hill, to attract the attention and dollars of wealthy patrons and builders who want to see their names on new streets and edifices. It is quite another to attract investors, politicians, architects, and other experts in an effort to reinvent a place associated with the fading achievements of the past and the distress and angst of the present. And, when that reinvention includes as one of its primary goals a commitment to housing integrated by race and class, the challenge is that much harder.

62. *Id.* at 364.

63. William H. Honan, *Edward Logue, 78, Dies; Fought Urban Decay*, N.Y. TIMES, Jan. 29, 2000, at B7.

64. COHEN, *supra* note 1, at 96.

65. *Id.* at 93.

The closing pages of Cohen's volume—"The Legacy of Logue's Story"⁶⁶—are the hardest and most important passages for the reader. In terms of federal government programs designed to create new or rehabilitated housing for low- and moderate-income residents, the pickings are mighty slim. Low-Income Housing Tax Credits and housing vouchers can only go so far to reducing the growing gap between market rates and family wealth (made much worse by a pandemic crisis), especially in metropolitan areas in which housing costs have skyrocketed. Community development corporations are overburdened and underfunded. Cities that attempt to exact fees from nonresidential developers and that use inclusionary zoning programs, if they survive the political process and judicial challenges, "do not come close to meeting the enormous demand for affordable housing nor creating socially balanced neighborhoods."⁶⁷

Perhaps the most stark lesson the reader can glean from Cohen's revision of urban renewal history is that, despite the dreams and schemes of neoliberals, a public-private partnership that does not prominently feature a healthy and sustained federal contribution will never be transformative (in the positive sense of the word) for American cities that are plagued by severe shortages in affordable housing, shocking levels of income and education disparity, and a paucity of middle-class jobs. As noted in Cohen's apt words,

There is much lost in a neoliberal world where the most robust activity is local and global. The intervening levels of state and national governance are crucial tools of redistribution within vast and diverse territories. Only policy and program at that scale can counteract the inequalities that flourish in a society consisting of islands of property and privilege.⁶⁸

Saving America's Cities closes with the hope that the book will "reawaken from a long slumber the will and wherewithal to revitalize cities that still struggle for economic survival, to invest in neighborhoods still lacking adequate services, and to improve the prospects for those Americans still poorly housed, or, in the worst cases, homeless."⁶⁹ Unfortunately, this optimism may be asking too much of vast segments of the American people who seem unmoved by wealth disparities and the damage caused by racism, and of the politicians who choose to follow rather than provide leadership to their constituents.

Yes, the Biden-Harris ticket owes its victory in large part to central city and inner suburban voters. Nevertheless, the persistence of anti-urban rhetoric among Republican politicians and voters and the relative silence of many Democrats do not bode well for any effort to restore a prominent role for enhanced and expanded federal tax credits, not to mention the block grants, mortgage guarantee, vouchers, model city, UDAG,

66. *Id.* at 393.

67. *Id.* at 396.

68. *Id.* at 397.

69. *Id.* at 398.

Homeownership and Opportunity for Everyone, and enterprise-zone programs of the past, and the trickle-down Opportunity Zones scheme of the present.

In the *Torah*, the first five books of the Bible, Joseph is the transitional figure linking Jacob, his father and the third patriarch, and Moses, the law-giver who was the greatest Jewish prophet. Sold by his brothers, enslaved and imprisoned in Egypt, and rising to the eminent position of viceroy, Joseph's life embodies the rise from despair to hope. In like manner, *Saving America's Cities*, skillfully chronicling the up-and-down career of a relentless, creative Edward J. Logue (fittingly, the "J" is for Joseph), a leader who could command or compromise, is situated between another Jacob(s) and Moses—that is, Jane Jacobs's pessimistic view of planning and government rebuilding efforts and the ruthless, bullying Robert Moses portrayed in *The Power Broker*. Elizabeth Cohen has done a great service to lawyers, planners, historians, government officials, and concerned citizens who are in need of a usable past to guide much-needed initiatives addressing the unrelenting affordable housing and redevelopment needs of the 2020s.

*Digest of Recent Literature**

Repeal Opportunity Zones

Calvin H. Johnson

(https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725846)

This article provides an overview of Opportunity Zones and argues that Opportunity Zone incentives are harmful to low-income communities. It then provides suggestions for how to best modify the program.

Properties qualify as Opportunity Zones when a state's governor nominates tracts of land and the Treasury secretary certifies them as meeting the general requirements. The median income level of the tract must be under eighty percent of the median income of the metropolitan area, or, for rural populations, the median income must be less than the eighty percent of the average income level of the entire state. This calculation allows an average income in an Opportunity Zone to be roughly twice the poverty level.

The Opportunity Zone program is a tax expenditure constituting of a subsidy administered through the tax system rather than through direct government spending. The tax benefits of Opportunity Zones initially flow to taxpayers in the form of capital gains, because the program allows for deferrals of tax on realized capital gains if an amount equal to the capital gains is invested in a certified Opportunity Zone. Depending on the length of time that a property in the Opportunity Zone is held by an investor, a portion or all of the gains recognized upon an ultimate sale of the property are exempt from tax. If the taxpayer still owns the Opportunity Zone property on December 31, 2026, the taxpayer will be treated as if they had sold the property for the lesser of the amount of the deferred capital gain or the fair market value of such property as of said date. Opportunity Zone tax incentives increase the price and value of Opportunity Zone land, which benefits investors and the property owners, without any demonstrated benefit to the low-income individuals who live in Opportunity Zones.

This article argues that Opportunity Zone investments, which are often more-profitable high-income housing or commercial properties, raise property values and encourage gentrification, effectively driving out poor people who cannot afford the increased rents and lead to a reduced stock of affordable housing. There is also no obligation to provide relocation housing to low-income tenants displaced by the Opportunity Zone program.

Contributors: Theresa Omansky, Emmet, Marvin & Martin, LLP, New York, NY; Trevor Warren, University of Idaho College of Law; Rachel Gillan, University of Idaho College of Law; Patrick Jenkins, University of Maryland Francis King Carey School of Law; Kyle Slominski, University of Idaho College of Law; Grant Patton, University of Idaho College of Law.

In addition to a repeal, this article suggests the following: (1) qualifying Opportunity Zone investments so tax subsidies attach to low-income housing as a means of encouraging development of affordable housing; (2) modifying the program to no longer provide tax subsidies for commercial properties and luxury apartment buildings that displace low-income households; (3) giving money such as the tax subsidy directly to the indigent or providing housing vouchers to pay for a portion of their rent; or (4) revising the program so that councils of citizens residing in the Opportunity Zone would decide where the Opportunity Zone money goes.

A Federal Builder's Remedy for Exclusionary Zoning

Eric E. Stern, Yale Law Journal

(<https://www.yalelawjournal.org/note/federal-builders-remedy-for-exclusionary-zoning#>)

This article proposes a constitutional solution, as well as models for state and federal level approaches, for home builders and policy makers to reduce the impact of efforts to exclude lower-income households from neighborhoods through exclusionary zoning (EZ). The article begins by discussing the negative impacts of EZ and weighs these impacts against the "social, fiscal, and environmental" factors giving rise to these discriminatory practices. Beyond the social cost of racial discrimination, there is a rising financial burden of housing on low-income populations outside of exclusionary areas, caused at least in part by the limited supply and type of housing available. The article cites studies finding that nearly fifty percent of Americans in the nation's largest cities are "rent burdened," while approximately twenty-five percent are "severely rent burdened." A high percentage of these populations are Black and Hispanic.

The problem, the article argues, stems from a lack of proper legislative channels for low-income housing builders and local governments to challenge exclusionary zoning laws. To support the argument for much-needed change, the article offers Oregon's preemptive requirements for multi-family dwellings as an example. The Oregon statute is an attempt at the state level to lessen the housing crisis burden and to help home builders procure rights to build multi-family structures. But Oregon is mostly alone in this endeavor; the article reviews how various states along the East Coast are struggling to set similar precedent to help low-income residents find better housing. Given the inability to replicate the Oregon model, the article proposes a "federal builder's remedy." This remedy would authorize litigation when a local government denies a builder's proposal for new affordable housing and seeks to challenge local zoning regulations. Such a solution has previously fallen short of adoption for two reasons, the most damaging of which is the Supreme Court's reluctance to view the issue of affordable housing as "a fundamental right" triggering strict scrutiny. To this point, the article argues that, "[w]ithout a fundamental right at stake,

a substantive-due-process remedy appeared out of reach to prior scholars and litigants,” a position that the article challenges. The article proposes three theories to argue that EZ policies violate the Due Process Clause of the Fourteenth Amendment and contends that these theories are supported by previous Supreme Court decisions. In addition, the author emphasizes the importance of a builder’s approach to litigation, rather than litigation by “would-be residents,” who typically have fewer resources and face numerous hurdles to establish standing to sue.

Why the Most Affordable Homes Increased the Most in Price Between 2000 and 2019

Jung Hyun Choi, John Walsh, Laurie Goodman

(https://www.urban.org/research/publication/why-most-affordable-homes-increased-most-price-between-2000-and-2019/view/full_report)

Homes at the low and high ends of the housing market increased in value in Metropolitan Statistical Areas (MSAs) all over the country between 2000 and 2019. However, low-tier homes saw a 126.2% increase nationwide, whereas high-tier homes only increased 86.4% during this time. Researchers determined that three factors were important to consider in evaluating what led to this price increase: (1) housing supply constraints; (2) employment growth; and (3) the presence of investors in the transaction markets.

In MSAs with housing supply constraints, the data suggested that regulations on land use and geographic constraints on new construction assisted in increasing housing prices. Similarly, a low supply of available housing units may have an even greater effect on the affordability of housing. In MSAs with employment growth, which is measured by the change in the number of people employed in the MSA, a positive correlation exists with increased housing demand. Essentially, where there is an increase in the number of people employed, the price of low-tier homes also increased. There was generally also an increase in the number of households in MSAs with employment growth, which compounded the increase in demand for a limited number of housing units. The presence of single-family investors was ultimately determined to have little effect over the price growth of high-tier homes, and, in some MSAs, the presence of investors actually caused the price of low-tier homes to decrease. The availability of land and employment growth were found to have stronger influences on the price of homes than the presence of strong land-use regulations.

In conclusion, price increases in low-tier homes were the greatest in MSAs with more land-use regulations, less available land, and greater employment growth. Renters generally feel the effect of increased prices greater than homeowners, because lower-income households, who may not be able to purchase affordable housing, drive up the demand for rental housing. This, combined with increased building costs (which leads to more construction of high-end homes and less construction of low-tier homes),

further increase the cost of rental housing. To address the increased cost of low-tier housing, local policy makers need to focus on housing and labor markets as well as the intersection of the two.

Dismantling Segregationist Land Use Controls

Sarah J. Adams-Schoen

(https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3695337)

This article highlights four recent land use control changes and their potential use to fight racism. The article begins by reviewing the history of overtly racist land controls and then traces their impact and spirit through modern policy that perpetuates inequity. The latter half of the article reviews land use changes in Seattle, Washington; Minneapolis, Minnesota; Portland, Oregon; and the State of Oregon more broadly.

In the early twentieth century, U.S. land use controls, such as restrictive ordinances, restrictive deed covenants, federal lending policies, and tiered zoning designations, overtly segregated communities. Although facially race-neutral, modern land-use controls, such as restrictive residential zoning, height and density maximums, minimum lot sizes, and parking requirements, disproportionately restrict opportunities for Black and Indigenous people and People of Color, and they reinforce geographic racial segregation.

Four recent policy changes have demonstrated the potential to curb the segregationist pressure these policies create: (1) increasing opportunities for accessory dwelling units (ADUs) in Seattle, Washington; (2) removing restrictive single-family detached residential zoning in the Minneapolis, Minnesota; (3) allowing duplex, triplex, and fourplexes in parts of Portland, Oregon's highest density single-dwelling residential zones; and (4) instituting middle-housing policies in the State of Oregon that allow for increased housing density and require periodic assessment of state housing needs.

All four policies emphasized increasing density to provide more housing options. Seattle and Portland aim to encourage adoption of ADUs by eliminating owner-occupancy requirements, off-street parking requirements, and increasing the zoning areas amenable to ADUs. Similarly, Minneapolis, Portland, and the State of Oregon aim to address "middle housing" by relaxing zoning restrictions on duplexes, triplexes, and fourplexes. This option includes increasing the number of properties eligible for development, removing barriers to converting single-family dwellings, relaxing restrictions on non-related family members, and removing off-site parking requirements.

These land use reforms shift away from exclusionary zoning that serves as a proxy for "expressly racially restrictive zoning laws" and acknowledges that residential land uses are not uniform. Although obviously not comprehensive, these reforms are examples that land-use planners, lawyers, government officials, and affected communities can use to confront continuing systems of oppression.

Housing Mobility Programs in the U.S. 2020

Poverty & Race Research Action Council

(<https://prrac.org/pdf/housing-mobility-programs-in-the-us-2020.pdf>)

This piece is a compendium of new and existing housing mobility programs across the nation, which are programs designed to help families who want to move to a higher opportunity neighborhood. The report contains information compiled from interviews with program staff, program documents, experiences of the authors with the programs, and publicly available information. The report is organized alphabetically by region, with existing programs listed prior to new and emerging programs. The authors caution that new programs may still be refining their plans, while existing ones may be in the process of changing theirs. Each program description begins with information concerning the region as a whole, not necessarily indicating the mobility program responsible for it, and contains information such as population, total vouchers held by families with children, share of vouchers held by families with children in low poverty tracts, number of public housing agencies (PHA), average rental vacancy rate, and the black-white dissimilarity index. Following this information is a brief overview of each program and a list of program descriptors, containing information such as number of dedicated mobility staff, services offered, funding sources, number of families served annually, program cost per successful move, and whether the program has any evaluation or assessment plan. The authors have attempted to make this list of program descriptors as uniform as possible across programs, though they faced issues obtaining current comparable data on the total program budgets for each program, and the program cost per successful move to an eligible mobility area. Appendix A to the report contains a summary compilation of descriptors for all the programs in the report. Last, the authors note that while several “moving to work” PHAs have undertaken mobility initiatives, the report is limited to programs that include or will include some of the attributes of full mobility programs.

The existing programs featured are Baltimore, MD, Buffalo, NY, Chicago, IL, Columbus, OH, Cook County, IL, Dallas, TX, Houston, TX, Massachusetts, Minneapolis/St. Paul, MN, New York City, NY, Richmond, VA, San Diego, CA, Seattle/King County, WA, St. Louis, MO, and Westchester, NY.

The new and emerging programs featured are Baltimore County, MD, Boston, MA, Charlotte, NC, Cleveland, OH, Connecticut, Long Island, NY, Los Angeles, CA, Milwaukee, WI, New Jersey, and Pittsburgh, PA.

Accessibility Features for Older Households in Subsidized Housing

Whitney Airgood-Obrycki and Jennifer Molinsky

(<https://www.jchs.harvard.edu/research-areas/working-papers/accessibility-features-older-households-subsidized-housing>)

This paper examines the availability and accessibility features of HUD-subsidized housing for a rapidly growing population of older adults, as well

as the suitability of these units for older adults aging in place. The authors analyze data from the 2011 American Housing Survey to identify the physical challenges faced by older renters, the difficulties that they experience with their housing environment, and whether subsidized units are more equipped with accessibility features than units without rental assistance. The article notes that while older adult income has risen over the past fifteen years, nearly two million households age sixty-two or over have very low incomes, pay more than thirty percent of their incomes for housing, or live in overcrowded or poor-quality units. Despite the Section 202 program being designed to provide housing and services for older adults as they age, only eight percent of HUD-subsidized older adults live in these units.

The paper next examines the characteristics of older adults in subsidized housing, highlighting research that shows the longer duration of time spent in subsidized housing among older adults compared to other populations, as well as the higher degree of vulnerability faced by older adults due to factors such as financial status, higher rates of disability, poor health, and lack of other household members. The authors contend that a clear need exists for public housing authorities and subsidized property owners to provide accessible housing and on-site services and that previous studies show shortfalls in this area.

The minimum percentage of units that must be accessible, and the legal basis for residents to obtain accessibility features under the Fair Housing Amendments Act of 1988 and Section 504 of the Rehabilitation Act of 1973, are discussed next. These laws require property owners to allow for reasonable accommodations to ensure that individuals with disabilities can use the housing and prevent denying the benefits of federal programs based on disability alone. Tenants in private housing typically are responsible for making and paying for any accessibility modifications, and may be required to revert these changes upon vacating. Housing providers that receive federal financial assistance, however, are required to pay for these modifications themselves. HUD regulations specify that accepting a tenant-based voucher does not constitute receiving federal financial assistance, so renters in the private market using vouchers generally would be required to pay for modifications themselves. For new construction, "a minimum of five percent of the total dwelling units or at least one unit in a multifamily housing project [with at least five units], whichever is greater, shall be made accessible for persons with mobility impairments." This rule also applies to existing structures of at least fifteen units that undergo major alterations. The authors note that while this five percent rule sets a minimum requirement, it is unknown how many units actually feature accessibility components.

The data and methodology employed in the study are discussed next. The American Housing Survey documents "demographic characteristics of subsidized households, their physical disabilities, the challenges they have with navigating their housing environment, and the accessibility features

included in their homes.” The authors include in their analysis any household with an elderly person present, which HUD defines as age sixty-two and over. The Bo’sher et al. index, which categorizes units as modifiable, livable, or wheelchair accessible, is used, as well as a binary variation that combines the livable and wheelchair accessible categories as one singular category, as well as combining the modifiable and unmodifiable categories. The authors first compare older subsidized households to older, income-eligible but unsubsidized households before comparing older subsidized households receiving project-based assistance to those receiving tenant-based assistance. The authors employ chi-square statistics, logistic regression modelling, and propensity score matching in their analysis. A robust data set is included, with the results suggesting that subsidized housing shows many benefits for older adults but also leaves many needs unmet.

The authors conclude that subsidized housing has myriad positive effects beyond the merely financial. It also suggests improvements, such as conversion of public housing and Section 202 units through the Rental Assistance Demonstration program, and education efforts geared at informing older adult households of their rights.

A Vision for Federal Housing Policy in 2021 and Beyond

Poverty & Race Research Action Council

(<https://prrac.org/pdf/vision-for-federal-housing-policy-2021-beyond.pdf>)

Residential segregation is a problem with deep historical roots that continues to impact racial equality and intergenerational life outcomes today. Recognizing that American housing policy must be a core pillar of systems change, this report recommends concrete and impactful reforms to existing housing programs. These recommendations aim to break the ongoing cycle of residential segregation and to transform the federal government’s role into one of strong, active promotion of structural change and racial justice.

The recommendations provided are built on four principles. The first principle is to empower households receiving housing subsidies by providing greater residential choices. The second principle is to reform programmatic barriers and access to legal services. The third is to correct decades of confining low-income people of color into high-poverty areas while expanding housing supply in ways that do not exacerbate poverty concentration and racial segregation. The fourth is to support fair-housing oversight and enforcement to ensure that the legal initiatives result in real change.

In all, the article lays out eleven distinct recommendations. It suggests providing universal housing assistance through Housing Choice Vouchers program and enacting key reforms thereto. The authors also recommend protecting against source of income discrimination—including on the basis of housing vouchers. Further, the authors suggest addressing housing supply and discuss ways to expand the housing supply for low-income

households while making existing public housing safe and healthy. Further, the article recommends incorporating civil rights into the Low-Income Housing Tax Credit Program, updating HUD's site selection criteria, and counterbalancing the ways the housing finance systems undergirds segregation. Finally, the article recommends restoring the Affirmatively Furthering Fair Housing (AFFH) Rule, invigorating fair housing oversight, and strengthening the legal services sector.



ORGANIZATIONAL PROFILE

The Inclusive Communities Project

*Demetria McCain**

In August, 2020, President Trump tweeted a promise to protect suburban housewives from the invasion of low-income housing.¹ To the Inclusive Communities Project (ICP), it was as an oft-repeated refrain that reflected today's reality in the Dallas region and not a mere promise of things to come. ICP works for the creation and maintenance of thriving racially and economically inclusive communities, expansion of fair and affordable housing opportunities for low-income families, and redress for policies and practices that perpetuate the harmful effects of discrimination and segregation. The organization's mission and its work over the past fifteen years are in direct contrast to the vision of those who ascribe to the tweet's sentiments.

In furtherance of its mission, ICP has worked directly with and in support of low-income Black families and others who participate in the federal housing choice voucher (HCV) program and seek to use their vouchers in safe, low-poverty, well-resourced, historically off-limits areas (HOAs) of the Dallas Metroplex. It is no coincidence that an overwhelming number of neighborhoods that host these features are predominantly white. Richard Rothstein, author of *The Color of Law: The Forgotten History of How Our Government Segregated America*, illustrates how white neighborhoods' prosperity and black neighborhoods' experiences with abuse and neglect are results of government action—not innate behaviors of residents.² It is this neighborhood abuse and neglect that the Dallas-area mothers who

*Demetria McCain, Esq., serves as the president of the Inclusive Communities Project, an affordable fair housing nonprofit in Dallas, TX. Prior to serving as president she supervised ICP's Mobility Assistance Program as well as worked on advocacy efforts in furtherance of the organization's mission. She is the creator of ICP's Voices for Opportunity, an advocacy training initiative that assists low- and moderate-income residents who want to make their fair housing and neighborhood equity concerns heard.

1. "The 'suburban housewife' will be voting for me. They want safety & are thrilled that I ended the long running program where low income housing would invade their neighborhood. Biden would reinstall it, in a bigger form, with Corey Booker in charge! @foxandfriends @MariaBartromo." <https://twitter.com/realDonaldTrump/status/1293517514798960640>.

2. Film Short, *Segregated by Design* (2019), available at <https://www.segregatedbydesign.com> (last visited Dec 14, 2020).

seek ICP's assistance long to escape. Not unlike child protective services, ICP makes it its duty to aid these parents, their children, and other Dallas Housing Authority voucher holders in overcoming the multitude of barriers that they face as they journey to communities of their choosing.

Amidst racist attitudes, individual beliefs in white supremacy, and governmental actions that have played and continue to play a role in the resiliency of residential segregation, ICP endeavors to dismantle these artificial housing patterns. This work has required the organization to engage in an array of activities that it has found effective, many of which are detailed here.

Engagement with Clients

When ICP began its housing mobility program in 2005, there was still much debate in the affordable housing and community development field about the value of housing-mobility moves out of high poverty areas. In just fifteen years, that debate has largely been ended by the overwhelming research showing that moves into lower poverty, lower crime neighborhoods have both economic and non-economic benefits for children.

Conclusions about the efficacy of housing mobility dramatically changed with the release of research by Harvard's Raj Chetty, Nathaniel Hendren, and Lawrence Katz.³ The trio, using U.S. Department of the Treasury income data, analyzed virtually every U.S. census tract and compared that data to a reanalysis of the data from the HUD Moving to Opportunity experiment. The research focused on economic outcomes for low-income children who moved to lower-poverty neighborhoods at a young age and remained through adulthood. The results were staggering. Since the release of the initial report, the research dam has broken with new studies released annually reinforcing the basic findings and conclusions about the positive effects of mobility moves on the life trajectory of low-income

3. RAJ CHETTY, NATHANIEL HENDREN & LAWRENCE F. KATZ, *THE EFFECTS OF EXPOSURE TO BETTER NEIGHBORHOODS ON CHILDREN: NEW EVIDENCE FROM THE MOVING TO OPPORTUNITY EXPERIMENT* (2015), http://www.nber.org/mtopublic/final/MTO_IRS_2015.pdf. Their findings including the following:

We conclude that the Moving to Opportunity experiment generated substantial gains for children who moved to lower-poverty neighborhoods when they were young. We estimate that moving a child out of public housing to a low-poverty area when young (at age 8 on average) using an MTO-type experimental voucher will increase the child's total lifetime earnings by about \$302,000. This is equivalent to a gain of \$99,000 per child moved in present value at age 8, discounting future earnings at a 3% interest rate. The increased earnings of children ultimately leads to significant benefits to taxpayers as well. Children whose families took up experimental vouchers before they were 13 pay an extra \$394 per year in federal income taxes during their mid-twenties. If these gains persist in subsequent years of adulthood, the additional tax revenue obtained from these children will itself offset the incremental cost of the experimental voucher treatment relative to providing public housing. Thus, our findings suggest that housing vouchers which (1) require families to move to lower-poverty areas and (2) are targeted at low-income families with young children can reduce the intergenerational persistence of poverty and ultimately save the government money.

young children. While it has been rewarding to see ICP's focus on helping families gain access to such neighborhoods validated, the people least surprised to hear those results are ICP's clients. They have always understood that living in safer, better-resourced neighborhoods absent environmental toxins bodes better for their children.

ICP's housing mobility program has provided a wide range of assistance to families. The structure has included ICP informational briefings at the Dallas Housing Authority (DHA) where families receive a relocation orientation and relocation vouchers from DHA. Through the briefings, ICP has educated over 30,000 families about their rights under the voucher program and fair housing law. A segment of these attendees have then signed up after briefings for one-on-one housing mobility counseling services. Through the years, over 4,000 thousand movers have received a full range of individualized housing mobility supports as they used their vouchers in historically off-limits areas. Some have been first-time movers to HOAs, and others have been movers who have sought to remain in HOAs, reflecting their desire to continue living in such neighborhoods.

The one-on-one assistance that ICP's Mobility Assistance Program has provided has been based on the respective needs of individual families and has included the following:

Pre-move counseling

Initial pre-move conversations and assessments allow counselors to help families decide whether to make a move, and what locations best meet the families' needs.

Housing Search Assistance

Significant amounts of time have been spent helping families during their housing searches. Engagement in landlord research and outreach, negotiations with landlords on behalf of families, and payments of incentive bonuses where necessary to obtain a unit for a family have all been aspects of the housing-search assistance provided. When resources have been available, move-related financial assistance, such as help with security deposits and application fees, has been processed on behalf of families.

Post-Move Counseling

Post-move assistance has helped ensure moves are successful for the family and has taken various forms depending on need. This level of counseling has included working with families as they adjust to new school environments, locating and connecting families with employment, services, and amenities in the new communities, as well as referring families to appropriate social service agencies and support organizations.

Research and Data Analysis

ICP has self-published reports for public consumption. *Mobility Works*, an analysis of the patterns of mobility moves by DHA families using various forms of assistance, was published in 2013. It demonstrated the added value of various levels of assistance to voucher holders seeking opportunity moves, including that provided by ICP.

The organization has conducted two comprehensive surveys of landlords to determine where vouchers are accepted. ICP's 2017 report, *Survey of Multi-Family Properties—Voucher Acceptance in Collin, Dallas, Denton and Rockwall Counties*, analyzed and mapped findings while overlaying them with demographic data.⁴ This approach has shown how impactful voucher discrimination is as a reinforcer of residential segregation. The visual of the racial divide, showing where landlords are willing to rent to voucher families and where they are not, has effectively painted the picture of voucher holders' housing search experiences. ICP's maps and other information from its 2017 report were used by the *Dallas Morning News* in a major story that resulted in an interactive mapping tool created by the newspaper.⁵

Program Modeling

To evidence how it is possible to create housing opportunities, ICP has developed and operated small-scale low-income housing programs that provide direct access to opportunity housing for voucher holders. While not the primary focus of ICP's work, these efforts are models for other non-profit, for-profit, and governmental actors who seek to develop housing that can be made available to low-income families in better resourced areas.

One of the creative initiatives undertaken by ICP to address the problem of voucher discrimination has been the ICP Sublease Program, which began in 2016. Patterned after the corporate lease approach, the program provides housing units to voucher holders by leasing a small number of apartments from private owners. Then, the organization has, as landlord, entered into Housing Assistance Payment (HAP) contracts with DHA for these apartments and sub-contracted units to voucher families. With just under thirty units subleased, ICP has been successful in getting the City of Dallas to adopt the model as part of its comprehensive housing plan—such that the City would facilitate the leasing of units and the sub-contracting to voucher families. However, despite the City's inclusion of this model in its plan, the City has yet to move its sublease program from policy to reality, and ICP has been compelled to don its policy advocate hat to advance this program.

Outreach and Public Policy Advocacy

Armed with the lived experiences of ICP clients and the counselors who aid them, the organization has been successful in giving voice to families who

4. *Survey of Multi-Family Properties—Voucher Acceptance in Collin, Dallas, Denton and Rockwall Counties*, ICP (July 2017), <https://www.inclusivecommunities.net/wp-content/uploads/2017/07/Survey-of-Multi-Family-properties-Analysis-CDDR-6-8-17-w-cover.pdf>.

5. Sarah Mervosh, *26 North Texas Cities Where Landlords Won't Rent to Poor Families on Section 8*, DALL. MORNING NEWS (Sept. 19, 2017), <https://www.dallasnews.com/business/real-estate/2017/09/19/26-north-texas-cities-where-landlords-won-t-rent-to-poor-families-on-section-8>.

seek opportunity housing options. ICP's Voices for Opportunity Initiative,⁶ an advocacy training program for residents, has prepared voucher holders to share their stories with on-camera news outlets and newspapers and at hearings before deliberative bodies. The organization's outreach to the faith community, affordable housing allies, developers seeking to build in exclusionary HOAs, and others continues to increase the coalition of the willing who pledge to sound the alarm against residential segregation. Concurrently, ICP continues to make its own positions known while targeting local, state, and federal policies that have the effect of helping or hindering the fight for open housing options for low-income people of color.

Litigation

"Power concedes nothing without a demand. It never did and it never will."
—Frederick Douglass delivering his
"West India Emancipation"
speech at Canandaigua, NY
(August 3, 1857)

As an organization, ICP has confronted local, state, and federal gatekeepers about their barrier-creating policies and practices in hopes of seeing them removed. Based on the organization's experience, it is clear that, absent the ability to credibly threaten litigation, those in power often do not consider that a demand has even been made.

Taking on the Barrier of HUD Fair Market Rents (FMRs)

ICP realized early that the maximum rents (which determine voucher subsidy ceilings) set by HUD—called Fair Market Rents (FMRs)—for use by voucher families were insufficient to enable families to move to neighborhoods where they wanted to move: well-resourced historically off-limits areas (HOAs). HUD set the rents using a metro area methodology that overwhelmingly steered voucher families into high poverty, Black, and Latinx isolated neighborhoods. Using sophisticated data research and analysis, ICP demonstrated the segregative impact of HUD's multicounty FMRs methodology. When efforts to negotiate with HUD failed, ICP sued HUD, twice, compelling the agency to make appropriate changes to address the problem.⁷

The needed change, which resulted from the litigation, became known as Small Area Fair Market Rents (SAFMRs). The SAFMR methodology began to base rent comparables on geographies defined by zip codes instead of the previous multi-county area that failed to reflect the nuances of local housing markets. The Dallas Housing Authority has used SAFMRs since 2011, which has

6. *E.g.*, Davis & McCain, "The City Should Prohibit Discrimination Against Federal Housing Choice Voucher Participants," available at <https://medium.com/p/654d8aa8c567> (last visited Dec. 14, 2020).

7. The case, which concluded in settlement, was filed in the Northern District of Texas, Dallas Division in 2007. *See also* SAFMRs, DANIEL & BESHARA, P.C., <https://www.danielbesharalawfirm.com/new-page> (last visited Dec. 14, 2020).

vastly increased housing choice for voucher holders in HOAs. In zip codes where average market rents were higher than 110% of the previously formulated FMRs, the SAFMR methodology made 50% of the rental units newly accessible. In comparison, the FMR made only 23% of the rental units in those zip codes available.⁸ MaryAnn Russ, the DHA Executive Director responsible for implementing the SAFMR's in 2011, reported that SAFMRs had provided a "tremendous benefit" to thousands of families in the Dallas area.⁹

Ultimately ICP's FMR litigation made a broader impact when HUD expanded the new zip code-based rents nationwide.¹⁰ As a result of ICP's work, housing authorities around the country have either adopted or explored the efficacy of some version of SAFMRs. Research regarding the impact of SAFMRs has validated the ICP's position, not only in Dallas, but throughout the country. In 2018 Peter Ganong and Robert Collison published a report comparing two policy changes in the voucher program related to "ceiling rents," both of which were intended to spur moves to resource rich neighborhoods.¹¹ One policy increased the maximum voucher rents across the metro area, and the second policy increased the voucher rents for resource rich zip codes and lowered them in other zip codes. The researchers specifically looked at the use of SAFMRs in the Dallas metro area and compared the results to that in neighboring Fort Worth, Texas. They concluded that "a simple budget-neutral reform to housing voucher design" such as achieved by ICP in its litigation, "has the potential to substantially improve the voucher holder neighborhood quality," while the "uniform increase" policy was found to raise the rents charged by voucher landlords to the government, with little impact on neighborhood quality for the voucher holders.¹²

Steering and the Low Income Housing Tax Credit Program

By federal statute, owners of multifamily housing built with Low Income Housing Tax Credits (LIHTC) may not discriminate against housing choice voucher holders simply because they use the subsidy. This law makes LIHTC complexes attractive to voucher holders who have few other options, given the rampant voucher discrimination in the Dallas Metroplex's housing market. Years of study and analysis took place before ICP, through the Daniel & Beshara law firm, filed its complaint against the Texas Department

8. SAMUEL DASTRUP, MERYL FINKEL, KIMBERLY BURNETT & TANYA DE SOUSA, HUD, SMALL AREA FAIR MARKET RENT AREA DEMONSTRATION EVALUATION FINAL REPORT (Aug. 2018), <https://www.huduser.gov/portal/publications/Small-Area-FMR-Evaluation-Final-Report.html>.

9. See AUSTIN AMERICAN-STATESMAN E6 (July 26, 2015).

10. See HUD, OFFICE OF POL'Y DEV. & RSCH., SMALL AREA FAIR MARKET RENTS, <https://www.huduser.gov/portal/datasets/fmr/smallarea/index.html> (last visited Dec. 14, 2020).

11. Robert A. Collinson & Peter Ganong, *How Do Changes in Housing Voucher Design Affect Rent and Neighborhood Quality?*, 10 AM. ECON. J.: ECON. POL'Y 62 (May 2018), <https://www.aeaweb.org/articles?id=10.1257/pol.20150176>.

12. *Id.*

of Housing and Community Development Affairs (TDHCA) in 2008.¹³ TDHCA's administration of the LIHTC program had long steered development of the program's coveted units to high poverty, under-resourced areas of Black and Latinx neighborhoods—causing a level of racial segregation that outpaced even the siting of public housing, historically recognized as being located in racially isolated parts of the City of Dallas. Between the time of the filing and conclusion of trial, in 2011, TDHCA began incrementally improving its administration of its LIHTC program. The now well-known *Texas Department of Housing & Community Affairs v. Inclusive Communities* win at the Supreme Court was a proud moment for the organization,¹⁴ but it knew the war had not yet been won. ICP continues its monitoring and advocacy regarding TDHCA's administration of its LIHTC program, as some of the gains have already begun to fade, not unlike other civil rights advances.

With concurrent administration of the LIHTC program at the federal level, ICP also recognized that the U.S. Treasury Department's administration of the LIHTC program steered families to segregated Dallas neighborhoods, causing harm. So, in 2014, after attempting through policy advocacy to get the Treasury Department to change its ways, ICP took its advocacy to the courts. Without a successful win in the Fifth Circuit Court of Appeals, however, ICP continues to look for ways to get the federal government to take its thumb off the scale so families can access LIHTC housing throughout the Dallas Metroplex and not just in segregated southern and western Dallas.

Several other pre-litigation and litigation strategies, against private and other public actors, have seen success; others have not. ICP recognizes that the courts remain a valuable tool when events and circumstances call for it.

Conclusion

After fifteen years, ICP celebrates the growing following of those concerned about the need to make well-resourced low-poverty neighborhoods available to low-income Black and Latinx families. A call to end public and private exclusionary practices and policies has been issued, and the need is now discussed more frequently in mainstream media. While ICP appreciates being considered a thought leader in the affordable fair housing space, it is clear, from the racially divisive appeal made by President Trump about low-income housing, that the work of ICP and organizations like it remains desperately needed.

13. This case was originally filed in the Northern District of Texas, Dallas Division in 2008.

14. *Tex. Dep't Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015), available at <http://inclusivecommunities.net/documents/USSupremeCourtDecision6-25-15.pdf>; see also Press Release, ICP v. TDHCA, Daniel & Beshara, P.C. (June 25, 2015), <https://www.danielbesharalawfirm.com/icp-v-tdhca>.



ARTICLES

The Race Conversation About Housing

*Antoinette M. Jackson**

“In the end, we will remember not the words of our enemies, but the silence of our friends.”

—Martin Luther King Jr.

Race and Housing	414
Race and NIMBY	415
Race and Education	416
Race and COVID-19	416
Race and Solutions	418

When the invitation was released that the *Journal on Affordable Housing* was seeking articles related to race and racism in affordable housing law and policy, I knew that I wanted to write an essay because I had something to say. I believed that, as an African American woman representing the affordable housing industry, my thoughts may come from a different perspective. The invitation further stated that “the death of George Floyd in Minneapolis opened a new conversation about racism embedded in American social institutions,” which I assumed meant that the *Journal* was open to opinions addressing these conversations. But, as I began to write, I could barely think about the housing aspect because I have a lot on my mind about race and racial inequality. The initial question that the invitation raised for me was whether we are ready to have the conversations openly and honestly. And, more importantly, are we ready to listen and come together to identify and work towards solutions? For many Black people, we have been ready to have these conversations long before watching a knee on the neck of George Floyd, but those 8:46 minutes witnessed by the world may have finally gotten everyone else ready.

Since these incidences, I have leaned into the above quote by Martin Luther King Jr. about our words or conversations and, for the purposes of

*Antoinette M. Jackson is a Principal with The Banks Law Firm, P.A., in Houston, Texas, and focuses her practice on affordable housing and community development financing.

business, I have substituted the word “friends” with “colleagues.” Ordinarily, there are certain subjects that we are taught that it is not proper to address in a work environment: politics, race and religion. However, as we have experienced COVID-19, heightened racial tensions, and political polarization this year, it has become hard to not address at least two of these subjects, race and politics. In recent years since the Obama presidency, politics has raised more issues around the subject of race, so the two subjects have become closely entwined in a manner that was previously not discussed.

Race and Housing

It is very clear that, when we discuss housing, we often try to do so in the most colorblind way possible. We work to show sensitivity to the people who will live in the developments or the communities where we build. We try not to make decisions based upon race, but many of those decisions are in fact race-based. When we try to operate in a colorblind fashion, we don't see the issues of color and race that exist. People of color become invisible, and it becomes easier to not recognize problems that are unique to race. As such, decisions are made without giving thought to the communities that are being impacted. It's done so with the belief that housing will solve all the wrongs and nothing else needs to be considered. However, as an African American woman representing those who develop affordable housing, I have never had the luxury of being colorblind and not considering the people or the poverty-impacted communities.

Lots of the terms that we use in housing reveal a secret code that when deciphered has certain racial meanings or stereotypes. When people discuss “public housing,” they usually think of Black and brown people, although statistics show us that the numbers of Black and brown people living in public housing are not greater than those of white residents. Also, it makes it easier for us to forget that public housing was actually built as a mechanism to assist the white middle class. When people address “neighborhoods of higher opportunities,” people assume white neighborhoods. However, what are these opportunities, and are they still availed to a person of color who in fact moves to that neighborhood? Does having a Starbucks nearby avail more opportunity?

It has been suggested by some that, rather than use “affordable” housing, the term should really be “workforce” housing. But is this just a way of distinguishing between housing that is subsidized versus that which is not. When we think of housing, subsidy becomes a bad concept, but no one finds it unusual for Amazon, Walmart, and other large companies to seek subsidies to build distribution centers in a new city. Is it subsidy when the government bails out the banks and airlines but the employees are put in a position of having to work because they haven't received any assistance? If we refer to a “project,” it is assumed that we are discussing communities of color, but a reference to “developments” assumes a place to live for white people. It seems that many neighborhoods only have a problem with multifamily if it is a project, but isn't a ten-story luxury high-rise also

multifamily? These questions should make us all think. These terms show us that words matter. It also shows us that race is a factor. We cannot work in this industry and develop communities without recognizing this fact and working to change the stereotypes.

Race and NIMBY

When we deal with the phenomenon known as “Not in My Backyard” or NIMBY, most often we know that the people fighting against new affordable housing are fighting against “those people,” or more specifically people of color. I personally have too many stories of attending meetings where I was representing a client, only to be mistaken for one of the prospective tenants in the development because I was either the only or one of few persons of color in the room. Yes, race plays a part in housing whether we as practitioners want to think about it, acknowledge it, or address it.

I completely understand that persons in a community should be able to make decisions about the community. But I also understand the premise of free enterprise and the ability for persons to be able to freely move into a neighborhood that has amenities and opportunities such as better schools, access to transportation, nearby grocery stores, and the convenience of basic retail that may not exist in a neighboring community. When we attend community meetings, the comments are often disguised, but they are made with the intent of racial insult and condescension. I have participated in meetings where communities feel living in a better community are rights that should be reserved for a certain race of people. I have witnessed comments made that denigrate what people of color can afford to eat, i.e., “we only have Whole Foods in our neighborhood so where will they shop for food?” or “we don’t have a Jack in the Box nearby so they won’t be able to get those 99 cents specials.” I have listened to comments that suggest people of color are only appreciated for their athletic prowess, i.e., “when they were relocated, the school’s test scores improved, but the football team got worse.” And almost always, we hear the excuse that crime rates are going to increase and that property values are going to decrease. These comments are made despite numerous studies that have been provided by leading policy think tanks, such as the Brookings Institute or Center for American Progress, coupled with local crime statistics showing information to the contrary.

Yes, NIMBY exists, and, as I often remind my clients, it has gotten more sophisticated. We no longer sit in the rooms where the ugly and condescending comments are made. Communities now create password-protected websites, utilize group text chains, social media, and other mechanisms to communicate their hidden messages. Sadly, NIMBY isn’t an issue just in affordable housing but also used in communities that are being gentrified in an effort to further move out the persons who have historically lived in the community. There was a case in Houston last year where the white neighbors who had moved into a historically Black neighborhood began a campaign to remove a well-known Black-owned

restaurant. These neighbors filed a lawsuit to close the restaurant, indicating certain health concerns as a result of the restaurant's cooking process with barbeque smokers. As the case gained momentum and the white neighbors received a temporary restraining order, information began to come out about the white neighbors' real motivations. Shortly before going to the final court hearing, emails and phone messages were leaked to the court. It was revealed that the "gentrifiers" had a game plan that provided talking points, suggestions for taking notes and pictures of the restaurant's patrons, and even outlined information about faking asthmatic symptoms.

NIMBYism is real and has become very strategic. What's even more real is that, although people hide behind a myriad of other excuses like taxes, crime, and even asthma, the truth is NIMBYism is often based on race and/or class.

Race and Education

Barriers created due to inequities in housing opportunities impact the ability for people of color, Blacks specifically, to build wealth and have access to better health and educational opportunities. Housing is the one thing that has the ability to help level the playing field or in the past has been the thing that has disproportionately impacted opportunities for economic advancement due to race. Homeownership is the one way that most people gain wealth and pass wealth to the next generation. According to the Survey of Consumer Finances in the Federal Reserve, the average white household has ten times the wealth of Black households. In addition to passing wealth, studies have shown that children who live in decent and stable housing perform better in school and, as such, increase their prospects for higher paying jobs and economic advancement.

In states such as Texas, resources for education and schools are based upon the property taxes that are collected in a neighborhood. Therefore, the schools located in richer neighborhoods receive more funding and subsequently more resources. Although Texas exercises the Robin Hood rule where funding from richer areas is directed to lower income communities, these funds are never directed in a proportion that makes up for the other resources that go to richer, predominantly white neighborhoods.

Children of color oftentimes also need school for more than providing an education. Data show that a large number of children of color and in low-income communities often get one of their only or best meals at school. All of these factors were illuminated even further as a result of COVID-19 as the nation realized the large number of children who were going hungry as a result of the schools being closed.

Race and COVID-19

Many Black people have continued to be left behind due to practices that began with slavery and have been continued through governmental policies and practices systematically aiding these inequities. And each time the

country experiences a disaster or an event like COVID-19 that creates an economic setback, Black people get left even farther behind.

Now, as we live through this season of COVID-19, we are faced with heightened incidents of racial disparity, and we have seen Black people hit even harder. The persons that have continued to work so the rest of us can maintain some normalcy of lifestyle are Black and brown persons and low-income persons. And many of these essential workers are renters with hourly wage jobs. Studies have already shown that Black and brown low-income renters are more likely to miss paying rent during COVID-19 due to housing cost burdens and housing instability. These tenants are also more often the first to be laid off, which leads to further housing instability.

People of color and lower incomes are working essential jobs that don't transition to remote work. These persons are stuck in a vicious cycle; they are unable to work from home, pay for childcare due to children home from school, or access paid sick leave. They are the ones working in the grocery stores, processing plants, and restaurants, and as janitors; lower income families are the ones most often using public transportation; leaving children in overcrowded day care; passing on going to the doctor/hospital, or not being treated even when going. They are vulnerable to exposure to COVID-19 but not provided the benefit of a living wage or medical benefits that assures that in the event of sickness they know their families will be financially secure. They are caught in a vicious cycle.

Additionally, children of color and lower incomes are already finding themselves behind in school. As we transitioned to this remote world, many of us never considered that the cable bill that we pay with our other utility bills is not in fact a basic utility like water and electricity. The Internet is a luxury that COVID-19 has taught us many families do not enjoy. We have learned of stories where children are sitting against the walls of Starbucks and Taco Bell to get Internet so they can do their schoolwork. In rural communities, children have been bused onto the school grounds for Internet access, although they weren't allowed inside the classroom or building. All of these efforts are made so that minority and low-income children continue to have access during this time of remote learning.

And, even if the family has Internet, they may not have a computer or tablet to use to access the Internet and their schools. Companies like Verizon have given out thousands of tablets so that children can do schoolwork. Colleges and universities have tried to supply students with tablets and even mi-fi devices to assure that those without were not left too far behind. But the need is still so great, and many children are continuing to be left behind.

When affordable housing communities closed the doors on community rooms, access to school was lost to many children. Data have shown that Black and brown children have already taken the biggest hit as a result of school closings and remote learning. Also, children of college age are having to drop out of school as a result of COVID-19 due to families not being in position to provide the financial assistance for them to continue their

studies. There is an old saying that “when America sneezes, the world gets a cold,” but, in the Black community, we say, “when the nation gets a cold, Black people get the flu” and, more recently, get COVID-19. The problems that we are seeing due to COVID-19 all seem like a today problem, but these issues will have a domino effect for years to come and put Black and brown families even further behind educationally and economically.

Race and Solutions

After George Floyd was murdered, we saw many people hit the streets in rage and frustration. The difference with these protests from the many in the past is that we saw people of all races walking side by side. Racial inequities have been around for as long as I have been on this earth and have been seen and experienced by my parents and many generations before me. I have experienced being stopped for no reason, having to explain why I am in a certain neighborhood, having to show credentials that my white colleagues did not have to show, being followed or questioned because I was in a store that a clerk felt I could not afford. These are things that I regularly experience in my day-to-day life, and many who look like me experience the same. When I volunteer with Habitat for Humanity, I have been asked on a number of occasions if I am excited about my new home. All of these things tell me that it is time for us to begin to see each other. It is time for us to seek solutions. If people are walking together in protest and recognizing that the inequities exist, we need to also work together to identify solutions.

So, what does that mean for affordable housing and our industry? It is important for us to begin to seek solutions but understand that one size does not fit all. When we are looking at solutions we have to be honest and recognize that certain practices impact communities of color in a different way and be prepared to find solutions to address these practices. I recently heard it suggested that we need to shift economic tools and begin to develop affordable housing in a way that considers racial equity. Since COVID-19, we have seen that children of color and low-income households need the Internet. As standards are being created for housing development, basic Internet throughout the property should be considered as a threshold requirement. Isn't this more worthwhile to a housing development than whether the living room has vaulted ceilings or there is a Starbucks down the street?

Solutions for housing affordability, workforce development, health outcomes, quality education, and racial equity are as essential for families of color as they are for our national and global economic stability. If we continue to increase the wealth gap through our inattention to race-based policies, our nation as a whole suffers. As we continue to create tools to build affordable housing and to revitalize communities, we have to ask if there is racial equality or racial disparity in the persons benefitting from the programs. How can we continue to create programs where the big businesses, banks, owners, and developers benefit, yet nothing changes for the tenant

populations that we serve? We need to create programs in a way that they can truly respond to the needs of a community, rather than be a tool that simply responds to a scoring system that may not often address the needs of the families living in the developments. I have always been a proponent that people should have a choice where they live. However, they should also have an expectation of all of the things, including amenities and services, that they need are factored into that choice.

COVID-19 has shown us that some of our working poor make more money receiving an unemployment check than the salary they receive by going to work each day. In receiving an unemployment check, they have been able to feed their families, buy medicine, pay for childcare, pay rent, and contribute to the economic engine. We have to ensure that as we are creating new programs and revamping the ones that we have in a way that our tenants are also able to benefit from the tax savings, the location of development, and even the building of financial stability. We must consider race-conscious interventions that consider protecting tenants while supporting landlords/owners.

Because of the lower levels of wealth, Black families and other lower income families are not in the position to prepare for and respond to a pandemic like COVID-19 and, as such, they will have a harder time recovering if we do not identify solutions to assist with the recovery. The reality is that racial inequities do exist, and they are not going to be corrected overnight. But they also won't be corrected if solutions don't truly address the inequities. We have to look at innovative solutions for how we, as a housing industry, continue to move forward in doing business. If we are creating tools that continue to leave communities of color behind, have we in fact addressed the issue of race? It's time that we had a conversation.

Disasters Do Discriminate: Black Land Tenure and Disaster Relief Programs

Lesley Albritton & Jesse Williams***

I. Introduction.....	421
II. A Brief History of Black Land Tenure in North Carolina	422
A. Why does history matter to contemporary disaster relief programs?	422
B. Geography on the margins and the history of Black land tenure in Eastern North Carolina	426
C. Before the storms hit: political economy and contemporary challenges to Black property ownership in Eastern North Carolina	429
D. Heir property.....	431
III. An Overview of Ownership Requirements in Major State and Federal Disaster Relief Programs	433
A. FEMA’s individuals and households program	435
B. FEMA benefits and the National Flood Insurance Program	440
C. FEMA’s buyout program.....	441
D. Community Development Block Grant disaster recovery	443
V. Conclusion	444

I. Introduction

This paper considers the uneven effect of natural disasters on North Carolina’s coastal and inland coastal plain communities. Conventional wisdom holds that natural disasters do not discriminate, and this phrase is frequently rolled out during the recovery process. However, people most certainly do. Centuries of discrimination and economic exploitation have ensured that marginal lands—those most likely to flood during natural disasters—are overwhelmingly inhabited by poor people and Black people. Moreover, poor and Black North Carolinians find it far harder to

*Lesley Wiseman Albritton is the Managing Attorney and Project Coordinator of Legal Aid of NC’s Disaster Relief Project. Many thanks to Tommy Johnson and Josh McClain of Legal Aid of NC’s Disaster Relief Project for their contributions to editing this article.

**Jesse Williams is a Skadden Fellow and Staff Attorney, Legal Aid of North Carolina; J.D. Yale Law School, 2020. My sincere thanks to my co-author, Lesley Albritton, for her insight and contributions, without which this Article would never have materialized. I am also grateful to my peers and professors in the Program in Agrarian Studies at Yale, who supported the research upon which my contributions to this paper are partially based.

recover from disasters, in large part because disaster relief programs do not accommodate nontraditional forms of land tenure.¹ These failures effectively amount to a state intervention in property markets on behalf of the well-off and white, and at the expense of the poor and Black, contributing to the expropriation of Black land and the dislocation of Black people.

This article aims to connect the history of Black land tenure in North Carolina, especially as it regards heir property,² with the present-day crises which confront disaster relief policy. Following this introduction, Part II of this article provides a brief history of Black land tenure in North Carolina and explores the origins of the complex pressures on Black land ownership today, including heir property. Part III summarizes the current shape of disaster relief policy in North Carolina, and assesses the challenges that heir property owners face when seeking aid. Part IV concludes with a discussion of the need for further research connecting the issues of heir property in the Black community with the uneven process of disaster recovery—a need that is especially urgent as we come out of the most active hurricane season in modern history. This paper is fragmentary and preliminary. We ask our readers to forgive the haste with which we treat some topics and the deliberateness with which we treat others. Our intention is not to offer a definitive account of either the present flaws in disaster relief programs or the history and politics of land tenure in North Carolina. Rather, we mean to show that addressing the former depends on knowledge of the latter. We anticipate a subsequent Article developing this inquiry further through the analysis of FEMA datasets.

II. A Brief History of Black Land Tenure in North Carolina

A. *Why does history matter to contemporary disaster relief programs?*

Most Black Americans' ancestors came to the United States as property, shackled and denied virtually all social and political recognition, in order to make the real property owned by the wealthier segments of white America more productive. As recent scholarship shows, the theft of life and liberty from Black people was more than a Southern project; it was the project of a national elite whose fortunes and global ambitions were tied to the commodity production of cotton.³ (Indeed, many prominent New Yorkers were

1. This phenomenon is not unique to North Carolina. A 2018 survey of Texas survivors of Hurricane Harvey conducted by the Kaiser Family Foundation and the Episcopal Health Foundation found that Black residents of the twenty-four counties included in the survey were more likely to experience property losses than any other ethnic group surveyed, even when controlling for income differences. Sue Sturgis, *Recent Disasters Reveal Racial Discrimination in FEMA Aid Process*, FACING SOUTH (Sept. 24, 2018), <https://www.facingsouth.org/2018/09/recent-disasters-reveal-racial-discrimination-fema-aid-process>.

2. "Heir property" refers to a form of land tenure in which has been inherited from parents or other relatives, but has been neither willed, deeded, nor probated.

3. See, e.g., PHILIP SHELDON FONER, *BUSINESS AND SLAVERY; THE NEW YORK MERCHANTS AND THE IRREPRESSIBLE CONFLICT* (1941); RICHARD HOLCOMBE KILBOURNE,

stalwart supporters of the secessionist cause in 1861.⁴) It was the effort to maintain this system of large-scale commodity agriculture that produced an alliance between Southern elites and Northern business interests that shaped Reconstruction and the imposition of Jim Crow.

This economic system depended on more than real property—after all, Americans fought a civil war over the question of who *works* the land.⁵ Still, whoever owned the land had, at least in theory, a definite claim to participation as a free and equal participant in the broader economy. On this theory, generations of white farmers continued to expropriate western land from native peoples. On this theory, freed people across the South sought, in the wake of war, to become landowners. And on this theory, successive waves of white reaction sought to keep Black Americans from acquiring or holding land. The attempt to build Black ownership of land as the basis for Black economic and political liberty is one of the central stories of modern Southern history.⁶ No less than in the quest for formal political rights, in their efforts to own productive property, Black Americans sought recognition from the state and entitlement to its protections.

Long before emancipation, other Black Americans pioneered a different strategy of using land to achieve some political and economic autonomy. In the swamps of Eastern North Carolina—among other similar uncultivated and unnavigable lowlands across the country—Black people who escaped slavery forged communities, and held control of land, altogether outside the American state.⁷ These maroons included not just runaways but freed Black people who were, in the nation's younger years, nominally permitted to own property, even in the South.⁸ There were good reasons for choosing marronage, even for those who were formally entitled to own property, as the law embarked on a course toward the Supreme Court's famous declaration that "the black man had no rights which the white man was bound

DEBT, INVESTMENT, SLAVES: CREDIT RELATIONS IN EAST FELICIANA PARISH, LOUISIANA, 1825–1885 (1995); JAMES L. HUSTON, *THE PANIC OF 1857 AND THE COMING OF THE CIVIL WAR* (1987); BRIAN SCHOEN, *THE FRAGILE FABRIC OF UNION: COTTON, FEDERAL POLITICS, AND THE GLOBAL ORIGINS OF THE CIVIL WAR* (2009).

4. PHILIP SHELDON FONER, *BUSINESS & SLAVERY; THE NEW YORK MERCHANTS & THE IRREPRESSIBLE CONFLICT* (1941).

5. See, e.g., ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1995).

6. See, e.g., MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017).

7. See, e.g., Antwain K. Hunter, 'A Nuisance Requiring Correction': *Firearm Laws, Black Mobility, and White Property in Antebellum Eastern North Carolina*, 93 N.C. HIST. REV. 386 (2016). Jonathan Edward Barth, 'The Sinke of America': *Society in the Albemarle Borderlands of North Carolina, 1663–1729*. 87 N.C. HIST. REV. 1 (2010).

8. Hunter, *supra* note 7.

to respect.”⁹ The continual undermining of formal rights may explain why some Black Americans have continued to opt out of state-sanctioned property ownership up to the present day. Put simply, the American state has made it very hard for Black Americans to keep property. Better, some felt, to keep control of land where the state—and white people—could not see it well enough to take it.

As much as any other area, Eastern North Carolina has borne witness and given ground to Black Americans’ efforts to win economic autonomy within and outside the ambit of the American state. Its history demonstrates how the freedom of Black people depended on their capacity to go where others could not find them, or where others did not want the land they occupied.

The history of Eastern North Carolina also shows how these efforts have been stymied and undone. Again and again, the state itself has expropriated land from Black and poor people.¹⁰ So too has the market for real property tended to siphon land away from Black people, who were routinely coerced into selling or prevented from buying land—both by the state (through oppressive law and administrative action) and by private activity.¹¹ Still today, Black and cash-poor people routinely lose their land

9. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). While this statement encapsulates Taney’s view of the legal regime of his time, he intended it as a descriptive, historical remark. But, as history, it is hardly correct. The imposition of a rigid racial caste system in America has been a process unfolding across its history, rather than a momentary, early decision enacted in law. For a general treatment of this phenomenon, see GEORGE M. FREDRICKSON, *THE ARROGANCE OF RACE: HISTORICAL PERSPECTIVES ON SLAVERY, RACISM, AND SOCIAL INEQUALITY* (1988); for a case study in the development of firearm law in antebellum North Carolina, see Hunter, *supra* note 7.

10. See, e.g., ELIZABETH A. HERBIN-TRIAINT, *THREATENING PROPERTY: RACE, CLASS, AND CAMPAIGNS TO LEGISLATE JIM CROW NEIGHBORHOODS* (2019); Andrew W. Kahrl, *The Sunbelt’s Sandy Foundation: Coastal Development and the Making of the Modern South*, 20(3) *S. CULTURES* 24 (2014).

11. As Robert Hale famously observed, the mere fact that land was sold rather than expropriated by direct force or application of law does not guarantee that it was taken without coercion. Everyone must eat and be sheltered, and no one but landowners has direct access to the means of producing food or shelter; thus no one but these owners comes to the market free from the coercion of hunger and cold. But a corollary to Hale’s thesis recognizes the plight of cash-poor farmers: a landowner who cannot produce a harvest without credit must either accept *some* creditor’s terms as offered or go hungry; a landowner who cannot repair his home and cannot find credit must accept some buyer’s offer or go unhoused. As Hale observed, it is the law that hems the hypothetical landowner in: the equipment exists to repair his home, or to sow his crops, but the state will use force to prevent him from using it without paying those that the state has deemed its owners. Because the choices of the landowner are the result of the threat of state violence, Hale deemed these choices coerced. Every day, families sell their land because they can no longer afford to farm it or maintain it, despite that many others are afforded access to the capital that they need to farm and maintain similar land. Others are forced to sell their land because, due to historic prohibitions of Black landownership or the mere terms of

both to direct forms of state action (tax foreclosure, for instance) and to market transactions conducted under coercive pressures (such when a family sells land because they are denied the credit that they need to farm it, or because they did not receive government disaster assistance to repair structures on it). These present modes of dispossession are outgrowths and evolutions of prior modes—the inaccessibility of credit for Black farmers, for instance, is an age-old problem—so a thorough understanding of the present requires an examination of the past.

Moreover, North Carolina's modern history shows how life on the margins has become less tenable, both because the ambit of the state has grown and because the concentration of land in corporate agriculture and tourist development has limited the economic utility of marginal land to its occupants: fishing, hunting, and farming there have all been made harder.¹² The declining productivity of this land is part of the coercive pressure on market transactions. When capital is inaccessible to small farmers, for instance, and they are not protected from damaging pollution, their capacity to maintain income from their land is reduced, and, in that way, the state and private actors who create these conditions have effectively applied pressure on these farmers to sell. At the same time, some of the very methods that people invented for living on the margins—notably, the encoding of land rights in heir property—today present obstacles to their full and equal treatment by the state.¹³ Now, climate change means the acceleration of flood events and hurricanes—yet another blow to those living on marginal land in North Carolina.¹⁴ Increasingly, state officials understand the need to redesign policies that enable people to survive, rebuild, and when necessary relocate after these events. Without an eye toward history, we might not notice that the inhabitants of that land are not an arbitrary cross-section of the population, but specific communities who effectively have been

their mortgages, they bear a higher proportion of the risk of loss from disasters than others. As a general matter, acknowledging the complications of individual circumstances, we deem these sales coerced. See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

12. See e.g., Hans W. Paerl, Lexia M. Valdes, Alan R. Joyner, Benjamin L. Peierls, Michael F. Piehler, Stanley R. Riggs, & Robert R. Christian, *Ecological Response to Hurricane Events in the Pamlico Sound System, North Carolina, and Implications for Assessment and Management in a Regime of Increased Frequency*, 29 *Estuaries & Coasts* 1033 (2006); Charles D. Thompson, & Rob Amberg, *The Great Deluge: A Chronicle of the Aftermath of Hurricane Floyd*, 3 S. CULTURES 65 (2001); Michael D. Thompson, *This Little Piggy Went to Market: The Commercialization of Hog Production in Eastern North Carolina from William Shay to Wendell Murphy*, 74 AGRIC. HIST. 569 (2000).

13. See, e.g., CASSANDRA JOHNSON GAITHER, "HAVE NOT OUR WEARY FEET COME TO THE PLACE FOR WHICH OUR FATHERS SIGHED?": HEIRS' PROPERTY IN THE SOUTHERN UNITED STATES 40 (2016), https://www.srs.fs.usda.gov/pubs/gtr/gtr_srs216.pdf.

14. William K. Michener, Elizabeth R Blood, Keith L Bildstein, Mark M Brinson & Leonard R Gardner, *Climate Change, Hurricanes and Tropical Storms, and Rising Sea Level in Coastal Wetlands*, 7(3) ECOL. APPLICATIONS 32 (1997).

coerced into settling there. We might not recognize that the same structures that made these people settle on marginal land now impede their chances to benefit from disaster relief programs and preserve basic services in their communities. And we might not recognize the moral imperative to build these programs in a way that supports these communities' long-standing aspirations to autonomy.

B. Geography on the margins and the history of Black land tenure in Eastern North Carolina

Northerners, powerful colonists, and Europeans have thought Eastern North Carolina, and above all northeastern North Carolina, to be a backwater for as long as they have known it.¹⁵ Geographically, this impression is understandable. North Carolina's coastal plain once had about 10.3 million acres of wetlands—and still has more than 5 million acres.¹⁶ These wetlands extend the length of the coastal plain, but they are densest in its northern reaches, above all on the Albemarle Peninsula and along the courses of the Perquimans and Pamlico Rivers that bound that peninsula. In the heart of these wetlands are “pocosins,” or shrub bogs, which are nearly impenetrable stretches of evergreen shrub and pine growing atop peat bogs.¹⁷ The Great Dismal Swamp straddles the eastern extent of North Carolina's northern border with Virginia.¹⁸ Although several rivers provided navigable waterways through northeastern North Carolina, the area's rivers have a generally southeasterly flow, such that the southeastern ports of New Bern and Wilmington served larger amounts of territory upstate.¹⁹

With features like these, much of North Carolina's coastal land was long thought unsuitable for cultivation or other “productive” economic activity. And colonial officials came to despise the white settler population of eastern North Carolina much as they did the land itself: as idle, useless, and wild.²⁰ These people and the land they lived on contributed little to the commercial projects that colonial officials had ordained for the colonial—primarily the production of cash crops for export. Thus, although the people were industrious in fact, they were seen by the British as “useless lubbers,” whose “breeding” needed to be kept under control.²¹ Meanwhile, many such early white North Carolinians were squatters who held no formal title to the land that they occupied.²² Being harder for colonial officials

15. Barth, *supra* note 7.

16. THE NORTH CAROLINA ATLAS: PORTRAIT FOR A NEW CENTURY (Douglas M. Orr, Jr. & Alfred W. Stuart eds., 2000).

17. *Id.*

18. *Id.*

19. *Id.*

20. NANCY ISENBERG, WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA (2016).

21. *Id.*

22. *Id.*

to find, they were harder to tax, conscript, or force into *corvée* labor. Farming for subsistence, they had little need to interact with the early colonial marketplace—in which forced labor played a leading role.²³ Even a century before the United States was formed, the commercial ambitions of the colonial elite pushed those who sought real freedom to the geographic and legal margins of the state.

North Carolina was a relatively poor state and, as such, had from the start a smaller population of enslaved people than its neighbors.²⁴ The enslaved people who did live in North Carolina for the most part came to live in its coastal counties: for the first half of the nineteenth century, about forty-five percent of the population of the Tidewater (coastal) counties was Black.²⁵ Yet not all of these people were enslaved. In 1850, eleven percent of Halifax county residents were free Black people (fifty-four percent of the population were enslaved people); and in New Hanover County, free people of color were five percent of the population (against forty-eight percent enslaved).²⁶ Free people of color established distinct communities and played vital roles in the maritime economy as harbor pilots and maritime engineers.²⁷ Free communities were concentrated on the coast at least in part because coastal counties allowed them to use land and participate in the economy from the margins—not, primarily, as cash-crop farmers or merchants who depended on credit factors, stable land tenure, and a broad association of local tradesmen; but more often as navigators, ferries, and boatmen, or as lumberjacks and hunters working upon the still-wild lowlands.²⁸ Formally and legally freed Black people occupied land and trades that white North Carolinians preferred to avoid, or else where skilled laborers were sufficiently scarce that colored workers were admissible—but for the most part they lived where the authorities could find them.

By contrast, widespread communities of “maroons”—primarily enslaved people who had run away, but also other refugees from state violence—lived beyond the reach of state authority. In wetlands and forests across Eastern North Carolina, maroon communities built cabins, farmed clearings, and raised ground—and repeatedly repelled armed attempts to overrun and capture them. These communities gave aid, when they could, to Black people who were fleeing slavery. Several such communities had longstanding ties to white Quaker congregations nearby. Set apart from

23. *Id.*; see also Abby Chandler, ‘Unawed by the Laws of Their Country:’ *Local and Imperial Legitimacy in North Carolina’s Regulator Rebellion*, 93(2) N.C. HIST. REV. 119–46 (2016).

24. See, e.g., STEPHANIE MCCURRY, *CONFEDERATE RECKONING: POWER AND POLITICS IN THE CIVIL WAR SOUTH* (2010); David S. Cecelski, *The Shores of Freedom: The Maritime Underground Railroad in North Carolina, 1800–1861*, 71(2) N.C. HIST. REV. 174 (1994).

25. “Cecelski, *supra* note 24.

26. *Id.*

27. *Id.* At least some such free Blacks acted as agents on the Underground Railroad, to their own immense personal danger, helping conduct runaways north or abroad.

28. *Id.*

state power altogether, these communities were unbound by the laws that steadily constricted the rights of free Blacks in North Carolina in the middle of the nineteenth century. No wonder that the tradition of Black freedom in North Carolina bears the influence of these pioneers, whose landholding, economic activity, and social relations were wholly outside the view of the state and the elite. No wonder, too, that white concern with maroon communities was less a matter of their social and political independence, and more a matter of the threat they posed to white property—in human beings, but also in livestock, produce, and timber.²⁹

Even after Emancipation, Black landownership and meaningful economic autonomy remained elusive. Indeed, as cotton prices fell in the years after the Civil War, and as Northern capital preferred to deal with established merchants and planters, poorer white farmers started to find themselves forced to sell their land.³⁰ In general, external capital and planter families retained control of North Carolina's most productive land.³¹ Despite widespread efforts to obtain autonomy through landownership, by 1876, only five percent of Black families had become landowners.³² Seeking nominal independence from planters eager to continue to supervise and control their labor, yet unable to purchase land of their own, many Black North Carolinians became sharecroppers. Indeed, across the same period, many yeoman white farmers found themselves forced off their land and into tenancy by their creditors. The collapse of smaller farmers' autonomy is legible in trade statistics: by the mid-1870s, the South had for the first time begun to import food.³³

Both terror (increasingly state-sponsored after 1875) and outright racialized law played a role in limiting Black access to land in the South. So too did falling cotton prices. Yet the reason that smaller farmers tended to bear more of the risk of price fluctuations was much the same as the reason that smaller farmers, especially Black farmers, were subjected to outright discrimination—the law was shaped by the preferences of conservative planters, especially after the so-called "Redemption."³⁴ North Carolina, for instance, was notorious for a Landlord and Tenant Act of 1877 which "placed the entire crop in the planter's hands until rent had been paid and empowered him to decide when a tenant's obligation had been fulfilled, making the landlord 'the court, sheriff, and jury.'"³⁵ While many

29. While this interpretation conflicts with some dominant contemporary impressions of antebellum politics, it is well-substantiated by historical evidence. See, e.g., Hunter, *supra* note 7; Cecelski, *supra* note 24; Ron L. Harris, *The Tuscarora War: Culture Clash in North Carolina*, 63 *CENT. STATES ARCHAEOLOGICAL J.* 201 (2016).

30. ERIC FONER, *A SHORT HISTORY OF RECONSTRUCTION, 1863–1877*, at 165 (1990).

31. *Id.* at 173.

32. *Id.* at 175.

33. *Id.* at 170.

34. *Id.* at 250.

35. *Id.*

contemporary scholars have understood tenancy relationships as voluntary contracts, and the redistribution of land that they produced as an efficient allocation of property “on the market,” these relationships would not have arisen to the extent they did, and much land would not have passed out of the hands of smaller farmers, without the force of laws intended to coerce such farmers into debt and sale of assets.

Partially as a consequence of conservatives’ focus on preventing Black landownership in agricultural regions, Black North Carolinians achieved a high watermark of prosperity in urban areas as members of an emergent merchant and banker class.³⁶ Yet in time this prosperity was substantially checked and reversed by a combination of legal structures familiar to rural landowners: facially discriminatory laws alongside preferential treatment for white North Carolinians in markets and state programs for credit, insurance, and real property.³⁷ Even as the New Deal reoriented the American ideal of personal autonomy away from freedom of production and toward homeownership,³⁸ Black North Carolinians—and many poor white tenants—once again found this autonomy more challenging to achieve and maintain. Homeownership, like rural land ownership, was mostly only available on the margins.

C. Before the storms hit: political economy and contemporary challenges to Black property ownership in Eastern North Carolina

Across the second half of the twentieth century, wealthy white and corporate interests found ways to entice or compel rural Black North Carolinians—even those already on the margins—to part with their land. Black-owned banks foundered on the unfavorable economics of lending to poorer individuals and businesses that were facing discrimination up and down the supply chain, and credit for rural Black North Carolinians became more scarce and more expensive.³⁹ U.S. Department of Agriculture agents, who were meant to assist all farmers in accessing subsidized credit, routinely and actively denied credit to Black farmers on equal terms—discrimination that all too often led to bankruptcy or sale of Black-owned land, often to nearby white farmers or corporate interests whose connections to the agents themselves were suggestive.⁴⁰ Even as fair-termed credit became scarcer for Black farmers, the prevailing practices of agriculture became substantially more capital-intensive. New fertilizers, pesticides,

36. See, e.g., BARADARAN, *supra* note 6.

37. See, e.g., *id.* For a treatment of the phenomenon in North Carolina, see ELIZABETH A. HERBIN-TRIANT, *THREATENING PROPERTY: RACE, CLASS, AND CAMPAIGNS TO LEGISLATE JIM CROW NEIGHBORHOODS* (2019).

38. See AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2014).

39. BARADARAN, *supra* note 6.

40. See, e.g., *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999); see also TADLOCK COWAN & JODY FEDER, *THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 14* (2013), available at <https://www.everycrsreport.com/reports/RS20430.html>.

and machinery became preconditions for competitive production; if a farmer could not have these on fair credit terms, or if her farm was too small to justify the investment, she would find it impossible to maintain an income on commodity crops.⁴¹

The most notorious and most striking changes came not to vegetable agriculture but to the production of livestock for slaughter. Both poultry and hog farming were revolutionized by the development of so-called “concentrated animal feeding operations” (CAFO)—massive, indoor facilities holding thousands of animals in tight confinement while feeding them to bring them to slaughter weight.⁴² The cost of erecting one of these facilities is so great that for most farmers no existing credit facilities would finance them. Rather, financing came primarily from the large corporate interests that controlled meat processing and distribution: Smithfield, or Tyson, for example, would finance a farmer’s CAFO if they thought he would make a good supplier.⁴³ Those chosen by the large distributors to become CAFO farmers typically undercut and consumed their neighbors’ operations, absorbing their neighbors’ land.⁴⁴ And, because launching a CAFO requires access to credit, much of it risk-averse corporate credit, small animal farmers and above all Black animal farmers were less likely to survive.⁴⁵ Like so many economic developments before it, CAFO agriculture has had the effect of pushing Black farmers—and those interested in autonomy from the power of state-backed capital—farther to the geographic margins of arable land in Eastern North Carolina.

The dispossession of Black commercial farmers (alongside other poor and marginal farmers) is only part of the broader pattern of Black economic and geographic marginalization. As urban economies boomed in the state’s interior, tourism came to constitute a larger share of the coastal economy.⁴⁶ Increasingly, tourists came to North Carolina’s coast from out of state as well. The growing demand for real estate led developers to root out new properties on the edges of existing towns and settled areas—precisely the places where state-backed capital had for generations forced Black North Carolinians to seek stability and autonomy in land tenure.⁴⁷

41. Meanwhile, the advent of nationwide distribution systems meant that virtually all crops had been commodified or, at least, that one would have to compete against out-of-state producers of a much wider variety of crops. See, e.g., Michael D. Thompson, *This Little Piggy Went to Market: The Commercialization of Hog Production in Eastern North Carolina from William Shay to Wendell Murphy*, 74 *AGRIC. HIST.* 569 (2000).

42. *Id.*

43. *Id.* In the end, both the terms of these contracts and the dependencies they created between farmer and corporate sponsor have left many animal farmers in a state of modern-day vassalage. But many are large and powerful vassals.

44. *Id.*

45. Waymon R. Hinson & Edward Robinson, *We Didn’t Get Nothing: The Plight of Black Farmers*, 12 *J. AFR. AM. STUD.* 283 (2008).

46. *THE NORTH CAROLINA ATLAS*, *supra* note 16.

47. Gaither, *supra* note 13, at 40.

Rising tax costs, stagnant wages, and chronic un- and under-employment all produced pressure to sell to developers. And where Black people had elected less formal forms of land tenure, developers have often found ways to dispossess them through the legal system without consensual sale—sometimes without even having to pay cash for value. In a recent case in rural South Carolina, for instance, a former state politician was able to purchase land out from under a family that had held it for generations simply because the family's title to the land had not been properly recorded, and the politician paid less than an eighth of the land's actual value.⁴⁸

As Black people have been forced to the margins of North Carolina's economy and geography, their land has been taken. The problem of "land loss"—better understood as the coerced taking of land from Black owners⁴⁹—has plagued Black communities across the twentieth century and by some accounts has accelerated in recent decades. Recent media has brought attention to the problem of land loss at the national level, but rural landholders in North Carolina, especially in Black communities, have been particularly hard-hit. In 1925, about 80,000 Black-operated farms in North Carolina encompassed more than three million acres. In 2017, there were about 1,400 such farms, encompassing 170,000 acres. The number of small-holder farms owned by white North Carolinians has declined precipitously as well, though not to nearly the same extent. Between 1925 and 2017, the amount of acreage farmed in North Carolina has fallen by about half, while more than eighty-three percent of farms have disappeared. Large-scale farms now account for two-thirds of all agricultural production in the state. Even in the five years between 2012 and 2017 (the most recent period for which we have data), North Carolina lost almost 4,000 farms.⁵⁰ Although most of the research regarding Black land loss has focused on farmland, much of this farmland has been converted to residential property over the generations, meaning that loss of residential property is rampant as well.

D. Heir property

Indeed, an age-old tactic for preserving land tenure against developers—whether agricultural or residential—has begun, perversely, to make it harder for Black landowners to keep their land. From the early days of the North Carolina colony, settlers have used informal forms of land tenure as a way of hiding their occupation and use of land from wealthier colonists and commercial interests, and from the allies of the wealthy in state government.

48. Lizzie Presser, *Their Family Bought Land One Generation After Slavery. The Reels Brothers Spent Eight Years in Jail for Refusing to Leave It*, PROPUBLICA (2019), <https://features.propublica.org/black-land-loss/heirs-property-rights-why-black-families-lose-land-south>.

49. See *supra* note 11 and accompanying text.

50. These figures are drawn from the U.S. Department of Agriculture National Agricultural Statistics Service's 2017 and 1940 Censuses of Agriculture.

One particular form of rights in land gained widespread use among Black and white communities alike—primarily in rural eastern and central North Carolina among Black people, and primarily in white mountain communities. Rather than deeding or willing land to inheritors, a landowner would make no explicit provision for the inheritance of his real property; his inheritors (usually his children, in the end) would continue to use and occupy the land and leave it to *their* inheritors in the same fashion. “Heir property,” as this form of land rights has come to be known in North Carolina, is not a specific legal concept. Rather, it refers to the way in which property passes among generations without benefit of a formal legal document like a deed or a will.⁵¹ Despite its lack of codification, it is a perfectly legal way of transferring and holding real property that flows in accordance with the laws of intestacy. One of the purposes of this arrangement *was* that no court would probate the estates of the dead and, thus, that no one outside the family and those known to them would have notice of the land’s transfer or record of its ownership. This way, creditors, predatory developers, and state tax collectors might struggle to find and target the land and landowners.

Moreover, if a court were to consider who held title to land passed down in this way, it would most often find that this method of inheritance created a “tenancy in common” among the inheritors; that is, the court would find the inheritors possessed of equal undivided shares in rights to the land. This ownership structure, in theory, required collective consent to sales and major decisions about the use of the land. Not only did such a requirement make it—again, in theory—hard for land to leave family use; it also comported with the communalist approaches to land management often preferred by those who sought economic autonomy on the margins, Black and white alike.⁵² So it was not only to hide, as it were, from outside eyes that people across North Carolina created heir property, it was also sometimes an expression of preference, culture, and interest in common stewardship. Routinely, too, people on the margin lacked the literacy, time, money, or expertise to effectively navigate the legal system. A historic lack of access to courthouses and attorneys, and a mistrust of the legal system that was frequently used to prevent Black Americans from obtaining land and rights often meant that people had never acquired the legal documents required to show ownership like deeds and wills.⁵³ Heir property thus also arose by mere default. Today, the Federation for Southern Cooperatives

51. JOHNSON GAITHER, *supra* note 13, at 1.

52. *Id.*

53. *Id.* at 1; Rory Flemming, Jack Williams, Rebecca Neubauer & Lisa Schiavinato, *Splitting Heirs: The New Challenges Posed by Heirs’ Property Ownership to Coastal Resiliency Planning*, Sea Grant North Carolina, Aug. 2016, at 2.

estimates that of the total real property owned by African-Americans in the entire United States, sixty percent is owned as heir property.⁵⁴

With the advent of modern survey and recordation technology, land held as heir property became easier for the state to identify and tax. Meanwhile, with the rise of the law and economics movement, courts which had traditionally respected long-settled law about tenancies in common—above all, that they should generally not be partitioned; and that if they had to be partitioned, they should be divided into separate lots for each owner rather than sold at auction for the owners' benefit—began a program of judicial activism. Increasingly, courts were willing to order "partitions by sale"; that is, the forced sale of heir property out from under its owners, who would receive a prorated share of the proceeds.⁵⁵ In this way, wherever a property developer could convince a cash-poor person to sell her small portion of ownership in heir property, the developer could then turn around and have a court order the property sold at auction—where its current owners could generally never afford to preserve their ownership.

Even without the specter of predatory developers, heir property poses other challenges to rural landholders: it can make tax payment complicated and can make it hard to receive various forms of state and federal benefits—including disaster relief funds. In part for these reasons, heir property has been a focus in narratives about rural land loss. Yet to focus on heir property as the primary problem in need of fixing for those who would protect Black land rights is to ignore the broad context in which heir property emerged and in which it continues to serve important purposes for Black communities seeking autonomy on the land. Indeed, it is in some sense to blame the victims of centuries of land loss for the tactics that they adopted to secure their rights in land.

III. An Overview of Ownership Requirements in Major State and Federal Disaster Relief Programs

Eastern North Carolina encompasses the counties in North Carolina that lie east of Interstate 95. The area has some of the highest poverty rates in the state, with approximately twenty-one percent of the population living below the poverty level.⁵⁶ About thirty percent of the area's population

54. Sarah Whites-Koditscher, *Alabama Descendants Look to Reclaim Land Clouded by Legacy of Jim Crow*, AL.COM (Nov. 26, 2019), <https://www.al.com/news/2019/11/alabama-descendants-look-to-reclaim-title-to-land-clouded-by-legacy-of-jim-crow.html>.

55. See generally, Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 523 (2001).

56. NC EAST ALLIANCE, DEMOGRAPHIC INFORMATION (2014), <https://www.nceast.org/overview/demographics> (last visited Jan. 11, 2021).

is Black.⁵⁷ In recent years, Eastern North Carolina experienced two major hurricanes within two years of each other—Hurricane Matthew in 2016 and Hurricane Florence in 2018. These events caused a combined 21.8 billion dollars in damage to this largely rural, disproportionately impoverished area of the state.⁵⁸

The two major federal and state programs that fund individual recovery from natural disasters, FEMA's Individuals and Households Program and Housing and Urban Development's CDBG-DR program (which is actually provided to states in the form of grants), have pumped billions of dollars into Eastern North Carolina for recovery from these two storms. Against that backdrop and in the historical context discussed above, this section examines how the current requirements for accessing these funds negatively impact the Black communities located disproportionately in flood-prone areas. A deeper understanding of these issues is critical because, due to the forces pushing Black communities into the margins, the counties impacted by both Hurricane Matthew and Florence have some of the highest concentrations of Black North Carolinians.⁵⁹ North Carolina's Black citizens comprise 22.2% of the state's overall population.⁶⁰ Of the twenty-six counties that were designated by FEMA as eligible to receive individual assistance (IA)⁶¹ from by both Hurricane Matthew and Florence,⁶² seventeen of them have Black populations higher than the state average. The North Carolina counties with the three highest Black populations—Bertie County at 61.2%, Hertford County at 61%, Edgecomb County at 57.8%—were all designated to receive IA from Hurricane Matthew. There is good reason to believe that residents of these locales will have need for recovery assistance again since all of them has been subject to between four and nine state

57. *Id.*

58. See Richard Stradling & Abbie Bennett, 'Historic' Hurricane Florence Caused More Damage Than Matthew and Floyd Combined, Governor Says, *NEWS & OBSERVER* (Oct. 31, 2018), <https://www.newsobserver.com/news/local/article220890905.html>; GOVERNOR ROY COOPER, HURRICANE FLORENCE RECOVERY RECOMMENDATIONS (Oct. 26, 2018), https://files.nc.gov/ncosbm/documents/files/Florence_Report_Full_rev20181016v10.pdf.

59. See *North Carolina Black Population Percentage by County*, INDEX MUNDI, <https://www.indexmundi.com/facts/united-states/quick-facts/north-carolina/black-population-percentage#map> (last visited Jan. 11, 2021) (index of North Carolina's Black population by county).

60. *Id.*

61. FEMA's individual assistance program is explained in greater detail later in this section. Broadly this designation is required for survivors to access individual disaster assistance from FEMA.

62. Maps and designated areas for Hurricane Matthew can be found at FEMA, Designated Areas: Disaster 4285, <https://www.fema.gov/disaster/4285/designated-areas> (last visited Jan. 11, 2021). Information for Hurricane Florence can be found at FEMA, Designated Areas: Disaster 4393, <https://www.fema.gov/disaster/4393/designated-areas> (last visited Jan. 11, 2021).

disaster declarations between 1950 and today and many of them are on the high end of that number.⁶³ But without the ability to access it, their homes and communities will become increasingly distressed and uninhabitable and land disposition is likely to increase in concert. One can lay a map of the counties designated in Hurricane Matthew and Hurricane Florence over a map of heir property in North Carolina and readily see the correlation between the state's Black population, the counties with repeated disaster declarations, and concentrations of heir property.⁶⁴ Increasing attention has been focused on how natural disasters exacerbate wealth inequality in our country. A recent study from Junia Howell and James R. Elliott exposed a gaping disparity between how well Black and white communities recover from natural disasters with the aid of federal recovery dollars.⁶⁵ Focusing specifically on FEMA benefits, the same study found that while wealth increased for white communities as the amount of FEMA aid increased in the community, Black communities *lost* wealth as FEMA aid increased.⁶⁶ Although Howell and Elliott's research cites race and homeownership as factors contributing to this uneven recovery, no research has specifically focused on the ways in which the disproportionate amount of heir property among Black communities may contribute to the inequity. Thus, this section explores that issue by looking at how current rules dictating how to show ownership specifically disfavor heir property and prevent its owners from accessing recovery funds in spite of the fact that they are just as much owners of their homes as those who possess a deed with their name on it.

A. *FEMA's individuals and households program*

Those who focus their work on disaster recovery tend to break down the process into phases, drawing distinctions between short- and long-term recovery and the federal programs that support each phase. The Federal Emergency Management Agency (FEMA), which is typically "first on the scene" during the short-term recovery phase, provides funds for home repairs to homeowners when there is a major disaster declaration, funds

63. See N.C. FLOODPLAIN MANAGEMENT, 2017 QUICK GUIDE 6, https://flood.nc.gov/NCFLOOD_BUCKET/FAQS/QuickGuideTopic/NCQuickGuide2017.pdf. Note that our estimates are updated to reflect Hurricane Florence, which happened in 2018.

64. It can be difficult to determine the exact extent of heir property in states and counties given that, by its very definition, there is no readily available paper trail to parse. For a map of heir property in North Carolina, see Mavis Gragg and Sam Cook's excellent webinar, Heirs Property: Standing on a Lot of Love (May 21, 2020), <http://www.forestrywebinars.net/webinars/heirs-property-standing-on-a-lot-of-love>.

65. Junia Howell & James R. Elliott, *Damages Done: The Longitudinal Impacts of Natural Hazards on Wealth Inequality in the United States*, 66 SOC. FOR STUDY SOC. PROBS. 448, 457 (2018).

66. *Id.* at 457–61.

which are typically the first to make their way to homeowners.⁶⁷ Federal statute (42 U.S.C. § 5174) authorizes the President, through FEMA, to provide financial assistance for “the repair of owner-occupied private residences, utilities, and residential infrastructure (such as a private access route) damaged by a major disaster to a safe and sanitary living or functioning condition.”⁶⁸ This program is known as FEMA’s Individuals and Households Program (IHP).⁶⁹ A guiding star of FEMA policy is that its funds are emergency in nature and not meant as a substitute for private insurance, already a hammer-blow against Black and poor communities that occupy land that is much harder to insure. Thus, FEMA only covers losses to primary residences and does not provide funds for many losses that insurance could be expected to cover.⁷⁰ For instance, while a flood insurance policy purchased through the FEMA-run National Flood Insurance Program⁷¹ explicitly covers items such as window blinds and damaged cabinets, FEMA IHP benefits would likely not cover such items as FEMA is required only to make the home habitable.⁷² Although the awards provided to homeowners through IHP are not mandatory,⁷³ they are nonetheless essential for beginning repairs and preserving what for most people is their largest asset, their home.⁷⁴ This is particularly true for poor disaster survivors, who are more likely to lack quality insurance coverage, savings that can be dedicated to emergency home repair, or the good credit needed to secure loans for repairs that exceed savings.

FEMA’s guidelines for proving ownership are continually changing, and they allow FEMA workers discretion to reject documents which their

67. FEMA also provides limited funds to renters to cover losses of personal property, among other losses. Several excellent articles have shown the spotlight on the unequitable recovery experienced by renters, which is beyond the scope of this article.

68. 42 U.S.C. § 5174(b)(2)(A)(i).

69. Robert T. Stafford Act §§ 408–416, 423, 426, 42 U.S.C. §§ 5174–5183, 5189, 5189(c), (d).

70. See FEMA, FACT SHEET: FREQUENTLY ASKED QUESTIONS ABOUT INDIVIDUAL ASSISTANCE (May 17, 2018), <https://www.fema.gov/press-release/20201016/fact-sheet-frequently-asked-questions-about-fema-individual-assistance> (“FEMA’s Individual Assistance Program provides financial assistance and direct services to eligible individuals and households who have uninsured and underinsured necessary expenses and serious needs. The program is not a substitute for insurance and cannot pay for all losses caused by a disaster. It is intended to meet basic needs and help you get back on your feet. FEMA is not empowered to make you whole.”).

71. NFIP is covered extensively elsewhere in this article.

72. See FEMA, FACT SHEET: WHAT IS COVERED (AND NOT COVERED) UNDER MY NFIP POLICY (May 2015), https://www.fema.gov/media-library-data/1432130966606-ec9a9793a03f4a4b5655de0db708a256/Fact_Sheet_What_is_Covered-508.pdf.

73. The purpose of FEMA assistance is to make a home safe, sanitary and functioning again, not to return the home to its pre-disaster condition. Stafford Act § 408(c)(2)(A)(i).

74. 42 U.S.C. § 5174(b)(3)(A).

property owners might use to demonstrate ownership. FEMA defines “owner-occupied” to mean that the residence is occupied by:

- (1) The legal owner;
- (2) A person who does not hold formal title to the residence and pays no rent, but is responsible for the payment of taxes or maintenance of the residence;
- (3) A person who has lifetime occupancy rights with formal title vested in another.”⁷⁵

The primary way in which FEMA verifies ownership is “through inspection, automated public records search, or submitted documents, including documents from the state, territorial, or tribal government.”⁷⁶ If ownership cannot be proven through this method, FEMA provides a list of alternative documentation⁷⁷ and publishes guidance for showing ownership with each respective storm in the form of FAQs (Frequently Asked Questions). For instance, after Hurricane Florence, FEMA made available FAQs 001, published on October 13, 2018, which explained that FEMA is required by law to verify ownership and enumerated how it does.⁷⁸ FEMA guidance mandates that the occupant of a residence must submit ownership documents, which it then verifies, presumably for authenticity.⁷⁹ FEMA emphasizes that the list of acceptable documents that it describes is not exhaustive. However, the agency has broad discretion with regards to determining ownership and is not *required* to accept any of the examples that it lays out as definitive proof of ownership. The discretionary and shifting nature of this guidance means that it is difficult for advocates and owners of heir property alike to anticipate which documents will be most persuasive to verifying ownership.

FEMA’s ownership and occupancy requirements may seem to be broad and permissive at first blush. For instance, the FAQ for Hurricane Florence describes acceptable documents as follows: “A deed, title or lease agreement. A bill of sale or land contract. A mortgage payment booklet. A property tax receipt or property tax bill. A last will and testament (along with a death certificate) naming applicant heir to the property or [a] real property structure insurance policy.”⁸⁰ The FAQ then goes on to require that the document or documents presented must show a date prior to Hurricane Florence, the applicant (or co-applicant’s) name, and the address of

75. 44 C.F.R. § 206.111.

76. FEMA, INDIVIDUAL ASSISTANCE PROGRAM AND POLICY GUIDE (IAPPG), 54 (Mar. 2019) [hereinafter FEMA, IAPPG].

77. *Id.* at 55–56.

78. FEMA, VERIFYING HOME OWNERSHIP IN THE DISASTER ASSISTANCE PROCESS (Oct. 18, 2018), <https://www.fema.gov/news-release/20200220/faq-verifying-home-ownership-disaster-assistance-process>.

79. *Id.*

80. *Id.*

the residence in question.⁸¹ However, if a homeowner or occupant cannot provide these types of documentation, FEMA considers the occupant of the residence to be essentially a squatter and not entitled to any recovery funds. And given the way that heir property is treated in North Carolina, these indicia of ownership may be impossible for many primary occupants to provide, even if they have a legitimate ownership interest.

By the very definition of heir property, its owners will neither be able to provide any of the first several proofs of ownership (deed, title, lease agreement, or bill of sale), nor will they be able to produce a will showing that the property has been left to them. But what of the other evidence that FEMA says it will accept? Because most heir property has been in families for many generations, this property is typically unencumbered by a mortgage. Likewise, for the very same reasons that obtaining recovery benefits may be difficult, owners of heir property are rarely able to obtain a new mortgage on the property. Mortgage companies require that ownership to the property in question is clear. Although many owner-occupants of heir property maintain the property by paying property taxes and general upkeep on the home, the property taxes often remain in the name of a previous owner or owners because the current generation may have never bothered to update the information with their local tax office. Yet heirs often disagree about who is responsible for paying property taxes on land owned in fractionalized interests, which means that taxes go unpaid and become delinquent. The same holds true for insurance payments. This lack of documentation is compounded by the fact that occupants of heir property tend to have few resources, and insurance costs in flood-prone areas are well beyond their means, as detailed in the discussion about flood insurance below.

The only exception that FEMA provides to these ownership requirements is for applicants located in insular areas, on islands, or on tribal lands.⁸² Although the above exception seems to draw a distinction between “insular areas” and “islands,” FEMA has chosen to adopt the narrowest definition of insular.⁸³ Thus, FEMA’s definition encompasses only “American Samoa, the Federated States of Micronesia, Guam, the Marshall Islands, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and the Virgin Islands.”⁸⁴ From applicants in those areas, FEMA

81. *Id.*

82. FEMA, IAPPG, *supra* note 75, at 56.

83. The three main definitions of *insular* are (1) “a: characteristic of an isolated people *especially*: being, having, or reflecting a narrow provincial viewpoint; (2) of, relating to, or constituting an island.” b: dwelling or situated on an island *insular* residents; (3) of or relating to an island of cells or tissue.” *Insular*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/insular> (last visited Nov. 19, 2020).

84. 42 U.S.C. § 5204(1).

may accept a written statement attesting to ownership.⁸⁵ It is worth noting that this exception is specifically noted on the FAQ for Hurricane Florence applicants from North Carolina, which initially seemed to indicate that this alternate form of documentation, a potential lifeline for heir property owners, would be accepted. However, when volunteers and attorneys from Legal Aid of North Carolina attempted to use this exception to submit appeals for FEMA applicants, these appeals were routinely denied.

One can presume that FEMA guidance, in carving out an exception for insular and island communities, recognizes both that the unique circumstances of different communities may impact the ability of applicants to provide conventional indicia of ownership. Yet, FEMA carves out no similar exception for Black owners of heir property who have been forced into flood-prone geography and deprived of access to the conventional means of proving ownership.

In specific instances, FEMA has reformed its typical ownership requirements for certain distinct communities in certain storms. However, this piecemeal approach seems to be based more on the laws of individual states than on the needs of potential recipients. For instance, states like Texas—where FEMA has accepted an affidavit tracing the ownership—have corresponding state laws that recognize this as an alternative pathway.⁸⁶ North Carolina law offers no such alternative means of documenting property ownership, so owners of heir property are left limited means of proving their interest under state law.

The fact that FEMA does not take the racial composition or income characteristics of a geographical area into account when determining whether exceptions to typical ownership requirements apply means that there is little consideration of the underlying reasons why heir property may be prevalent in a particular geography or of the reasons why a community has not availed itself of legal mechanisms for showing ownership. The results of FEMA's policy, or lack thereof, regarding heir property was well documented after Hurricane Katrina; a 2017 study conducted by the U.S. Department of Agriculture found that 20,000 owners of heir property were denied recovery benefits because they lacked clear title.⁸⁷ This policy effectively amounts to a market intervention on behalf of white homeowners, allowing them to recover better and more thoroughly from disasters, while Black homeowners watch their homes continue to lose value before their eyes.

85. *Id.* These self-declared statements must include “how long the applicant lived in the disaster damaged primary residence prior to the Presidential Disaster Declaration, an explanation of the circumstances that prevent standard ownership verification, and the applicant’s signature.”

86. Texas law recognizes Affidavits of Heirship as evidence of an individual’s ownership interest in property. TEX. EST. CODE § 203.001.

87. Sturgis, *supra* note 1.

B. FEMA benefits and the National Flood Insurance Program

Insurance provides the best hope for a full and rapid recovery to those whose homes have been damaged by a natural disaster. The National Flood Insurance Program (NFIP) was born out of congressional passage of the National Flood Insurance Act of 1968.⁸⁸ Today, the program, operated by FEMA, provides about ninety-six percent of all flood insurance policies in the United States.⁸⁹ NFIP was conceived as a way to subsidize the high cost of flood insurance and to help insure more homes against flooding losses not typically covered by traditional homeowner's insurance. However, even with subsidies, NFIP rates have increased steadily since the program was instituted, especially for residents of communities more prone to repeated flooding.⁹⁰ Predictably, the cost of NFIP coverage is based at least in part on the level of risk in a particular location,⁹¹ and mortgage companies require flood insurance for properties that FEMA categorizes as high risk.⁹² For these properties, failure to carry flood insurance may result in foreclosure.⁹³

For obvious reasons, owners of their property rarely have to worry about the mortgage consequences of failing to maintain flood insurance since these intergenerational homes are rarely covered by a mortgage. However, many owners either allow policies to lapse because of the high cost

88. 42 U.S.C. § 4001 *et seq.*

89. Jie Jenny Zou, *Climate Change and Soaring Flood Insurance Premiums Could Trigger Another Mortgage Crisis*, Vox (Feb. 25, 2020), <https://www.vox.com/2020/2/25/21146896/climate-change-fema-flood-insurance-mortgage-crisis>.

90. Cf. Charles Elmore, *Flood Insurance Rates "Unfairly Discriminatory," Top Regulator Says*, PALM BEACH POST (Aug. 14, 2015), <https://www.palmbeachpost.com/article/20150814/BUSINESS/812066284>. A typical annual premium for \$100,000 of flood insurance is around \$700 per year. See FEMA, *The Cost of Flooding*, www.floodsmart.gov (last visited Jan. 11, 2021). Many low-income individuals simply cannot afford this expense in addition to the cost of daily living.

91. The NFIP has been plagued by financial difficulties for many years. Arguably, one cause of this financial strain was grandfathered rates. In an effort to make the program more sustainable, Congress passed the Biggert-Waters Flood Reform Act of 2012. The Act directed FEMA to remove subsidies for certain homes located in flood-prone areas, thereby placing flood insurance premiums well out of reach for many homeowners. The reforms were quickly rolled back by the Homeowner Flood Insurance Affordability Act of 2014, restoring grandfathered rates and requiring FEMA to develop an affordability framework for homeowners. None of these reforms changes the reality that flood maps continue to change and premiums continue to increase for many in low-income, flood-prone communities.

92. *Id.* The article goes on to point out that "'working-class people increasingly can't afford the cost of living by the coast, but wealthier populations can.' The program also ignores the impact of discriminatory mortgage lending on communities of color. Instances of 'environmental gentrification,' where luxury development displaces low-income residents following a natural disaster, have played out in post-Hurricane Katrina New Orleans and storm-prone Miami-Dade County in Florida." *Id.*

93. *Id.*

of premiums or are simply unaware that the property that they inherited was ever covered by flood insurance in the first place. Yet, FEMA and other federal aid programs will generally refuse to provide home repair aid to homeowners and occupants who have not maintained coverage, especially homes that previously received federal disaster recovery benefits.⁹⁴ The duty to maintain coverage follows the structure, not the homeowner.⁹⁵ This policy is not a problem for buyers who receive disclosures and who most likely purchase a property with the aid of a mortgage⁹⁶ and therefore know that coverage is needed and required. However, it is exceptionally punitive for heir property owners who inherit their homes and may not know much about the expenses associated with the properties at all.

C. FEMA's buyout program

FEMA sometimes provides buyouts for properties located in areas plagued by persistent flooding. This buyout program is intended to save taxpayer dollars, where FEMA determines that it is less expensive to purchase an applicant's property outright than to continue to pay for repairs with each repeated storm.⁹⁷ Ideally, the program aims to buy out entire communities so that the purchased properties can be torn down and the area turned into green space.⁹⁸ In 2019, National Public Radio (NPR) issued a public records request to FEMA in order to obtain data about who was receiving these FEMA buyouts.⁹⁹ According to NPR's analysis of the data, "white communities nationwide have disproportionately received more federal buyouts after a disaster than communities of color."¹⁰⁰ NPR attributed this evaluation to FEMA's tendency to buy out more expensive properties without regard to who is most in need of a buyout.¹⁰¹ While undoubtably true, it may not be the entire story behind the numbers.

FEMA buyouts are part of its Hazard Mitigation Program. Unlike the IHP, buyouts are made through grants to states, which provide twenty-five percent matching funds for the program. Communities make application to their state first, and those applications then go to FEMA. FEMA is required to review the applications for more than just their cost-effectiveness. FEMA

94. FEMA, FLOOD INSURANCE REQUIREMENTS FOR RECIPIENTS OF FEDERAL DISASTER ASSISTANCE (July 2019), <https://www.fema.gov/sites/default/files/2020-05/FloodInsuranceRequirements-080119.pdf>.

95. *Id.*

96. *See id.* (discussion of a seller's responsibility to disclose the need for flood insurance to a prospective buyer).

97. Robert Benincasa, *Search the Thousands of Disaster Buyouts FEMA Didn't Want You to See*, NPR (Mar. 5, 2019), <https://www.npr.org/2019/03/05/696995788/search-the-thousands-of-disaster-buyouts-fema-didnt-want-you-to-see>.

98. *Id.*

99. You can view data provided by FEMA at the zip code level here: <https://apps.npr.org/fema-table>.

100. *Id.*

101. *Id.*

must also determine whether the applications adequately address historic and cultural resource issues.¹⁰² Once applications are approved, the local community determines willing homeowners and takes title to eligible property. In its guidance to communities, FEMA advises them to conduct a title search for each potential buyout property to ensure that the seller is in fact the title owner of the property that the title is clear at the time of sale and free from mortgages, outstanding liens, incompatible easements, or other encumbrances.¹⁰³ Thus, the ownership requirements for a buyout are more stringent than they are for the IHP program, in that they require the seller to possess “clear title” as opposed to simply being *an* owner and occupier of the home as is required to receive benefits under IHP.

It is possible that some communities that are predominantly comprised of Black residents simply decline to participate in buyout programs because buyouts may result in the loss of a historical community of color. FEMA acknowledges that one of the drawbacks to the buyout program is that it leads to displacement of communities.¹⁰⁴ Princeville, North Carolina, a community incorporated in 1885 by freed slaves on the low-lying bank of the Tar River, remains 93.4% African-American, according to the most recent census data.¹⁰⁵ This historic town has repeatedly wrestled with whether to participate in FEMA’s buyout program, with both the town commissioners and local residents often finding themselves divided between concerns over recurrent flooding and the desire to maintain their community.¹⁰⁶ However, it is equally possible that towns with large Black communities that would like to participate in buyout program are prevented from

102. FEMA, Hazard Mitigation Grant Program (HMGP), <https://www.fema.gov/grants/mitigation/hazard-mitigation>.

103. 44 C.F.R. § 80.17 states that: “[t]he subgrantee will obtain a title insurance policy demonstrating that fee title conveys to the subgrantee for each property to ensure that it acquires only a property with clear title. The property interest generally must transfer by a general warranty deed. Any incompatible easements or other encumbrances to the property must be extinguished before acquisition.” See also FEMA, PROPERTY ACQUISITION HANDBOOK FOR LOCAL COMMUNITIES A SUMMARY FOR STATES, October 1998, https://www.fema.gov/media-library-data/20130726-1507-20490-4551/fema_317.pdf.

104. In its training, *Breaking the Disaster Cycle*, FEMA’s trainer notes the following disadvantage to the buyout program: “Disruption of established neighborhoods—People often become rooted to their neighborhood, despite the recurring disruption and loss caused by flooding. In fact, many people take great pride in having survived major floods, rebuilding their homes and lives after the floodwaters subside. Buyouts can disrupt or destroy neighborhood ties.” <https://training.fema.gov/emiweb/downloads/breakingdisastercycle/session04-revised.pdf>.

105. United States Census Bureau, *American Community Survey*, 2018, available at <https://www.census.gov/programs-surveys/acs>.

106. WRAL.com, *Princeville Residents Hesitant to Accept FEMA Buyouts*, Oct. 22, 1999, <https://www.wral.com/news/local/story/121022/>; WRAL.com, *Princeville Opts to Rebuild Dike Instead of Federal Buyout*, November 22, 1999, <https://www.wral.com/news/local/story/121121/>, Tim Pulliam, *Historic or Not, Some In*

doing so because of FEMA's stringent ownership requirements. Communities where a disproportionate number of community members struggle to even show a partial ownership interest in their homes cannot hope to meet the area-wide "clear title" requirements of FEMA's buyout program. Thus, residents of these communities are trapped in a cycle of repeated flooding and further diminution of the value of their homes even as white homeowners literally move to higher ground.

D. Community Development Block Grant disaster recovery

Federal long-term recovery funds often arrive many long months after a natural disaster. Nevertheless, this money holds the promise of bringing home repairs to storm survivors without insurance and to those who were not among the lucky few to receive assistance from nonprofit organizations. The Community Development Block Grant program (CDBG) was enacted through the Housing and Community Development Act of 1974 (HCD).¹⁰⁷ Program oversight was vested in the Department of Housing and Urban Development (HUD), which is responsible for enforcing, and sometimes modifying, the rules that govern the program. Unlike the CDBG program, which awards grants annually to entitlement communities, the Community Development Block Grant Disaster Recovery (CDBG-DR) program is not permanently authorized. Rather, Congress may appropriate CDBG-DR funds to assist with unmet disaster recovery needs from presidentially declared major disasters. Because states typically have the best capacity to administer large grants, HUD typically allocates CDBG-DR funds to state grantees,¹⁰⁸ and the states then make grants directly to homeowners.¹⁰⁹ Although the CDBG-DR program is governed by the same general statutes as CDBG funds generally and by the Stafford Act,¹¹⁰ Congress writes new legislation and issues new Federal Register notices for each appropriation. Grantees are also left to draft their own program guidance regarding the implementation of the funds and must propose an action plan to HUD, which is subject to citizen participation and input,

Princeville Welcome a Buyout, December 20, 2016, <https://abc11.com/princeville-flooding-hurricane-matthew-tarboro-fema-buyouts/1665782>.

107. 42 U.S.C. § 5301.

108. Counties and municipalities are also eligible to apply for these grants, although few possess the necessary infrastructure to administer such large sums of money and to meet the program's stringent reporting requirements.

109. See HUD, Community Development Block Grant Disaster Recovery Guidance for Grantees 2019, <https://files.hudexchange.info/resources/documents/CDBG-DR-Policy-Guide.pdf>.

110. The Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988, 42 U.S.C. §§ 5121–5207, vests the federal government with the authority to provide assistance to states in a variety of ways after a major federal disaster declaration is issued by the president. Although FEMA generally oversees this aid, a variety of other federal disaster relief programs are governed by the requirements of the Act.

including, at a minimum, a public comment period.¹¹¹ These action plans generally include information about how the grantee will treat the issue of proving ownership because, although clear title is a requirement of the program, HUD does not provide specific instructions about how to verify ownership.

North Carolina's action plan for CDBG-DR funds appropriated for Hurricanes Florence and Matthew provided the following proposed guidelines for proving ownership. The program that administers these plans is known to the public as Rebuild NC (Rebuild). Like FEMA, Rebuild requires successful applicants to have owned and occupied their home as their primary residence at the time of the hurricane.¹¹² Unlike FEMA, Rebuild also requires partial owners to obtain the permission of all other owners for Rebuild to repair the home. This requirement presents severe challenges for owners of heir property.¹¹³ Many times, owners of heir property may not even know which other family members have an interest in their home, and all the other owners are not necessarily aware of their rights to the property. Without an intricate knowledge of North Carolina intestacy rules, it is unlikely that owner occupiers would be able to trace heirship on their own. Assuming that owner-occupants can determine all the owners with the assistance of an attorney, there is no guarantee that the other owners can be located or will cooperate in the process. Furthermore, some individuals may be unaware of their ownership interest in the property until they are notified as part of the Rebuild process. Because these unknowing heirs are tenants in common, enjoying all the same rights to use and enjoy the property as the owner-applicant despite having had nothing whatsoever to do with the property, they may choose to sell their newly discovered interest to a third party. Thus, through the process of attempting to restore their homes, heirs that have been living in and maintaining heir property are put at greater risk of losing that property through partition.

IV. Conclusion

As the foregoing section reveals, Black communities face barriers to accessing virtually every source of recovery dollars—barriers that are not encountered by white communities.¹¹⁴ In each program, Black North Carolinians

111. *Id.*

112. *Id.*

113. REBUILD NC, HOMEOWNER RECOVERY POLICY MANUAL, Section 2.3.3.7 Successors in Interest at 51 (June 15, 2020), https://files.nc.gov/rebuildnc/Images/homeowner-recovery/NCORR-HRP-Policy-Manual-V5.1_508.pdf.

114. Research has revealed major disparities in the SBA Disaster Loan program as well. Although that program is beyond the scope of this article, see the excellent article by Thomas Frank, *Disaster Loans Entrench Disparities in Black Communities*, SCI. AM. (July 2, 2020), for an excellent analysis of how the SBA's reliance upon credit ratings to determine who receives loans result in far fewer loans being made to black homeowners and business owners.

are less likely than whites to receive recovery awards. Undoubtedly, many reasons exist for this disparity, and much has been written about its origins. Certainly, one of those reasons, as discussed in this article, is the confluence of the historical inequities of Black land ownership, both in terms of geographical location and the means by which Black North Carolinians hold their land, and the onerous ownership requirements of current-day disaster recovery funding programs. This convergence causes Black disaster survivors to have poor application success rates for all of the recovery programs discussed in this article, even as they continue to disproportionately occupy some of the most disaster-prone real estate in our country.

This paper observes a historical trend and documents its extension in an analysis of the law governing disaster relief programs. From redlining to U.S. Department of Agriculture lending programs, to the selective construction of environmental regulations, the state has constructed property markets in ways that devalue property, especially economically productive real property, held by Black North Carolinians. This is a self-reinforcing tendency, since political power in rural spaces accrues to those who control economically productive real property, spurring further state interventions on behalf of the wealthy and white. This tendency has pushed Black North Carolinians to the geographic margins in Eastern North Carolina, where land is typically more flood-prone and less economically productive. It has also led many Black North Carolinians to adopt unconventional forms of land tenure which render ownership of their property harder for the state to identify. Thus, state interventions on behalf of the white and wealthy have ensured that Black North Carolinians are at greater risk of harm from natural disasters and face greater obstacles when they seek disaster relief afterward. Offering Black North Carolinians less compensation even though they bear a more substantial risk, disaster relief programs effectively amount to an intervention in property markets on behalf of the wealthy and white. These programs thus inadvertently reproduce the conditions that led to their own deficiencies and shape markets to strip Black communities of their most valuable assets.

Further empirical work is warranted to assess the size and consequences of these effects for property ownership among Black North Carolinians and the concentration of productive assets. Such work may depend in part on quantifying exactly how much heir property exists and its exact location in Eastern North Carolina. This latter inquiry is challenging because no central database in the United States currently tracks information about heir property. Most research tracking African-American land loss due to heir property issues focus on the loss of farmland, as opposed to land occupied either by individual homeowners or where multiple family members occupy the same undivided parcel. This work awaits scholars concerned with the state-backed dispossession of Black communities.

We hope such work will bear in mind the lessons of this study. First, the history of state and economic development in North Carolina is, in part, a history of pushing Black people toward flood zones. This is a history of

state and market action alike, since the two do not exist independently of one another. To say that disasters do not affect all communities equally is to acknowledge that we have built a society that regularly forces certain communities into harm's way. In our view, then, the aid programs that assist home and property owners with recovery after major flooding events—above all after hurricanes—are best conceived of not just as an effort to assist any and all who have experienced losses, but as an effort to provide a backstop for the losses and forced migrations of those who have repeatedly been pushed to geographic margins. Such a distinction does not call on these programs to give anyone short shrift; on the contrary, it suggests only that they take care to ensure that they really are serving those people who most need their help: Black people, native people, other people of color, and the poor.

Second, disaster relief programs must recognize that the same people that they seek to serve have been forced to adopt ways of making their lives, labor, and property ownership illegible to state actors. The prevalence of heir property is a direct consequence of white and wealthy interests' theft of land from Black and poor North Carolinians. Yet now white and wealthy landowners, who generally hold "clean" title, find compensation for their losses far more forthcoming than Black and poor landowners, whose titles were carefully, deliberately distributed outside the reach of probate court.¹¹⁵

Third, disaster relief programs must recognize that in the context of a market system for the transfer of property rights, any systematic shortfalls in the distribution of aid to marginal communities will effectively amount to state support for the dispossession of those communities, since, on average, such shortfalls will increase the resources that well-off landowners can devote to acquisitions of new property and, for the poor, heighten the effective cost of remaining on their land. Research discussed in this paper supports that this process has already begun. The failure to distribute aid evenly amounts to policy support for displacement.

Finally, while these goals call for state and national intervention where disaster relief programs fail to treat marginal communities as true equals of their better-off neighbors, they also suggest the need for close attention to local autonomy and for the centering of marginal communities' own requirements and aspirations. Ultimately, the goals of contemporary communities may not be so distant to the goals of their ancestors: real and meaningful freedom to live on the land together. Thus, work toward these goals must be informed by the experiences and preferences of those communities with which it claims to concern itself. Across the history of Black communities in Eastern North Carolina, property ownership and conventional economic productivity mostly have been means toward the end of

115. Similarly, informal sources of income—a consequence of the search for economic productivity beyond the ambit of state and corporate control—deserve recognition from disaster relief programs and merit compensation when disasters limit or eliminate them.

genuine community autonomy. Even today, Black North Carolinians seeking such autonomy have good reason opt out of the dominant economic system and to try to find some form of freedom on its margins. To be clear, this is never a choice itself made freely: it is always a choice made in the shadow of decades of formal and informal economic and social policy bent toward the dispossession of Black people. Yet now even the possibilities for hewing a living out of North Carolina's marginal eastern lands are dwindling, too. There has rarely been a better time for ensuring that programs seeking to assist all North Carolinians in building stable lives and homes for themselves are fair and just.

Race, Place, and Housing in Los Angeles

*Shashi Hanuman & Nisha Vyas**

Abstract.....	449
I. Introduction.....	450
II. The Racialized Roots of the Los Angeles Housing Crisis.....	452
A. Historical Evolution of Housing Inequality	452
B. A Snapshot of Today’s Disparities	454
i. Affordability levels of new housing are not matching needs.....	455
ii. Displacement is devastating neighborhoods of color.....	457
iii. COVID 19 and human and neighborhood impacts	459
III. The Insufficiency of Prevalent Narratives and Strategies	460
A. Deregulation Risks Disproportionate Harm to Communities of Color.....	461
B. NIMBYism and YIMBYism as Simplistic, Race-Neutral Narratives	464
C. The Need for a Place- and Race- Based Approach	467
IV. Beyond Unit Counts to Thriving Neighborhoods.....	467
A. The Neighborhood-Based Community Development Model... 468	
i. Boyle Heights.....	470
ii. Vernon Central.....	471
iii. Little Tokyo.....	472
iv. South LA.....	473
B. The Role of NBCDCs in Making Race- and Place-Conscious Systems Change.....	474
i. Inclusive transit development.....	475
ii. Strategic land acquisition	477
iii. Looking forward.....	477
C. Affirmatively Furthering Fair Housing	479
i. Housing element law	480
ii. Historic, inequitable allocation of regional need	482
iii. Inadequate production of lower-income housing.....	483
iv. Housing element reforms.....	485
v. Regional housing needs assessment reform.....	486
vi. Looking forward.....	487
D. Racial Impact Analysis.....	488
Conclusion	490

Abstract

Today, Los Angeles is one of the most racially and economically segregated regions in the nation—a result of generations of entrenched racially exclusionary policies, practices, and systems. Yet economists, policymakers, and developers continue to

define the housing crisis as primarily a crisis of supply that can be solved by prioritizing deregulatory solutions. This myopic view undercuts the need for race- and place-based solutions necessary to reimagine more inclusive neighborhoods. The time is ripe to reevaluate and reimagine existing approaches. By using race- and place-conscious strategies such as those outlined below, housing policy can be advanced in a more successful and inclusive manner, measuring housing as one essential part of community health. To do otherwise risks perpetuating inequities and further harming the region's most economically vulnerable communities—overwhelmingly communities of color.

I. Introduction

Los Angeles is experiencing a sustained, persistent crisis in housing affordability, availability, and accessibility.¹ The interrelated markers of the housing crisis—including severely rent-overburdened households, overcrowding, and homelessness—increase every year and, in the case of homelessness, become increasingly visible. This crisis is rooted in generations of entrenched exclusionary housing and development policies, contributing to racially and economically segregated geographies as well as pernicious class and race disparities. Shockingly, prior to the COVID-19 pandemic, 600,000 people lived in Los Angeles County paying ninety percent or more of their income on rent.² Decades of stagnating wages, skyrocketing rents,³ and systems of inequality have caused disproportionate

*Shashi Hanuman is Directing Attorney with the Community Development Project of Public Counsel in Los Angeles. Nisha Vyas is Senior Attorney with the Western Center on Law & Poverty. The authors acknowledge Janis Breidenbach, Maria Cabildo, Rémy De La Peza, Nancy Halpern Ibrahim, Joan Ling, Michael Rawson, Laura Raymond, Arnulfo Sanchez, Rabeya Sen, Doug Smith, Takao Suzuki, Matthew Warren, and Mark Wilson for their review and insights on this essay. In this essay, we use BIPOC to signify Black, Indigenous, and People of Color (POC). We use the term “historically excluded” to refer to a broader set of groups that have been excluded from full rights, privileges, or opportunities in this country. “Excluded” populations are those that have been historically excluded and continue to deal with oppressive and discriminatory forces because of factors such as race, sex, gender, age, and/or status. This essay uses the gender-neutral term “Latine” interchangeably with the terms “Latino” and “Hispanic.” All views expressed in this essay are solely the authors’ views and should not be attributed to any other person or organization.

1. See e.g., MAYOR OF L.A., CITY OF L.A., EXECUTIVE DIRECTIVE 13 (Oct. 23, 2015), https://www.lamayor.org/sites/g/files/wph446/f/page/file/ED_13_-_Support_for_Affordable_Housing_Development.pdf?1445984955; CAL. HOUS. P'SHIP, LOS ANGELES COUNTY 2020: AFFORDABLE HOUSING NEEDS REPORT (May 2020), available at https://1p08d91kd0c03rlxhmhtydpr-wpengine.netdna-ssl.com/wp-content/uploads/2020/06/Los_Angeles_Housing_Needs_Report_2020-HNR.pdf.

2. Daniel Flaming et al., *Escape Routes: Meta-Analysis of Homelessness in L.A.*, UNIV. S. CAL. (2018), https://socialinnovation.usc.edu/homeless_research/escape-routes-meta-analysis-homelessness-1.

3. LUSKIN SCHOOL OF PUBLIC AFFAIRS, 2020 UCLA COMMUNITY COLLABORATIVE: DE-COMMODIFYING HOUSING DURING COVID-19, at 78, <https://www.cacltnetwork.org/wp>

harm to lower-income communities of color, contributing to double-digit increases in the numbers of unhoused persons.⁴ Now, with a global pandemic triggering an even more severe economic crisis, the region teeters on a precipice as mass evictions threaten the housing security of hundreds of thousands of households.⁵ The pandemic has laid bare stark, structural inequities in housing, health, and the economy, making even more evident the need for a more nuanced, holistic approach to defining and generating solutions to Los Angeles's housing crisis.

In this essay, we illuminate the historical roots of the Los Angeles housing crisis and respond to an ever-present narrative that deregulatory strategies to accelerate housing development must be given precedence to solve the housing crisis in Los Angeles.⁶ We then provide examples of necessary strategies and tools to achieve inclusive development, including (1) neighborhood-based development approaches combining community-based planning with targeted investments to address race- and place-inequities; (2) implementation of a new state law in California requiring all jurisdictions to affirmatively further fair housing; and (3) application of a race-impact analysis on new housing legislation.

-content/uploads/2020/07/De-Commodifying-Housing-During-COVID-19.pdf (rents doubled in Los Angeles County between 2009 and 2019, while incomes stagnated, with communities of color such as Boyle Heights and the Crenshaw Corridor hit hardest, given the rent burden and incomes in those areas); *see also* BRING CALIFORNIA HOME, <https://bringcahome.org> (noting that most income growth in California has been concentrated in the top one percent of earners since 1989 and that California has no statewide strategy or long-term, guaranteed funding to end homelessness).

4. Los Angeles Homeless Services Authority, 2020 Homeless Count Results Key Messages at 1, 4 (June 12, 2020), <https://www.lahsa.org/documents?id=4561-2020-homeless-count-key-messages> (observing that “[h]omelessness starts rising when median rents in a region exceed 22% of median income and rises even more sharply at 32%. In LA, the median rent is 46.7%—nearly half—of median income” and that “[s]tructural racism causes Black people to be 4x more likely to experience homelessness”).

5. Even under conservative estimates, the Los Angeles area will witness over 100,000 evictions if eviction protections are lifted, absent meaningful government intervention, and tens of thousands of those households will become homeless. *See* Declaration of Professor Emily A. Benfer in Support of Intervenors' Opposition to Plaintiff's Motion for Preliminary Injunction ¶16 (Oct. 4, 2020), and Declaration of Dr. Sam Tsemberis in Support of Intervenors' Opposition to Plaintiff's Motion for Preliminary Injunction ¶6, Exh. B (Oct. 5, 2020), *Apartment Ass'n of Los Angeles Co., Inc. v. City of Los Angeles* (No. 2:20-cv-05193-DDP-JEM). Scholars researching the impacts of the pandemic in the Los Angeles region find that “the most vulnerable renters in Los Angeles County are concentrated in Black, Latine, and immigrant neighborhoods in the City.” Brief of Amici Curiae Scholars in Support of Intervenors' Opposition to Plaintiff's Motion for Preliminary Injunction at 7 (Oct. 9, 2020) (Professor Ananya Roy, UCLA Luskin Institute on Inequality and Democracy and Professor Paul Ong, UCLA Center for Neighborhood Knowledge).

6. This is not an argument against development, or against density, or, for that matter, deregulation. It is an observation regarding the prioritization of strategies and how that prioritization works to disproportionately harm communities of color in Los Angeles.

Our goal is to demonstrate that community development practitioners should be analyzing race- and place-equity considerations up front in planning for housing in our neighborhoods. The approach suggested in this essay looks not just to the housing crisis, but also to how housing intersects with other markers of community health, including access to economic opportunity, jobs, environmental factors, and education—all currently determined by race and place.

II. The Racialized Roots of the Los Angeles Housing Crisis

A. Historical Evolution of Housing Inequality

Housing and community development in the Los Angeles region, like other metropolitan areas in the United States, have long been guided by racial exclusion and racial barriers.⁷ Beginning with expropriation of land from indigenous peoples, Los Angeles was built on over a century of federal, state, and local policies that created vast *new* housing opportunities for whites, while simultaneously restricting *occupancy* of any safe, suitable housing by Black Californians and other persons of color.⁸

Policies that have limited, steered, and harmed people of color in Los Angeles include the Homestead Act of 1862,⁹ the racialized implementation of the GI Bill,¹⁰ Federal Housing Administration lending policies guided by “redlining” that kept federal financing out of communities of

7. References to Los Angeles region include the eighty-eight cities within the geographic boundaries of the County of Los Angeles, including Los Angeles City, as well as unincorporated areas of the County. Unincorporated Los Angeles County refers to areas that are not in any of the County’s eighty-eight incorporated cities. Over one million people live in unincorporated areas of Los Angeles County. If these areas comprised a single city, it would be the third largest city in California, behind only Los Angeles and San Diego. PUBLIC COUNSEL & UNIV. CAL. L.A., PRICED OUT, PUSHED OUT, LOCKED OUT: HOW PERMANENT TENANT PROTECTIONS CAN HELP COMMUNITIES PREVENT HOMELESSNESS AND RESIST DISPLACEMENT IN LOS ANGELES COUNTY 10 (June 2019), <http://www.publiccounsel.org/tools/assets/files/1188.pdf>.

8. See generally Richard Rothstein, *Why Los Angeles Is Still a Segregated City After All These Years*, L.A. TIMES (Aug. 20, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-rothstein-segregated-housing-20170820-story.html>; RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017).

9. Larry Adelman, *RACE—The Power of an Illusion: Background Readings*, PBS (2003), https://www.pbs.org/race/000_About/002_04-background-03-02.htm.

10. Erin Blakemore, *How the GI Bill’s Promise Was Denied to a Million Black WWII Veterans*, HIST. (Sept. 30, 2019), <https://www.history.com/news/gi-bill-black-wwii-veterans-benefits>.

color,¹¹ racially restrictive covenants,¹² and exclusionary zoning.¹³ In the mid-twentieth century, the federal government explicitly prohibited discrimination in housing sales, rental, and financing, but little progress was made to undo patterns of segregation or entrenched inequalities.¹⁴ Even after restrictive covenants were formally deemed unconstitutional in 1948, Black resident opportunities to purchase homes were restricted: less than two percent of the housing financed with federal mortgage insurance was made available to Black Americans.¹⁵ Ultimately, a variety of systems of exclusion steered Blacks, Latines, Japanese Americans, and other communities of color to more industrialized spaces such as Crenshaw, Boyle Heights, and Gardena (in the case of Japanese Americans), while whites settled outwards to wealthier, greener suburbs such as Pasadena, Bel Air, Rancho Palos Verdes, and Beverly Hills.¹⁶

Urban renewal and redevelopment programs in the later years further entrenched segregation and inequality, destroying low-cost housing and displacing existing communities of color. Thousands of Mexican American families were forcibly removed from their properties in Chavez Ravine (a vibrant, close-knit community) to make way for public housing (which never materialized). The City used eminent domain to displace low-income residents of Bunker Hill starting in the 1960s as part of the redevelopment of Downtown Los Angeles. Federal transportation dollars were used to gut predominantly minority neighborhoods such as Boyle Heights, while wealthy and white neighborhoods such as Hancock Park successfully organized against freeway plans in their area.¹⁷ Freeway

11. Alexis C. Madrigal, *The Racist Policy That Made Your Neighborhood*, ATL (May 22, 2014), <https://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439>.

12. See, e.g., Marisa Kendall, *For Whites Only: Shocking Language Found in Property Docs Throughout Bay Area*, SAN JOSE MERCURY NEWS (Feb. 27, 2019, 9:41 AM), <https://www.mercurynews.com/2019/02/26/for-whites-only-shocking-language-found-in-property-docs-throughout-bay-area> (describing that, while covenants that restricted home ownership or occupancy by race are no longer legally enforceable, they remain on the title of homes across California).

13. See ROOTS, RACE, & PLACE: EXCLUSIONARY ZONING, OTHERING & BELONGING INST. (Oct. 1, 2019), <https://belonging.berkeley.edu/rootsraceplace/exclusionaryzoning>.

14. The federal Fair Housing Act (Act), 42 U.S.C. § 3601 *et seq.*, was enacted in 1968 after the assassination of Dr. Martin Luther King, Jr. In addition to barring discrimination by non-governmental actors, the Act also includes a largely unenforced mandate to “affirmatively further fair housing.” 42 U.S.C. § 3608 (d); see Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015, 1:26 PM), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>.

15. Laura Pulido, *Rethinking Environmental Racism: White Privilege and Urban Development in Southern California*, 90 ANNALS ASS’N AM. GEOGRAPHERS 12, 28 (Mar. 2000).

16. *Id.* at 27.

17. LUSKIN SCHOOL OF PUBLIC AFFAIRS, *supra* note 3, at 28.

construction created physical boundaries separating and further segregating communities of color while jobs and commercial growth followed the white population outward to suburbs.¹⁸ In one national estimate, seventy-five percent of those displaced by urban renewal programs were people of color.¹⁹ These trends left communities of color in the urban core segregated, overcrowded, disinvested, and, due to lack of other housing opportunities, primed for “predatory forms of rental entrepreneurship” that continue to shape our economy to this day.²⁰

Disparities deepened following the subprime mortgage crisis in the late 2000s and the ensuing economic recession. The mortgage foreclosure crisis revealed continued predatory lending practices (as well as their racialized nature) within the housing market.²¹ This crisis devastated family homeownership, hitting people of color hardest. Black people were “seventy-one per cent more likely than white people to lose their homes.”²² The resulting massive transfers of ownership of Los Angeles family-owned residential property to Wall Street has exacerbated the racial wealth gap and led to increased neighborhood instability.²³

B. A Snapshot of Today's Disparities

In Los Angeles, Latine and Black households now have about one cent for every dollar of white households' wealth.²⁴ The city of Los Angeles remains “starkly segregated with Black and Hispanic residents facing the highest levels of segregation and often having limited residential options outside of [racially or ethnically concentrated areas of poverty], which are majority non-white census tracts with poverty rates of 40% or more.”²⁵ The compounding impacts of racial discrimination, historical segregation,

18. Pulido, *supra* note 15, at 27.

19. Mindy Thompson & Rodrick Wallace, *Serial Forced Displacement in American Cities*, 88 J. URB. HEALTH 381 (May 24, 2011), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3126925>.

20. Amy Scott, *Inequality by Design: How Redlining Continues to Shape Our Economy*, MARKETPLACE (Apr. 16, 2020), <https://www.marketplace.org/2020/04/16/inequality-by-design-how-redlining-continues-to-shape-our-economy>.

21. See Nick Carey, *Racial Predatory Loans Fueled U.S. Housing Crisis: Study*, REUTERS (Oct. 3, 2010, 8:19 PM), <https://www.reuters.com/article/us-usa-foreclosures-race/racial-predatory-loans-fueled-u-s-housing-crisis-study-idUSTRE6930K520101004>.

22. Francesca Mari, *Using the Homeless to Guard Empty Houses*, NEW YORKER (Nov. 30, 2020), <https://www.newyorker.com/magazine/2020/12/07/using-the-homeless-to-guard-empty-houses>.

23. Richard Florida, *How Housing Wealth Transferred from Families to Corporations*, BLOOMBERG CITYLAB (Oct. 4, 2019, 8:10 AM), <https://www.bloomberg.com/news/articles/2019-10-04/the-decline-in-owner-occupied-single-family-homes>.

24. LUSKIN SCHOOL OF PUBLIC AFFAIRS, *supra* note 3, at 1.

25. CITY OF L.A., ASSESSMENT OF FAIR HOUSING PLAN 4 (Nov. 6, 2017), available at <https://lawyerscommittee.org/wp-content/uploads/2018/04/12-6-2017-City-of-LA-Final-AFH-Plan-Only.pdf> [hereinafter AFH].

income inequality, and continued economic and racial barriers to housing have hit Black Americans the hardest. In the most visible marker of our housing crisis, racial disparity in the unhoused population is stark. In Los Angeles County, Black residents represent 7.9% of the population, but thirty-four percent of people experiencing homelessness.²⁶ By other measures, homelessness continues to grow among seniors as well as transition age and unaccompanied minors. From 2019 to 2020, family homelessness grew by over forty-five percent.²⁷ Disinvestment and financial discrimination continue today.²⁸

i. Affordability levels of new housing are not matching needs

The market is neither creating nor preserving sufficient housing for lower-income communities of color, and historic planning practices catering to wealthier communities have exacerbated the issue. Consistent with historic trends, more than ninety percent of new homes permitted between 2014 and 2018 in Los Angeles were geared towards affluent renters and buyers.²⁹ Nearly forty percent of the state's need for affordable housing

26. L.A. HOMELESS SERVS. AUTH., GREATER LOS ANGELES HOMELESS COUNT 2020 [hereinafter GREATER L.A. HOMELESS COUNT 2020], <https://www.lahsa.org/documents?id=4558-2020-greater-los-angeles-homeless-count-presentation.pdf>. This disparity persists year after year. In 2018, the Los Angeles Homeless Services Authority released the "Report and Recommendations of the Ad Hoc Committee on Black People Experiencing Homelessness." Its key findings show that widespread discrimination and bias in housing and employment, systemic problems in the child welfare and criminal justice systems, and, significantly, lack of affordable housing opportunity, are responsible for the persistent disparities. Among the Committee's recommendations are to root out housing discrimination, including landlord refusal to accept Section 8 Housing Choice Vouchers as other governmental assistance for tenants, as well as "further affordable housing development to address the deficit in the supply of affordable housing, and apply a racial equity lens to ensure thoughtful and strategic investment that considers the needs of disenfranchised communities." L.A. HOMELESS SERVS. AUTH., AD-HOC COMMITTEE REPORT ON BLACK PEOPLE EXPERIENCING HOMELESSNESS: KEY TAKEAWAYS FROM THE REPORT, available at <https://docs.google.com/document/d/1DfFIUjoLeokvYRkH0bHalLzG4w0g39ndqoKOcQIDZIA/edit> (last visited Dec. 6, 2020) [hereinafter REPORT ON BLACK PEOPLE EXPERIENCING HOMELESSNESS].

27. GREATER L.A. HOMELESS COUNT 2020, *supra* note 26.

28. Aaron Glantz & Emmanuel Martinez, *Keep Out: For People of Color, Banks are Shutting the Door to Homeownership*, REVEAL (Feb. 15, 2018), <https://revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership> ("African Americans and Latinos continue to be routinely denied conventional mortgage loans at rates far higher than their white counterparts."). For more examples of redlining in effect today, see Brentin Mock, *Redlining Is Alive and Well—and Evolving*, BLOOMBERG CITYLAB (Sept. 28, 2015, 12:43 PM), <https://www.bloomberg.com/news/articles/2015-09-28/eight-recent-cases-that-show-redlining-is-still-alive-and-evolving>.

29. MCKINSEY GLOBAL INST., AFFORDABLE HOUSING IN LOS ANGELES, DELIVERING MORE-AND DOING IT FASTER (Nov. 2019), <https://www.mckinsey.com/~media/mckinsey/industries/public%20and%20social%20sector/our%20insights/affordable%20>

is concentrated in Los Angeles County, where 509,404 low-income renter households do not have access to an affordable home.³⁰ Perpetuating this is the continued loss of already existing affordable units, including removal of many thousands of rent-stabilized units by market forces,³¹ and expiring affordability covenants at risk of conversion to market rents.³² Los Angeles County has the highest number of at-risk affordable homes in the state.³³

Statewide, an analysis of jurisdictions reporting housing permit data showed that “above moderate income and moderate income units continue to be built,” while “progress on lower income [units] is farther behind across the state.”³⁴ The same study compares five Southern California jurisdictions (including communities in Los Angeles and Orange Counties) to show that affluent communities that tend to restrict new housing development “have no difficulty issuing permits for housing construction for households making above moderate income.”³⁵ And between 2014 and

housing%20in%20los%20angeles%20delivering%20more%20and%20doing%20it%20faster/mgi-affordable-housing-in-los-angeles-full-report-vf.pdf; see also Benjamin S. Beach, *Strategies and Lessons from the Los Angeles Community Benefits Experience*, 17 J. AFFORDABLE HOUS. 77, 81 (2007) (noting the proliferation of specific plans in Los Angeles restricting development in wealthy, exclusive areas). Recent amendments to state laws such as Density Bonus Law, CAL. GOV. CODE § 65915, and the Housing Accountability Act, CAL. GOV. CODE § 65589.5, and local ordinances such as Measure JJJ and the Transit-Oriented Communities Program, have now started to open up these historically exclusionary areas to development to a greater degree. See *infra* Section IV (describing JJJ/TOC).

30. *Housing Needs Dashboard*, CAL. HOUS. P'SHIP, <https://chpc.net/housingneeds> (last visited Dec. 6, 2020).

31. According to the Coalition for Economic Survival and the Anti Eviction Mapping Project, over 26,000 rent stabilized units and counting were withdrawn from the rental market in the last twenty years. *Map of Ellis Act Evictions in Los Angeles*, COALITION ECON. SURVIVAL, <http://cesinaction.org.dnnmax.com/MapofEllisActEvictions.aspx> (last visited Dec. 6, 2020). This number does not take into account the number of informal evictions through tenant harassment or indirect displacement due to rising rents and other neighborhood pressures.

32. CAL. HOUS. P'SHIP, *supra* note 30; CAL. HOUS. P'SHIP, AFFORDABLE HOMES AT RISK: HOW MANY OF CALIFORNIA'S AFFORDABLE RENTAL HOMES HAVE CONVERTED TO MARKET RATE? HOW MANY ARE STILL AT RISK (Feb. 2020), available at https://1p08d91kd0c03rlxhmhtydpr-wpengine.netdna-ssl.com/wp-content/uploads/2020/02/2020-Affordable-Homes-at-Risk_CHPC-Final.pdf.

33. *Id.* Per n.1, these numbers represent only units at risk under HUD, USDA, Cal-HFA, and LIHTC programs. Per City of Los Angeles's housing element, in the city alone there were 19,888 units at risk of converting to market rates between 2013 and 2023. LOS ANGELES CITY, HOUSING ELEMENT 1-66 (2013), <https://planning.lacity.org/plans-policies/housing-element> [hereinafter HOUSING ELEMENT].

34. NEXT 10, MISSING THE MARK: EXAMINING THE SHORTCOMINGS OF CALIFORNIA'S HOUSING GOALS, <https://www.next10.org/sites/default/files/california-housing-goals-2019-3.pdf>.

35. *Id.* at 24.

2019, Los Angeles City permitted nearly 100,000 above market units during the current eight-year planning period (ending 2021), exceeding its target for above market units by two hundred sixty one percent while permits for very-low, low-, and moderate-income units lagged at well under fifty percent of the targets for these income categories.³⁶ These numbers represent a failure in equitable *distribution* of housing; by and large, the housing that is getting built is not available, accessible, or affordable to lower-income communities of color.

ii. Displacement is devastating neighborhoods of color

Urban displacement maps demonstrate the changes to Los Angeles's ethnic enclaves brought on by forces of gentrification and displacement.³⁷ These are areas where racial minorities were originally steered by racialized housing practices—and which are now experiencing rapid gentrification and displacement due to their proximity to a resurging Downtown, with residential and legacy small business tenants being pushed out or at greater risk of being pushed out due to rising housing prices, landlord harassment, and evictions. Researchers anticipated this wave of displacement, noting that the impact of planned transit investments funded by Measures M and R, combined with other investments, would contribute to rising housing prices and hit low-income residents hardest, particularly rent-burdened households concentrated in so-called “majority-minority areas” including Central LA, South LA, East LA, Northeast LA, and significant portions of the San Fernando Valley.³⁸

Neighborhoods experiencing gentrification and displacement include Echo Park, Highland Park, Downtown, Koreatown, Exposition Park,

36. CITY OF L.A., ANNUAL PROGRESS REPORT 2019 (Jan. 2020), <https://planning.lacity.org/odocument/8204713d>.

37. Prior to the pandemic, an estimated 500,000 tenants in California faced eviction every year. AIMEE INGLIS & DEAN PRESTON, CALIFORNIA EVICTIONS ARE FAST AND FREQUENT 5 (May 2018), <https://www.tenants-together.org/updates/new-tenants-together-report-reveals-evictions-california-are-triple-previous-estimates>. *Mapping Neighborhood Change & Gentrification in Southern California County*, URBAN DISPLACEMENT PROJECT, <http://www.urbandisplacement.org/map/la#> (last visited Dec. 4, 2020).

38. See AMANDA GEHRKE ET AL., CTR. FOR TRANSIT-ORIENTED DEV., CREATING SUCCESSFUL TRANSIT-ORIENTED DISTRICTS IN LOS ANGELES: A CITYWIDE TOOLKIT FOR ACHIEVING REGIONAL GOALS 20–21 (Feb. 2010), <https://ctod.org/pdfs/2010LATOD.pdf> (finding disproportionate numbers of low-income families in Los Angeles living near transit and vulnerable to displacement as housing prices and development increase around transit). See also CITY OF L.A., LOS ANGELES INDEX OF DISPLACEMENT PRESSURE (July 16, 2019), available at https://geohub.lacity.org/datasets/70ed646893f642dbca858c381471fa2_0 (noting that the City's “Displacement Index” demonstrates the risks of displacement for rent burdened households concentrated in so-called “majority-minority areas,” including Central LA, South LA, East LA, Northeast LA, and significant portions of the San Fernando Valley); see also AFH, *supra* note 25.

Jefferson Park, West Adams, and Baldwin Hills/Crenshaw.³⁹ Per the City's Assessment of Fair Housing (AFH), "transit access often makes neighborhoods susceptible to gentrification: "These include [historically Black] neighborhoods near the recently completed Expo Line such as Exposition Park, Jefferson Park, West Adams, and Baldwin Hills/Crenshaw. Home prices have already risen dramatically in Jefferson Park and West Adams in part because of the Expo Line."⁴⁰ The Black population in the City of Los Angeles has decreased by fifteen percent since 2000.⁴¹

Yet the City continues to prioritize development that exacerbates, rather than mitigates, these impacts. In South Los Angeles, the community group UNIDAD is fighting for a treasured parcel of public land, formerly known as the Bethune Library. More than eighty percent of families that lived on the two blocks of 36th Place between Catalina Street and Vermont Avenue—half of a block north of the Bethune Library site—were displaced between 2003 and 2013. Despite the acknowledged need for affordable housing and displacement pressures in the area, the City is proceeding with plans to advance a 168-room luxury hotel on its publicly owned property to serve the nearby USC Coliseum and other professional sports stadiums in the area.⁴²

Black lives, communities, and neighborhoods have been repeatedly devalued in LA's history, leaving some residents of historically Black communities and spaces feeling vulnerable to a "white return" to areas that whites previously fled, including Inglewood, Crenshaw, Leimert Park, View Park, and Baldwin Hills. As one commentator noted, "The troubling thing about gentrification is that it involves not [B]lack people's arrival, but their exit."⁴³ Similar forces are at work in predominantly Latine communities such as Boyle Heights and in other ethnic enclaves such as Chinatown and Koreatown.⁴⁴

39. AFH, *supra* note 25, at 72.

40. *Id.*

41. TERRA GRAZIANI ET AL., LUSKIN INST. FOR INEQUALITY AND DEMOCRACY, WHO PROFITS FROM CRISIS? HOUSING GRABS IN TIME OF RECOVERY 32 (Oct. 16, 2020), available at <https://escholarship.org/uc/item/5pw706tf>.

42. L.A. CITY PLANNING, CASE SUMMARY & DOCUMENTS: DIR-2020-301-SP, <https://planning.lacity.org/pdiscaseinfo/search/encoded/MjM1MDIw0> (last visited Dec. 6, 2020).

43. Erin Aubrey Kaplan, *For Many Black People, L.A. Is No Longer the Last Best Place to Live*, LOS ANGELENO (Jan 30, 2020), <https://losangeleno.com/features/inglewood-white-return>.

44. *Oriented for Whom, The Impacts of TOD on Six Neighborhoods*, A Comprehensive Project Submitted in Partial Satisfaction of the Requirements for the Degree Master of Urban and Regional Planning (June 5, 2015), https://www.urbandisplacement.org/sites/default/files/images/spring_2015_tod.pdf (describing gentrification pressures in Boyle Heights). See also Mary Apisakkul et al., *Gentrification and Equitable Development in Los Angeles Asian Pacific American Ethnic Enclaves* (Little Tokyo Service Center and A3PCON, 2006), 20, 38 (discusses gentrification and the risk of displacement in ethnic

iii. COVID 19 and human and neighborhood impacts

COVID-19 has exacerbated existing disparities. More than 1.9 million adults in California were unable to pay their rent on time in early July 2020, increasing the risk of evictions and homelessness, with Black and Latine renters twice as likely to be unable to pay when compared to whites and Asians. The most vulnerable neighborhoods, including South Los Angeles and Boyle Heights, have high concentrations of people living in poverty and disproportionately more Latine and Black residents.⁴⁵

Overcrowding and higher rent burdens are linked to numerous health impacts, including higher numbers of doctor visits, higher rates of frequently insufficient sleep, and lower levels of mental well-being.⁴⁶ Among young children, housing insecurity is linked to poor health, lower weight, and developmental risk.⁴⁷ Studies show a correlation between forced mobility and a host of mental and physical ailments, including anxiety, depression, substance abuse, and premature mortality.⁴⁸ Many who deal with housing instability will eventually experience homelessness.⁴⁹ Significantly, “[t]hese devastating effects of housing instability are disproportionately born by communities of color, even when controlling for income.”⁵⁰

The effects of eviction and housing instability tear existing social, economic, educational, and cultural fabrics. As Matthew Desmond observes in his book *Evicted*, “Residential stability begets a kind of psychological stability, which allows people to invest in their home and social relationships . . . [a]nd it begets community stability which encourages neighbors to form strong bonds and take care of their block.”⁵¹

enclaves in Los Angeles—stating that existing city “growth strategies have catered to the city’s higher income” working professionals).

45. Paul M. Ong et al., UCLA CENTER FOR NEIGHBORHOOD KNOWLEDGE, VULNERABILITY INDEX 2.0 (RVI 2.0), CALIFORNIA NEIGHBORHOODS AND COVID-19 VULNERABILITIES 27, 34 (Oct. 1, 2020), available at <https://drive.google.com/file/d/1T5U9hOvoHq5O6Rmyi--I2pn4EHGhRu3L/view?ts=5f7671a8>.

46. *Id.*; Yong Liu et al., *Relationships Between Housing and Food Insecurity, Frequent Mental Distress, and Insufficient Sleep Among Adults in 12 US States, 2009*, 11 PREVENTING CHRONIC DISEASE (Mar. 13, 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3958143>.

47. Diana Becker Cutts et al., *US Housing Insecurity and the Health of the Very Young Children*, 101 AM. J. PUB. HEALTH 1508 (2011), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3134514>.

48. MANUEL PASTOR ET AL., DORNSIFE PROGRAM FOR ENV’T & REG’L EQUITY, RENT MATTERS: WHAT ARE THE IMPACTS OF RENT STABILIZATION MATTERS? (Oct. 2018), https://dornsife.usc.edu/assets/sites/242/docs/Rent_Matters_PERE_Report_Final_02.pdf.

49. *Housing and Homelessness as a Public Health Issue*, AM. PUB. HEALTH ASS’N (Nov. 7, 2017), <https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/housing-and-homelessness-as-a-public-health-issue>.

50. PUBLIC COUNSEL & UNIV. CAL. L.A., *supra* note 7, at 28.

51. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 296 (2016).

Where you live matters; and housing is health. Place- and race-based equity efforts are needed to ameliorate overcrowding and rent burden, produce and preserve affordable housing, and prevent further displacement in communities of color. But current prevailing narratives and strategies dictating use of land in Los Angeles risk continued harm to lower-income communities of color.

III. The Insufficiency of Prevalent Narratives and Strategies

While a consensus exists that we have a profound housing crisis in Los Angeles that disproportionately burdens lower-income communities of color, proposed strategies to address the crisis differ. An ever-present narrative is that California's housing crisis is one of supply and demand that can be solved by accelerating private housing development.⁵² So the answer is quite simple: build more housing, more densely, in central areas.⁵³

An influential report cites certain barriers to accelerating development: community resistance, environmental review mandates, lack of local financing, and limited vacant land. It concludes that to combat our housing crisis, the state and local jurisdictions must ease regulations that increase the cost of building housing, including zoning regulations, and that cost reduction, combined with an overall supply increase, will result in more housing, and more affordable housing.⁵⁴

The report's recommended strategies are primarily race- and place-neutral, endorsing trickle-down economics and failing to meaningfully acknowledge policies of racial exclusion persisting to this day that have

52. See, e.g., CAL. LEGISLATIVE ANALYST, CAL. LEGISLATIVE ANALYST'S OFFICE, CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES (Mar. 17, 2015), available at <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf> (encapsulating the narrative) [hereinafter LAO 2015 REPORT]; CAL. LEGISLATIVE ANALYST, CAL. LEGISLATIVE ANALYST'S OFFICE, PERSPECTIVES ON HELPING LOW INCOME CALIFORNIANS AFFORD HOUSING (Feb. 9, 2016), <https://lao.ca.gov/Reports/2016/3345/Low-Income-Housing-020816.pdf> [hereinafter LAO 2016 PERSPECTIVES] (same). Market-based approaches include calls to "streamline" new housing development and are not always targeted to streamlining the types of housing most needed (e.g., affordable housing/homeless shelters). This call also assumes that streamlining will itself not have adverse consequences, such as increasing speculation, gentrification, and displacement. This dominant narrative, or so-called "housing as opportunity" school of thought, has wide appeal, is generally accepted by public media, and has captured the public's imagination. *But cf.* Andrés Rodríguez-Pose & Michael Storper, *Housing, Urban Growth and Inequalities: The Limits to Deregulation and Upzoning in Reducing Economic and Spatial Inequality*, 57 URB. STUD. 223 (Feb. 2020), available at <http://econ.geo.uu.nl/peeg/peeg1914.pdf> (describing and critiquing, in great detail, the dominant narrative).

53. LAO 2015 REPORT, *supra* note 52 at 24 ("Readers [] should focus less on our specific estimates and more on the simple story they tell: to contain rising housing costs, California would have to build significantly more housing, especially in coastal urban areas.").

54. *Id.* at 5. We shall refer to this approach in this essay as a "deregulatory" approach.

impacted housing production, access, and stability in California.⁵⁵ As detailed below, such approaches, without more, tend to entrench inequities, not remove them.⁵⁶

A. Deregulation Risks Disproportionate Harm to Communities of Color

For decades, policymakers, builders, and economists have decried the crisis of “supply” in California and in Los Angeles, stating the need to reform zoning to ensure production at a scale sufficient to meet growing needs for housing across the state. Unsurprisingly, this has resulted in increased prioritization of policies to streamline approvals and upzone across California (e.g. to deregulate). At the state level, housing streamlining policy proposals premised on deregulation continue to be adopted year after year. Los Angeles policymakers have gone further than others, adopting numerous streamlining and other mechanisms to increase density and hasten approvals of residential developments.⁵⁷ Yet, as can be seen by the Los Angeles crisis, sufficient affordability has not been realized. In hot urban

55. The report acknowledges that California’s housing challenges go beyond high housing costs, including “noneconomic barriers to housing, such as race, ethnicity, gender, and disability status,” but defers on proffering ways to remedy these inequities. *Id.*

56. See Martha M. Galvez et al., *What HUD’s Proposed Rule Gets Wrong About Fair Housing*, URB. INST. (Mar. 16, 2020), <https://www.urban.org/urban-wire/what-huds-proposed-rule-gets-wrong-about-fair-housing> (critiquing HUD’s 2020 proposed regulations to remove reference to racial disparities in access to housing, residential segregation, and racially concentrated poverty to focus on overall housing affordability and quality: “Although affordability is undeniably important and the affordability gap in this country continues to grow, exclusively focusing on affordability ignores decades of evidence of housing discrimination and unequal access to housing opportunities for people of color and protected groups. In light of these patterns, race-neutral and aggregate metrics could obscure disparities in housing access by race or other protected status and ultimately help perpetuate patterns of disadvantage.”).

57. See, e.g., Public Policy Institute of California, *California’s Future: Housing*, <https://www.ppic.org/publication/californias-future-housing/> (18 bills passed in 2019 alone to jump-start housing production). The City of Los Angeles already permits relatively high-density residential development as of right in its commercial zones, where much new housing is being built. See HOUSING ELEMENT, *supra* note 33, at ch. 3-9-11). Los Angeles facilitates housing construction at relatively high densities—as high as 50 to 100 units per acre in many multi-family neighborhoods, and up to 218 units per acre in all Regional Centers. Density is completely unlimited in downtown (building sizes are now limited only by a floor area ratio). *Id.* Los Angeles also permits as of right development for projects of 49 units or less consistent with base zoning. Density bonuses encourage developers to obtain streamlined development/greater density if they include affordable housing in their projects. CAL. GOV’T CODE § 65915(f). These incentives are magnified in the Greater Downtown Incentive Area. L.A. MUNI. CODE § 12.22.A.29(c)(1). The City’s Re:code will enable many more projects to be by-right; and, already, more than 57,000 single-family homes in the City of Los Angeles are on multifamily parcels. Also, the rate of applications for accessory dwelling units has dramatically increased since state law reforms were enacted. MCKINSEY GLOBAL, *supra* note 29, at 27, 33, 45.

markets, these approaches are more often associated with increased gentrification and displacement in communities of color—exacerbated by policy failures—including lack of adequate tenant protections, lack of adequate affordable housing and replacement housing policies, and failure to recognize the racialized roots of the housing crisis.

Those who favor deregulation often rely on the theory of “filtering” to demonstrate that it will generate affordable housing. Filtering presumes that as new housing units get built, higher-income households will move into them, and lower-income households will move into the newly vacated—presumably cheaper—housing units that the higher income households just left. In the context of growing and profound levels of income inequality, and a high-cost, urban-infill Los Angeles market, however, this theory fails to pass muster. As in many other regions, in Los Angeles, the housing market is made up of segmented sub-markets. Thus, increases in the supply of luxury housing, if anything, may help in marginally reducing prices for luxury housing, but will have little to no impact for lower-income households who exist in a vastly different sub-market.⁵⁸

The theory that rents will filter down to a level affordable to lower-income households is a “reductive oversimplification” of a complex issue.⁵⁹ Additional factors that weigh against the likelihood of significant downward filtering include the constrained nature of urban infill markets, the impact of land speculation,⁶⁰ increasing rates of corporate ownership of rental housing,

58. Rick Jacobus, *Why Voters Haven't Been Buying the Case for Building*, SHELTERFORCE (Feb. 19, 2019), <https://shelterforce.org/2019/02/19/why-voters-havent-been-buying-the-case-for-building> (describing the impact of segmented markets). In the San Francisco Bay Area, research indicates that any benefits to filtering for lower-income households depend on developers' initial decision to build at levels affordable to the median income, and that it would still take fifty years for that housing to filter to households earning fifty percent of the median. See MIRIAM ZUK & KAREN CHAPPLE, INST. OF GOV'TAL STUDIES, HOUSING PRODUCTION, FILTERING AND DISPLACEMENT: UNTANGLING THE RELATIONSHIPS (May 2016), https://www.urbandisplacement.org/sites/default/files/images/udp_research_brief_052316.pdf. Note that in Los Angeles, new housing is not affordable to median income levels; and income inequality is growing. See Los Angeles Homeless Services Authority, *supra* note 4 (noting that median rent in LA is 46.7%—nearly half—of median income; see also: An Equity Profile of the Los Angeles Region, PolicyLink and PERE, (2017) (noting that Los Angeles is the seventh most unequal metro region; since 1979, the highest-paid workers' wages have increased by thirteen percent while wages for the lowest-paid workers declined by twenty-five percent). https://dornsife.usc.edu/assets/sites/242/docs/EquityProfile_LA_Region_2017_Full_Final_Web.pdf.

59. Aaron M. Renn, *Is Urbanism the New Trickle-Down Economics?*, NEW GEOGRAPHY (Feb. 6, 2013), <https://www.newgeography.com/content/003470-is-urbanism-new-trickle-down-economics>.

60. Increases in cost of housing and gentrification are fueled by real estate speculation, by which profiteers purchase and sell property to make money off short-term gains in value. While price gouging goods and services is largely restricted, real estate speculation that operates in largely the same way is legal.

including single-family homes,⁶¹ conversion of existing homes to temporary rentals through AirBnB,⁶² and increasing numbers of wealthy households acquiring multiple properties as vacation homes—stock that clearly will not filter into affordability for lower-income households.⁶³

These narratives and strategies also fail to adequately capture the realities of densifying in urban areas: to do so, something else must be removed and replaced.⁶⁴ According to the Joint Center for Housing Studies at Harvard University, California lost over 400,000 low-cost rental units between 1990 and 2017.⁶⁵ In Los Angeles, entire buildings are often emptied under the Ellis Act, allowing property owners to evict despite the good-faith eviction protections of the local rent stabilization ordinance. These and other evictions continue to rise, with untold numbers of tenants displaced by increasing harassment.⁶⁶

61. In 2016, thirty-seven percent of home sales were to absentee investors, including the largest landlord in the world—Blackstone. *Beyond Extraction*, 113. HOUSING JUSTICE IN UNEQUAL CITIES, INSTITUTE ON INEQUALITY AND DEMOCRACY, UCLA LUSKIN (2016), available at <https://escholarship.org/uc/item/4kq1j0df>.

62. See Alex Scott, *Los Angeles, Displacement, and the Rise of Airbnb*, UCLA L. REV. (ONLINE) (Sept. 25, 2018), <https://www.uclalawreview.org/los-angeles-displacement-and-the-rise-of-airbnb>.

63. See Susan D. Bennett, *Making the Second Pandemic: The Eviction Tsunami, Small Landlords, and the Preservation of “Naturally Occurring” Affordable Housing*, 29 J. AFFORDABLE HOUS. 157, 175 (2020), https://www.americanbar.org/content/dam/aba/publications/journal_of_affordable_housing/volume29number2/bennett.pdf (“Market forces do not keep small buildings both habitable and affordable. In a commodified economy of housing, no “affordable, available, and adequate” units are “naturally occurring.”). With respect to Airbnb, the City of Los Angeles has taken measures to regulate vacation rentals. See, e.g., Jenna Chandler, *LA Regulated AirBnB. Now It Might Relax the Rules.*, CURBED L.A. (Dec. 20, 2019 11:22 AM), <https://la.curbed.com/2019/12/19/21030087/airbnb-los-angeles-vacation-rentals>, but not every city regulates vacation rentals, and there are numerous loopholes; ELIZABETH LA JEUNESSE ET AL., JOINT CTR. HOUS. STUD., DOCUMENTING THE LONG-RUN DECLINE IN LOW-COST RENTAL UNITS IN THE US BY STATE 13–14 (Sept. 2019), https://www.jchs.harvard.edu/sites/default/files/media/imp/harvard_jchs_loss_of_low_cost_rental_housing_la_jeunesse_2019.pdf (noting multiple reasons the supply of low-cost rental housing is diminishing in the massive numbers, including inability [or unwillingness] to build new units at rents affordable to low-income renters, insufficient filtering down to lower rent levels, filtering up to higher rent levels through improvements, and losses to demolition or tenure shifts).

64. Alan Mallach, *More Housing Could Increase Affordability—But Only If You Build It in the Right Places*, SHELTERFORCE (June 19, 2020), https://shelterforce.org/2020/06/19/more-housing-could-increase-affordability-but-only-if-you-build-it-in-the-right-places-urban_housing.

65. LA JEUNESSE ET AL., *supra* note 63, at 14.

66. *Map of Ellis Act Evictions in Los Angeles*, COALITION ECON. SURVIVAL, <http://cesinaction.org.dnnmax.com/MapofEllisActEvictions.aspx> (last visited Dec. 6, 2020); see also Miriam Zuk, Ariel H. Bierbaum, Karen Chapple, Karolina Gorska & Anatasia Loukaitou-Sideris, *Gentrification, Displacement and the Role of Public Investment*, 33 J. PLAN. LITERATURE 31 (2015) (consequence of revitalization is rising rents leading to displacement of

Researchers have confirmed there is virtually “no evidence that substantially lower [development] costs would trickle down to the lower two-thirds of households.”⁶⁷ Others have said that “addressing the displacement crisis will require aggressive preservation strategies in addition to the development of subsidized and market-rate housing, as building alone won’t protect specific vulnerable neighborhoods and households.”⁶⁸ At the neighborhood level, any benefits from market-rate housing-supply increases are often offset by the loss of neighborhood residents, rent-stabilized homes, and community-serving businesses, further perpetuating inequalities since what gets built is rarely affordable to lower-income households.

This is not particularly surprising. Deregulatory strategies that fail to take race, place, or income into account have not proven to be meaningful tools to serve low-income communities of color.⁶⁹ And, they may further perpetuate inequality by accelerating gentrification and displacement in these communities. Equity requires dominant narratives and strategies to center race- and place-consciousness—through meaningful, inclusive policies to protect tenants and serve the specific needs of the neighborhood. Without this intentional coupling, these strategies are unlikely to solve the housing crisis.⁷⁰

B. NIMBYism and YIMBYism as Simplistic, Race-Neutral Narratives

NIMBYism is a term that grew from the acronym “not in my backyard,” and describes opposition by local residents to a proposed development plan or project in their area.⁷¹ In the housing context, the history of NIMBYism is

lower-income households). The Ellis Act allows landlords to evict all tenants in a building in order to go out of the business of renting (and convert the rental units to condominiums). CAL. GOV. CODE § 7060.

67. Rodríguez-Pose & Storper, *supra* note 52.

68. ZUK & CHAPPLE, *supra* note 58.

69. For examples of community doubts being voiced re: trickle down economic policies, see Jan Breidenbach, *A Tip for Los Angeles Voters This Election Day. Vote Yes on Prop. JJJ*, ACT-LA, <http://allianceforcommunitytransit.org/a-tip-for-los-angeles-voters-this-election-day-vote-yes-on-prop-jjj> (last visited Dec. 6, 2020).

70. The deregulatory approach taken in LA’s downtown market ended up resulting in the replacement of thousands of units of affordable housing with luxury lofts—95% of the homes built were completely out of reach for median income earners, and towered over nearby Skid Row, with thousands of unhoused residents. Benjamin S. Beach, *Strategies and Lessons from the Los Angeles Community Benefits Experience*, 17 J. AFFORDABLE HOUS. 77, 82 (2007); see also Richard D. Kahlenberg, *An Economic Fair Housing Act*, CENTURY FOUND. (Aug. 3, 2017), <https://tcf.org/content/report/economic-fair-housing-act/?session=1&agreed=1> (arguing that economic zoning is pernicious, acknowledging reports that demonstrate density is not a proxy for affordability, and the need to combine inclusionary policies with the eradication of exclusionary policies, but dismissing these concerns as “theoretical”).

71. NIMBY: “Not in My Back Yard”, CORPORATE FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/other/nimby> (last visited Dec. 6, 2020).

one of white supremacy and exclusion. White communities used Jim Crow laws and exclusionary zoning, among other tactics, to exclude racial and religious minorities. This is why many coastal suburbs of Los Angeles currently house predominantly wealthier, white households.⁷² Well after explicitly racist laws were repealed or struck down, affordable and supportive housing developers in the Los Angeles region continue to encounter substantial community opposition to their projects, particularly in suburban communities, and particularly when the developments are targeted to unhoused or formerly unhoused populations, with affordability recognized as a proxy for racial integration.⁷³ Given that the occupants of such housing are disproportionately lower-income, persons of color, and persons with disabilities, these projects have faced vocal, vehement opposition. This opposition is often couched in concerns over property values and safety but implicitly “based on stereotypes and fears about people of color, people with disabilities and low-income people[,] mak[ing] affordable housing difficult to locate in affluent or segregated neighborhoods.”⁷⁴

Overt biases also surface fairly frequently. One Planning Commissioner in wealthy suburb La Cañada Flintridge explained that “people like people of their own tribe” and that “any state efforts to integrate housing of all income levels into wealthy communities are doomed.”⁷⁵ A fight over siting a bridge shelter in a wealthy Venice neighborhood also invoked defensive localism and concerns about property values, with a neighborhood association president exclaiming, “What idiot would put this in a residential

72. The Los Angeles Almanac identifies areas in the County of Los Angeles that are predominantly white (e.g., over sixty percent). These areas are suburban communities including La Cañada Flintridge, Hidden Hills, Malibu, Manhattan Beach, Palos Verdes Estates, Redondo Beach, Topanga, Glendale, and Beverly Hills. In contrast, East Los Angeles is predominantly Latine, and Compton, Inglewood, and Ladera Heights have significant numbers of Black residents compared to other cities. See Los Angeles Almanac, Racial/Ethnic Composition, Cities & Communities, Los Angeles County, by Percentages, 2015 Census Estimates (2015), <http://www.laalmanac.com/population/po38.php>; see also LUSKIN SCHOOL OF PUBLIC AFFAIRS, De-Commodifying Housing, *supra* note 3 at 70: “Making up 26.3% of the county population, large concentrations of White communities can be seen along the western coast of the county.” See generally AFH, *supra* note 25.

73. Zoning is but one tool that NIMBYs use to attack affordable housing, supportive housing, and shelters for people experiencing homelessness. These projects are subject to multiple points of attack, including land use and public funding approvals, which allow opportunities to delay, oppose, and defund the projects entirely. See Michelle Claros, Turner Ctr. Rsch. Series: *The Cost of Building Housing* (Mar. 20, 2020), <https://turnercenter.berkeley.edu/research-and-policy/the-cost-of-building-housing-series> (noting that affordable projects face costly local design requirements and community opposition in excess of other types of housing).

74. AFH, *supra* note 25, at 309.

75. Liam Dillon, *California Lawmakers Have Tried for 50 Years to Fix the State’s Housing Crisis. Here’s Why They’ve Failed*, L.A. TIMES (June 29, 2017), <https://www.latimes.com/projects/la-pol-ca-housing-supply>.

neighborhood on some of the most expensive land in California?"⁷⁶ This type of vocal opposition can result in homeless housing projects being shut down by locals blocking funding for homeless and affordable housing—a barrier that market rate developers do not contend with. What can get lost in the narrative on land use deregulation is the reality of the power that exclusionary interests have to sway ultimate decisions regarding funding homeless housing projects.

The YIMBY, or “yes in my backyard” movement emerged in response to NIMBYism. YIMBY is a pro-growth movement that prioritizes accelerating development, in contrast to the slow- to no-growth mentality of NIMBYs.⁷⁷ YIMBYs have adopted an “accelerate development and reduce regulations”⁷⁸ strategy, effectively a race-neutral, trickle-down approach; NIMBYs advocate for stopping or slowing development because of its disruptive effects to the community. To their credit, YIMBYs advocate for dismantling exclusionary barriers—such as limitations on density. But this movement does not adequately or target its solutions to ameliorate the impact of structural, implicit, and explicit racism that ultimately can determine where, when, and how affordable and supportive housing is built and preserved.

Recognizing the nuance of race, inequality, and place, many community advocates have instead advocated a different narrative: EIMBY, or PHIMBY. EIMBY stands for “Equity in My Backyard” and PHIMBY for “Public Housing in My Backyard.”⁷⁹ These advocates reject the simplicity of the narratives associated with YIMBY and NIMBY and seek recogni-

76. Elijah Chiland, *Venice Neighborhood Group Raises \$200K to Fight Homeless Shelter*, CURBED L.A. (Apr. 16, 2019), <https://la.curbed.com/2019/4/16/18410698/venice-homeless-shelter-lawsuit-fundraising>. For more on pocket vetoes, which are now restricted in California due to lawsuits and enactment of state prohibitions, see Press Release, Public Counsel, *Lawsuit Successfully Halts Illegal Pocket Veto Used to Block Supportive and Affordable Housing Projects for Homeless*, (Jan. 18, 2019), <http://www.publiccounsel.org/stories?id=0267>. Despite the elimination of the pocket veto, allocation of funding for affordable housing must be approved by the City Council; therefore, there are still potential ways for projects to be vetoed.

77. Jon Gorey, *What Is a NIMBY, Anyway?*, APARTMENT THERAPY (Sept. 11, 2020), <https://www.apartmenttherapy.com/what-is-a-nimby-36816179>.

78. CAL. YIMBY, ABOUT, <https://cayimby.org/about> (last visited Dec. 22, 2020). (naming streamlining and accelerating development as strategies, and problematic home building regulations as the cause of the housing crisis). While some of the strategies espoused by YIMBYs are similar to strategies that affordable housing advocates have sought for years, it is the prioritization of deregulatory solutions that raises questions for equity groups (see *supra* Section III). Strategies such as reducing regulatory barriers and fees should be targeted to need, and to housing types that face the most barriers—such as 100% affordable and supportive housing—and not at the expense of tenant protections and obtaining meaningful community input from communities traditionally left out of planning processes. Likewise, streamlining development without adequately safeguarding previously excluded communities is a recipe for gentrification and displacement.

79. *Enter the NIMBYs, YIMBYs . . . and the PHIMBYs*, URB. DEVELOPER (Apr. 17, 2018), <https://theurbandeveloper.com/articles/enter-the-nimbys-yimbys-and-the-phimbys>.

tion of the nuances, racialized history of land use, and need for production solutions to incorporate race- and place-specific equity strategies in order to be effective.⁸⁰ For these advocates, dismantling exclusionary barriers must come part and parcel with affirmatively guaranteeing protections and opportunities (e.g. affordable housing) for traditionally excluded populations.

C. *The Need for a Place- and Race-Based Approach*

Recently, the Los Angeles City Planning Department, the largest planning department in the nation, issued a statement affirming its role in creating and perpetuating racial disparities: “It is not lost on us the legacy of planning in Los Angeles and its contribution to the disparities [including racial segregation, poverty, environmental injustice, disinvestment, and poor health outcomes that we still experience today] that have resulted in the devaluing of Black lives, neighborhoods, and communities.”⁸¹

Originally and intentionally built into the system, racial inequality in land use is only intensified when dominant narratives and deregulatory strategies disregard both race and place. Consequently, we have seen primarily unaffordable development adding to displacement pressures in low-income Black and Latine at-risk ethnic and neighborhood enclaves—areas that have already been hit hardest by COVID-19. To stabilize and build inclusive communities, we need to look beyond measuring success by counting housing units built, to strategies and measurables that integrate community health, including affordable housing, protect tenants, and help them stay in their homes.⁸² A more holistic approach would reconcile our racialized history, thereby enabling community health, housing, and economic stability for all.

IV. Beyond Unit Counts to Thriving Neighborhoods

The housing crisis in Los Angeles has deep and pervasive roots in racialized systems of exclusion. The health of our people and our neighborhoods is subject to the fluctuations of a complex, segmented real estate market that, in urban infill Los Angeles, often means existing cultural and ethnic enclaves are devastated to make space for new, wealthier residents. Renters and community-serving business owners who are not directly displaced by evictions are indirectly pushed out by rising housing costs in

80. See, e.g., *Statement from Equity Advocates on SB 50*, ACT-LA, <http://allianceforcommunitytransit.org/statement-from-equity-advocates-on-sb-50> (last visited Dec. 6, 2020) (“We reject the status quo, but we also reject the notion that the low-income communities and communities of color most harmed by the planning and zoning decisions of the past should be forced to accept new policies that fall short of true equity and inclusion.”).

81. L.A. CITY PLANNING, MESSAGE FROM CITY PLANNING: CHARTING OUR COURSE FOR A MORE FAIR, JUST, AND EQUITABLE LOS ANGELES (2020), <https://planning.lacity.org/resources/message-city-planning>.

82. ZUK & CHAPPLE, *supra* note 58.

their neighborhoods.⁸³ Addressing this crisis meaningfully means that we must reimagine existing strategies, and we must plant new roots of equity and inclusion in a race- and place-conscious manner.

Below, we describe neighborhood-based community development as a race- and place-conscious model to achieve systems change for more inclusive neighborhoods. We then discuss implementation of new tools to address housing inequality, access, and affordability. The first is a new state law requiring all jurisdictions in California to affirmatively further fair housing. The second is the concept of a race equity impact analysis on new housing legislation. We highlight these specific concepts not because they are the only tools necessary, but to uplift affirmatively race- and place-specific tools as part of a comprehensive framework for building healthy communities for all.⁸⁴

A. *The Neighborhood-Based Community Development Model*

A model for inclusive development that combines community building strategies with race- and place-consciousness exists in the modern day, neighborhood-based community development corporation (NBCDC). NBCDCs emerged indirectly out of the social and racial justice movements of the late 1960s, charged with the express purpose of creating jobs in low-income communities.⁸⁵ They tend to share values including community self-determination, localism, and economic self-sufficiency.⁸⁶ Over time, NBCDCs have become known for their critical role in accessing financing to build needed affordable housing, as well as other community-serving uses.

83. See Anna Cash & Tim Thomas, *Urban Displacement Project, Sensitive Communities in California: Mapping Vulnerability and Displacement Pressure* | Urban Displacement Project (Jan. 29, 2020), <https://www.urbandisplacement.org/blog/sensitive-communities-california-mapping-vulnerability-and-displacement-pressure> (noting that neighborhood types that have the highest share of sensitive communities [at risk of direct and indirect displacement] are Black-Latine (sixty-one percent of these types of neighborhoods in the state are designated as sensitive communities in our mapping methodology . . . In other words, “sensitivity is concentrated in neighborhoods that follow the fault lines of generations of racist planning decisions that have segregated communities”); see also *Oriented for Whom*, *supra* note 44, at 72 (describing impacts of gentrification in neighborhoods of color and discussing commercial gentrification).

84. For a list of more comprehensive policies needed to achieve fair housing and equitable development goals, see ACT-LA’s letter to the City of LA regarding its proposed housing element update. ACT-LA, *LA’s Housing Element Update Could Be Transformative. We Are Calling on the City to Take Bold Action to Improve Housing Affordability* (Oct. 2020), <http://allianceforcommunitytransit.org/las-housing-element-update-could-be-transformative-were-calling-on-the-city-to-take-bold-action-to-improve-housing-affordability>.

85. Roger A. Clay & Susan R. Jones, *A Brief History of Community Economic Development*, 18 J. AFFORDABLE HOUS. 265 (2009), available at www.jstor.org/stable/25782846.

86. *Id.* at 261.

Present day NBCDCs continue to focus on serving the neighborhoods in which they are located—typically low-income, underserved neighborhoods of color. Many have organizing arms with the express mission of engaging residents to build community leadership in shaping their communities. A common feature for NBCDCs is having leadership, staff, and board representative of the communities that they serve, which helps foster community-centered, accountable approaches to the work.⁸⁷ In addition to developing affordable housing, NBCDCs in Los Angeles have engaged in far-reaching activities, including job creation and training, sanitation services, streetscaping, neighborhood planning, small business support and lending, financial education, health services, and child care.⁸⁸ The work is by its very nature local, place-based, with planning and development done *with* the community, not *to* them.⁸⁹

In 2009, representatives of four different NBCDCs and one public interest law firm formally came together in Los Angeles as the Neighborhood Based CDC Coalition: Coalition for Responsible Community Development, East LA Community Corporation, Esperanza Community Housing Corporation, Little Tokyo Service Center CDC, and Public Counsel. The Coalition aimed to leverage resources and achieve neighborhood-based systems change. These groups were the first in their respective areas to create free neighborhood wireless hotspots, to successfully advocate for the community land trust model, and to organize residential hotel residents to form a co-op to preserve it as affordable housing. With staff rooted in the community, they maintain expertise and cultural capacities

87. Nat'l Alliance Cmty. Econ. Dev. Assocs., What Is a Community Development Corporation (Sept. 17, 2014), [https://www.scirp.org/journal/paperinformation.aspx?paperid=92994](https://www.naceda.org/index.php?option=com_dai lyplanetblog&view=entry&category=bright-ideas&id=25%3Awhat-is-a-community-development-corporation-&Itemid=171#:~:text=Community%20development%20corporations%20(CDCs)%20are,the%20development%20of%20affordable%20housing; see also Ann Curry-Stevens, Gerald Deloney & Matt Morton, Rethinking Services with Communities of Color: Why Culturally Specific Organizations Are the Preferred Service Delivery Model. <i>Sociology Mind</i> 9, 183–206 (July 2019), <a href=); <https://doi.org/10.4236/sm.2019.93013> (noting the importance of “culturally specific organizations as a more promising organizational model to address racial disparities”).

88. For a good primer on the achievements of NBCDCs in Los Angeles (in partnership with the LA Community Redevelopment Agency), see PUBLIC COUNSEL, RECONSIDERING REDEVELOPMENT; NEIGHBORHOOD BASED ECONOMIC DEVELOPMENT IN LOS ANGELES (2012), <http://www.publiccounsel.org/tools/publications/files/Reconsidering-Redevelopment-2012-FINAL.pdf>; see Rémy De La Peza, *Housing Development Alone Is Not Enough to Address Economic Inequity*, LUZ COLLECTIVE (Aug. 7, 2020), <https://luzcollective.com/housing-development-alone-is-not-enough-to-address-economic-inequity>.

89. It is difficult to generalize NBCDCs across Los Angeles and the country. This essay seeks to draw unifying themes and parallels among NBCDCs with which the authors have direct experience, but it neither purports to describe with great detail the history of the CDC, nor do we suggest that all CDCs share the same values, strategies, or missions.

to provide services to entire neighborhoods, to take on community-building projects that others would not risk, and to reach the hardest-to-serve populations in their communities.⁹⁰ NBCDCs have had a critical role to play in building community wealth and health, anchoring capital in communities by developing residential and commercial properties, and supporting minority-owned homeownership programs.⁹¹ Following are brief case studies of four neighborhoods in Los Angeles that have been supported by these groups.

i. Boyle Heights

Today, the Boyle Heights neighborhood is home to immigrants, predominantly Latine, Spanish-speaking households, many of whom earn less than fifty percent of the area median income. For decades, the residents of this neighborhood have been ignored in decision-making processes and lacked access to capital and quality homes.

The East LA Community Corporation (ELACC) is a NBCDC in Boyle Heights. ELACC has been dedicated to serving the Boyle Heights neighborhood for over twenty years. Its mission centers on building grassroots leaders in Boyle Heights and East Los Angeles, developing affordable housing and neighborhood assets, and providing access to economic development opportunities for low- and moderate-income families. ELACC's staff and board have deep roots in the community and have successfully transformed multiple sites in the community into affordable housing, community centers, and other uses.

ELACC's restoration of the Boyle Hotel, originally built in 1889, represents a race- and place-conscious model for community development. When the building (one of the oldest in Los Angeles) was listed for sale in 2006, ELACC became concerned that it could be lost to speculators and seized the opportunity to purchase it. ELACC incorporated neighborhood resident priorities into the hotel's restoration, engaging residents who had been traditionally locked out of planning processes, assembling financing, and ultimately restoring the building to its former historic grandeur, but, this time, offering high-quality affordable housing. In the summer of 2012, ELACC completed the rehabilitation of the Boyle Hotel-Cummings Block into fifty-one units of affordable housing, a cultural center, and retail space.⁹²

90. Neighborhood Based CDC Position Paper, on file with author.

91. Faith Weekly, *Neighbors First: The Transformative Role of Community Development Corporations in Developing Neighborhoods of Choice*, FED. RSVR. BANK ST. LOUIS BRIDGES (Sept. 24, 2018), <https://www.stlouisfed.org/publications/bridges/summer-2018/neighbors-first>.

92. Another ELACC development, Cielito Lindo, is combatting gentrification by providing permanently affordable housing to Eastside residents; almost two-thirds of the residents are from the Eastside and in more stable living situations. *Home Within Reach Awards*, SCANPH Annual Conference 12 (Sept. 27–28, 2018), <https://static1.squarespace.com>.

Over the last twelve years, fueled in part by the Metro Gold Line light rail expansion in the area, Boyle Heights has become ground zero for gentrification and displacement. In addition to engaging in an intentional land acquisition strategy around the Gold Line, ELACC has taken on an even stronger organizing and advocacy role over this time, advancing campaigns to ensure regional and city authorities engage authentically with low-income communities of color and doing proactive planning by creating community plans envisioned by residents.⁹³

ii. Vernon Central

Central Avenue in Los Angeles was nationally known from the 1920s to the 1950s for its jazz music and performing arts. Over the years, the area experienced an exodus of affluent and middle-class African Americans, disinvestment, and neglect. Today, the area is densely populated, with over 100,000 residents; eighty-nine percent identify as Latine and ten percent as Black/African American.⁹⁴

Coalition for Responsible Development (CRCD), a NBCDC in South Los Angeles formed in 2005, offers economic opportunity and stability to residents in South Los Angeles's Vernon Central community. CRCD's mission is to "better sustain, coordinate and improve local planning, development and community services that address the needs of low-income and working-class residents and small businesses in South Los Angeles." This mission involves meaningful ties to local residents, a respect for local history, and a collaborative approach to supporting the community's vision for the future. Among CRCD's core values are stewardship—recognizing their role as trustees of community assets; and empowerment—empowering residents to take a leadership role in planning their communities.⁹⁵

Since its founding, CRCD has taken a youth-centered approach to community development. CRCD built South Los Angeles's first permanent supportive housing projects for transition age youth, including through restoration of the historic 28th Street YMCA (now known as 28th Street Apartments). The 28th Street YMCA was a landmark building designed and developed in the mid-1920s by trailblazing Black architect Paul

com/static/58793de5f7e0abe551062b38/t/5bb4fcec1905f4207c23c593/1538587889831/SCANPH_Awards_Booklet_2018_Online_Copy.pdf.

93. For more information about ELACC's "Development without Displacement" strategy, see Loren Berlin, *Development Without Displacement: An Interview with Isela Gracian*, NEXT50 BLOG (Feb. 13, 2019), <https://next50.urban.org/article/development-without-displacement-interview-isela-gracian> ("But then we became very intentional about acquiring land along the Gold line route, land that we would use to develop more affordable housing. . .").

94. COAL. FOR RESPONSIBLE CMTY. DEV., WHERE WE WORK, <https://www.coalitionrcd.org/where-we-work> (last visited Dec. 14, 2020) (describing Vernon Central area).

95. For more on CRCD, see COALITION FOR RESPONSIBLE COMMUNITY DEVELOPMENT, 2020–2024 STRATEGIC PLAN, https://www.coalitionrcd.org/wp-content/uploads/2019/10/2020-24-CRCD-Strategic-Plan_Brief.pdf (last visited Dec. 14, 2020).

Williams to provide community space for Black residents. The site, listed on the National Register of Historic Places, includes special-needs housing for formerly homeless and transition age youth, as well as 8,000 square feet of community space.⁹⁶

In a partnership with Little Tokyo Service Center, CRCD also developed 36th Street Apartments, which includes scattered-site permanent supportive housing units for transition-age youth, along with ground-floor office and services space. Through its Youth Build Program, at-risk young people in the neighborhood received classroom-based and on-site job training, and ultimately, helped build their own homes by rehabilitating the century-old building into homes where some now live. Others in the neighborhood attend CRCD Academy, an innovative partnership with LA Trade Tech allowing high schoolers to access courses at the Trade Tech campus.⁹⁷

iii. Little Tokyo

Throughout its 130-year history, the Little Tokyo community in Los Angeles has faced multiple threats, including wartime internment of its Japanese and Japanese American residents, economic devastation, and the forces of gentrification and displacement. Little Tokyo is only one of three Japantowns left in the United States.⁹⁸

As a NBCDC in Little Tokyo, the mission of the Little Tokyo Service Center (LTSC) is to provide linguistically and culturally sensitive community services to assist low-income individuals and other persons in need, to contribute to community revitalization and cultural preservation in Little Tokyo and among the broader Japanese and Japanese American community in the Southland, and to provide such resources to neighboring Asian Pacific Islander and other low-income communities. LTSC's approach advances social justice, environmental sustainability, community control, and self-determination.⁹⁹

LTSC has served as lead developer for over twenty completed housing projects, many in communities with strong ethnic and cultural identities, including Vernon Central and Koreatown. In addition to developing affordable homes, LTSC's work to preserve and strengthen Little Tokyo includes advocacy and organizing for an equitable rail line build-out, including a

96. Jeffrey Steele, *Historic Los Angeles YMCA Reborn as 28th Street Apartments*, MULTI-HOUSING NEWS (Dec. 14, 2012), <https://www.multihousingnews.com/post/historic-los-angeles-ymca-reborn-as-28th-street-apartments>; *28th Street Apartments*, CLIFFORD BEERS Hous. (2020), <https://cbhousing.org/communities/28th-street-apartments>.

97. CRCD Enterprises is the social enterprise arm of Coalition for Responsible Community Development (CRCD), creating job opportunities for at-risk youth that foster a sense of community stewardship. For description of CRCD Academy, see: COAL. FOR RESPONSIBLE CMTY. DEV., *WHAT WE OFFER*, <https://www.coalitionrcd.org/what-we-offer/youth> (last visited Dec. 22, 2020).

98. Amy Evans, *Preserving the Character of Little Tokyo*, SHELTERFORCE (Jan. 11, 2017), <https://shelterforce.org/2017/01/11/preserving-the-character-of-little-tokyo>.

99. *Id.* at 7.

successful campaign to bring Metro's Regional Connector below ground so as not to cut right through Little Tokyo's Second Street and destroy its remaining legacy businesses.¹⁰⁰

Recently, LTSC completed a flagship project, the Terasaki Budokan, a multipurpose sports and activity center that will host an array of special events, cultural performances, major tournaments, and programming for all ages. Its completion represents the realization of a twenty-five-year-old vision for a community space for future generations.

iv. South LA

South LA residents are predominantly Latine and Black, and they experience high rates of overcrowding, lack of proficient schools, limited supermarket access, and higher rates of homelessness.¹⁰¹ In 2015, thirty-four percent of South LA residents were living below the federal poverty line, almost double the rate in Los Angeles County (eighteen percent).¹⁰² It is an area that has historically suffered from disinvestment, air pollution, and industrialization causing deleterious health impacts for neighborhood residents. Today, due to its proximity to downtown and the University of Southern California campus, forces of gentrification are dramatically changing the urban landscape in and around the area.¹⁰³

Esperanza Community Housing Corporation is a neighborhood-based CDC located in South Central Los Angeles (South LA) that works to produce and preserve affordable housing; elevate health equity and access to care; mobilize for environmental justice; create and protect local economic opportunities; expand engagement in arts and culture; and advance racial justice, immigrant, and human rights. In 1999, Esperanza established the Mercado la Paloma, an economic development project that fosters family-business ownership and employment for local residents. The Mercado is

100. Kristin Fukushima, *Regional Connector*, TAKACHIZU 22–23 (Jan. 2019), <http://www.takachizu.org/content/about/takazine-4.pdf>.

101. See generally AFH, *supra* note 25.

102. *Poverty, Disinvestment, and Joblessness*, S. CENT. ROOTED 6, https://southlaisthefuture.pccase.com/wp-content/uploads/2020/02/SLABHC_PressKit_V2.pdf (last visited Dec. 14, 2020) (noting that sixty-three percent of households in South LA spent 30% or more of their income on housing, more than other service planning areas in Los Angeles County. Rent increases have also occurred more sharply in South LA, resulting in one in ten South LA adults experiencing housing instability).

103. MANUEL PASTOR ET AL., PLANNING, POWER, AND POSSIBILITIES: HOW UNIDAD IS SHAPING EQUITABLE DEVELOPMENT IN SOUTH CENTRAL L.A. 21 (Sept. 2015), https://dornsife.usc.edu/assets/sites/242/docs/Planning_Power_Possibilities_UNIDAD_PERE_final_report.pdf (noting the history of South Central and a developer-led “revival” of the area).

a vibrant community gathering space that, in addition to providing entrepreneurship and employment opportunities, showcases local artists.¹⁰⁴

Esperanza's focus on community health at the neighborhood level is critical given South LA's history of noxious, polluting land uses.¹⁰⁵ A key example of its commitment to neighborhood health is its leadership in the People Not Pozos (People, Not Oil Wells) campaign. The campaign began when Esperanza and its community partners identified AllenCo Energy's South LA drill site as the source of sudden illnesses—nosebleeds, headaches, and respiratory illnesses—of nearby residents. After many years of resident-led advocacy and significant health costs, the community celebrated when the site was shut down.¹⁰⁶

With UNIDAD, Esperanza also helped jumpstart a major community benefits campaign resulting in a commitment by a private developer to incorporate affordable housing, provide 7,500 square feet of community health clinic space, and millions in benefits to the community on the site of the former Orthopedic Hospital near USC. Esperanza also helped to develop the South and South East LA People's Plan, which has become a model for responsible community planning.¹⁰⁷

B. The Role of NBCDCs in Making Race- and Place-Conscious Systems Change
NBCDCs have been instrumental in acquiring and developing land to effect inclusive, healthy visions for their neighborhoods. In addition to engaging in brick and mortar development to self-determine their neighborhoods, these NBCDCs, with grassroots organizing partners, are raising up resident voices and effecting important systems changes to enable equitable opportunities for all, including the legalization of street vending, first in Los Angeles, then in the State of California, the development of resident-led planning initiatives such as the Central City United People's Plan, the creation of a social enterprise creating jobs for at risk young people in community beautification and contracting in Vernon Central, and the advancement of City- and County-wide policies to protect tenants at risk of eviction through the Healthy LA Coalition. NBCDCs have also played important roles in building trust with residents, a necessary component to effectively neutralizing NIMBYism.¹⁰⁸

104. *About Us*, ESPERANZA CMTY. HOUS., <https://www.esperanzacommunityhousing.org/faqs> (last visited Dec. 14, 2020); see also Hugo Martin, *A Haven for Vendors*, L.A. TIMES, Nov. 22, 1999, at B1.

105. PASTOR ET AL., *supra* note 103 at 10.

106. *The AllenCo Site*, STAND-L.A., <https://www.stand.la/allenco.html> (last visited Dec. 14, 2020).

107. PASTOR ET AL., *supra* note 104, at 22; <https://la.streetsblog.org/2017/11/22/peoples-plan-helps-shape-south-and-southeast-la-community-plans>.

108. For more on the systems change accomplishments of NBCDCs, see De La Peza, *supra* note 88. On strategies to address NIMBYism, see CORP. FOR SUPPORTIVE HOUS., THINKING BEYOND "NIMBY": BUILDING COMMUNITY SUPPORT FOR SUPPORTIVE HOUSING (Mar. 2006), <https://www.csh.org/wp-content/uploads/2012/07/BeyondNIMBYpdf>

Through these campaigns, NBCDCs have brought the unique needs of their neighborhoods into city, regional, and statewide systems change. As described below, this work, at different scales, demonstrates the power of intentional place- and race-based applications in the community economic development field.

i. Inclusive transit development

Recently, neighborhood groups in Los Angeles formed a collective strategy in response to LA's planned massive transit expansion bringing \$160 billion into the City's coffers through a series of sales tax increases.¹⁰⁹ These groups emphasized the opportunity for transit expansion to bring gains to the City, but also spoke of the risks involved with transit expansion, such as gentrification and displacement of communities of color in or near planned transit stops.

The Alliance for Community Transit-LA (ACT-LA) was formed by a group of neighborhood-based CDCs, housing, worker, environmental, legal, and organizing groups to advance equitable transit-oriented development across the City of LA, and to lift up local neighborhood voices to impact policy making. ACT-LA's first campaign was a community-led policy platform to push for equitable development around transit.¹¹⁰ Unfortunately, little progress was made at the City Council level.¹¹¹ In 2016, ACT-LA and the Los Angeles County Federation of the Labor put forth a ballot initiative, Measure JJJ, "to ensure that Los Angeles residents benefit from the current development boom in Los Angeles" by requiring low-cost housing be included in these developments, requiring living wage jobs for local residents, and preserving the City's affordable housing stock through replacement of rent stabilized units.

.pdf. (Given their unique role in the neighborhood, NBCDCs can play an important role in building trust and gaining buy-in from community residents regarding new development. This is not to say that NBCDCs always accept new development; or that they always develop projects with community consensus. These situations are complex, and fact specific. Still, given the need to establish trust to gain acceptance of new development, and to truly integrate new developments and their residents in the community, new development is more likely to be successful if promoted or advanced by groups rooted in the neighborhood).

109. Together, Measures M and R "will generate an astounding \$160 B for *transportation* investments in LA County over the next 40 years, and more in the years following—until voters choose to change it." MOVELA, OUR WORK: MEASURES R, M, H, NO PROP 6, AND VISION 2022, https://www.move-la.org/our_work (last visited Dec. 14, 2020).

110. The Alliance for Community Transit-Los Angeles strives to create community transit that just, equitable, sustainable transit systems and neighborhoods for ALL people in Los Angeles, placing the interests of low-income communities and communities of color first as we create a more sustainable city. Alliance for Community Transit, About ACT-LA, <http://allianceforcommunitytransit.org/about-us> (last visited Dec. 14, 2020).

111. Notably, previous efforts to pass inclusionary zoning at the jurisdictional level had failed.

Business interests and the *LA Times* opposed Measure JJJ, arguing that its requirements, though voluntary, would curtail needed development in the City.¹¹² Despite this resistance, due to the grassroots voter participation efforts of ACT-LA and the Build Better LA Initiative groups, the measure passed with sixty-four percent of the vote. The City's Transit-Oriented Communities Program (TOC, required by Measure JJJ) has now emerged as a nationally recognized model for inclusive development around transit. The TOC has been credited for having driven production across a broad swath of Los Angeles, including 30,000 units of housing, of which over twenty percent are required to be dedicated as affordable (without public subsidy), with half of those affordable homes reserved exclusively for households earning less than \$31,300 a year.¹¹³

Propelled by grassroots community organizing efforts and neighborhood and resident expertise, JJJ did not curtail development; it promoted more dense, affordable development along transit corridors.¹¹⁴ The ballot initiative is meeting the intended goal envisioned by ACT-LA and its founding groups of advancing equitable development near transit.¹¹⁵ It demonstrates the power of the model: how the leadership of local groups acting through ACT-LA, with the people and groups previously left out of development decisions, is essential to the development of healthy, inclusive neighborhoods and communities.

112. L.A. AREA CHAMBER COM., MEASURE JJJ, <https://lachamber.com/advocacy/measure-jjj> (last visited Dec. 14, 2020) ("Bottomline: The Chamber OPPOSES this measure due to the negative impact costly labor and inclusionary zoning mandates would have on the ability to build residential units, which is counterproductive to solving our housing crisis."); see also *Editorial: Measure JJJ Could Make L.A.'s Housing Crisis Even Worse*, *Vote No. L.A. TIMES* (Sept. 27, 2016), <https://www.latimes.com/opinion/editorials/la-ed-measure-jjj-20160923-snap-story.html>.

113. L.A. CITY PLANNING, HOUSING PROGRESS DASHBOARD, A CLOSER LOOK AT DENSITY BONUS AND TRANSIT-ORIENTED COMMUNITIES (2020), <https://planning.lacity.org/resources/housing-reports>; see also TERNER CTR. FOR HOUS. INNOVATION, LESSONS IN LAND USE REFORM, BEST PRACTICES FOR SUCCESSFUL UPZONING 8 (Dec. 2019), http://turnercenter.berkeley.edu/uploads/Lessons_in_Land_Use_Reform.pdf.

114. "Moreover, officials noted that Measure JJJ's language authorizing the TOC program was crafted in a thoughtful, intentional manner that gave the city clear direction on how to achieve the measure's goals." TERNER CTR., *supra* note 113, at 8.

115. See L.A. Dep't of City Planning, Housing Progress Report: Quarterly Report: April–June 2019, at 4 (Aug. 2019) ("TOC proposals are continuing to trend toward parts of the City well-served by transit and connected to job centers—Central Los Angeles accounts for half of all TOC projects, and Westside neighborhoods account for another 15%. But South Los Angeles now claims a 20% share of TOC projects across neighborhoods including West Adams, South LA, and Southeast LA."). (Authors' note: The TOC policy requires one-for-one replacement, but must be combined with important tenant protection, retention, and anti-harassment measures.)

ii. Strategic land acquisition

California's land is an exhaustible resource, not a commodity.¹¹⁶ Recognizing this, and the importance of strategic land acquisition to providing stable housing for lower-income households, on November 10, 2020, the Los Angeles County Board of Supervisors passed a motion prioritizing acquisition of affordable housing properties near transit, with high displacement risks, in higher-resource areas, with the long-term goal of enabling opportunities for land acquisition to permanently preserve existing affordable housing and ensure that people are not displaced.¹¹⁷ The motion was informed by a working group of community land-trust groups and NBCDCs, and it is an example of a race- and place-conscious strategy targeted at addressing the housing needs of those most at risk: in Los Angeles, disproportionately low-income communities of color.

iii. Looking forward

The affordability gap in the Los Angeles-Long Beach-Anaheim region is estimated at \$23.7 billion.¹¹⁸ Representing the difference between market rents and median household ability to pay, the gap is tremendous in part due to income stagnation, inequality, and skyrocketing rents. To close it, new housing must be reserved for, and affordable to, lower-income households who are disproportionately and severely rent-burdened. At scale, this involves both prioritizing and funding opportunities to acquire land for development, preservation of affordable and supportive housing, and investments in public and social housing. The County has made a good first step with its November 10 motion. The sheer scope of the issue will require budget strategies and priorities to be dramatically reassessed.¹¹⁹

116. CAL. GOV. CODE § 65030.

117. L.A. Cnty., Motion by Supervisors Hilda L. Solis & Sheila Kuehl, Creating Opportunities for Building Equity Beyond Chapter 8 Properties: Expanding the Pilot Community Land Trust Partnership Program (Nov. 10, 2020), <http://file.lacounty.gov/SDSInter/bos/supdocs/150370.pdf>.

118. MCKINSEY GLOBAL INST., A TOOL TO CLOSE CALIFORNIA'S HOUSING GAP: 3.5 MILLION HOMES BY 2025, at 5 (Oct. 2016), <https://www.mckinsey.com/~media/McKinsey/Industries/Public%20and%20Social%20Sector/Our%20Insights/Closing%20Californias%20housing%20gap/Closing-Californias-housing-gap-Full-report.pdf>.

119. The bold action that will be required to prevent homelessness includes funding at necessary scales, for example, as sought by the Bring California Home campaign. Bring CA Home, *It's Time to Reverse the Cycle of Homelessness in California* (2020), bringcahome.org (calling for a new plan to raise \$2.4 billion annually to help reverse the cycle of homelessness for our state); *see also* Press Release, United Way, Greater Los Angeles, Statement from Elise Buik on the Passage of Measure J (Nov. 4, 2020), <https://www.unitedwayla.org/en/news-resources/blog/statement-elise-buik-passage-measure-j> (noting successful ballot measure reallocating 10% of County budget to a 'care first, jails last' approach, including funds for housing, health, and jobs for Black and brown communities).

Meanwhile, as with prior economic downturns in Los Angeles, speculative activity is increasing.¹²⁰ Investors' strategies include both grabbing multi-family buildings and flipping single-family homes for greater profits.¹²¹ As these plans do not include housing for lower-income households, to have a chance at equitable outcomes, NBCDCs, community land trusts, and other mission-oriented entities will need sufficient and flexible acquisition funding to quickly purchase distressed or at-risk properties and convert them to community-serving uses.¹²² If left to market forces, the alternative is "rising prices and fewer affordable homes available for sale overall, a potential increase in the number of distressed neighborhoods anchored by fewer local landlords or homeowners, and a growing concentration of housing in a small number of for-profit hands."¹²³ Now, as we work towards an equitable recovery, policymakers would do well to consult with NBCDCs, who have been designing creative solutions, grounded in community needs and resident leadership, for years.¹²⁴

120. Graziani et al., *supra* note 41 (identifying company landlord proliferation in the housing market and noting a "distinctive geography of racialized risk in Los Angeles, most evident in working class communities of color with high rent burdens"); see also Than Merrill, *Los Angeles, CA Real Estate Market Trends & Analysis* (2020) ("While long-term real estate investments have taken a back seat to flipping and rehabbing strategies for the better part of a decade, 2020 appears ready to shift the balance. That's not to say flipping won't remain a lucrative, viable exit strategy in Los Angeles (it will), but rather that today's market indicators are more conducive to building a rental property portfolio.").

121. Paul Sullivan, *Some Real Estate Investors Are Putting More Money in One Basket*, N.Y. TIMES (Oct. 16, 2020) (noting trend towards wealthy investors buying rental buildings (assets that have suffered during the pandemic) as a strategy to profit off of the rental housing market).

122. Amanda Abrams, *Lessons from the Last Housing Crisis: How to Get Control of Properties*, SHELTERFORCE, (Sept. 17, 2020), <https://shelterforce.org/2020/09/17/lessons-from-the-last-housing-crisis> (citing David Abromowitz: "I truly believe that if community-based organizations had had access to essentially a line of credit, and were trusted to make intelligent decisions, they would've been able to buy up many more foreclosed properties and preserve them."). Importantly, NBCDC's acquisition strategies should be viewed as one of a number of strategies to ensure sufficient land is acquired for community-serving purposes. Other strategies include community land trusts and land banking. ACT-LA, *supra* note 84; see also Doug Smith & Katie McKeon, *Public Land for Public Good, How Community Groups Are Influencing the Disposition of Public Land to Help Address the Affordable Housing Crisis*, UCLA LAW REVIEW (ONLINE) (Sept. 25, 2018), <https://www.uclalawreview.org/public-land-for-public-good>.

123. Abrams, *supra* note 122. See also LUSKIN SCHOOL OF PUBLIC AFFAIRS, *supra* note 3, at 1 ("[L]ow-income neighborhoods of color will face growing impacts of speculation and displacement by financial actors with greater, more immediate access to capital.").

124. YARD & Co., COMMUNITY DEVELOPMENT CORPORATIONS + COVID 19 (2020), <https://www.buildwithyard.com/blog/2020/4/10/community-development-corporations-covid-19>.

C. Affirmatively Furthering Fair Housing

When it enacted the federal Fair Housing Act in 1968, Congress required all executive departments and agencies to administer housing and urban development programs and activities “in a manner affirmatively to further the purposes of [the Fair Housing Act].”¹²⁵ This provision of the Act remained mostly unenforced and dormant until 2015, when the U.S. Department of Housing and Urban Development (HUD) resurrected the requirement.

By using its regulatory authority to enact the “Affirmatively Furthering Fair Housing Rule,” HUD created a system of accountability for states and local jurisdictions receiving federal funds, intended to ensure availability of affordable housing to communities and individuals impacted by unlawful housing discrimination, and that they take “meaningful actions that overcome patterns of segregation and foster inclusive communities.”¹²⁶ Central to the Rule is the requirement that states and local jurisdictions receiving federal housing and community development dollars conduct an “Assessment of Fair Housing” (AFH). The AFH is at its core a planning document informed by community input and regional data and incorporated into corollary planning documents, requiring documentation of race inequities in housing and mitigation strategies.¹²⁷

Unfortunately, when then-incoming HUD Secretary Ben Carson referred to this rule as “social engineering,” it signaled to housing advocates and activists that the 2015 Rule would likely be withdrawn, and it eventually was.¹²⁸ Spurred by statewide housing advocacy groups, in 2019, California formally adopted the federal requirement, requiring all state public agencies to administer their programs and activities relating to housing and community development in a manner that affirmatively furthers fair housing, prohibiting actions materially inconsistent with the obligation, and further expressly incorporating the federal mandate to affirmatively

125. 42 U.S.C. § 3608(d).

126. 24 C.F.R. § 5.152 (defining “affirmatively furthering fair housing”).

127. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42271 (Aug. 17, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903), <https://www.federalregister.gov/documents/2015/07/16/2015-17032/affirmatively-furthering-fair-housing>.

128. See NAT’L LOW INCOME HOUS. COAL., HUD SUSPENDS ASSESSMENT OF FAIR HOUSING SUBMISSIONS UNTIL AFTER OCTOBER, 2020 (Jan 8, 2018), <https://nlihc.org/resource/hud-suspends-assessment-fair-housing-submissions-until-after-october-2020>; see also Editorial, *Ben Carson’s Disturbing Retreat on Fair Housing*, WASH. POST (Jan. 9, 2020), https://www.washingtonpost.com/opinions/ben-carsons-disturbing-retreat-on-fair-housing/2020/01/09/a2e73c9c-3251-11ea-91fd-82d4e04a3fac_story.html; https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_109.

further fair housing into its Planning and Zoning Law.¹²⁹ As a result of this mandate, every city and county in the state must now include in their general plan housing element a program to affirmatively further fair housing opportunities throughout the community.¹³⁰ As described below, this recent development augments a series of laws California has enacted to combat NIMBYism and assure each jurisdiction in the state accommodates a fair share of the housing need for the region.¹³¹

i. Housing element law

California's housing element law emerged out of the civil rights movement as an attempt to temper local control and affirmatively combat racial segregation. The state has long recognized the role that local governments' land use and planning policies have played in creating, perpetuating, and exacerbating racial segregation, and, since 1980, has required each city and county to create and periodically update a detailed housing element that must be approved by the state. As a mandatory element of the general plan, the housing element serves as a blueprint for future development, requiring each locality to identify, analyze, and commit to programs to meet projected housing needs for all economic segments of the community. Through a regional housing needs assessment (RHNA) process, each city or county in the state is allocated a "fair share" of the region's housing needs, based on the state's assessment of each region's responsibility to accommodate four income levels: very low income, low-income, moderate-income, and above moderate-income households.¹³² Local governments, in

129. CAL. GOV. CODE § 8899.50 (b). The state also creates new obligations under housing element law, including adopting a program that affirmatively further fair housing and promotes housing opportunities throughout the community for protected characteristics; conducting an assessment of fair housing; and preparing the housing element land inventory and identification of sites through the lens of affirmatively furthering fair housing.

130. *Id.* § 65583 (c)(9)(A)(i)-(v); Memorandum from Zachary Olmstead, Deputy Director, Div. Hous. Pol'y Dev., on AB 686 (Apr. 23, 2020), https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/ab686_summarhousingelementfinal_04222020.pdf [hereinafter Olmstead Memo].

131. For a detailed summary of laws that protect affordable and supportive housing, and emergency shelters, in California, see Public Counsel's "Local Zoning Best Practices for Shelter and Transitional and Supportive Housing" Guide (Oct. 2017), <https://homeless.lacounty.gov/wp-content/uploads/2019/02/Public-Counsel-SB-2-Best-Practices-Guide.pdf>; For a comprehensive primer on housing element law, see PUBLIC INTEREST LAW PROJECT, CALIFORNIA HOUSING ELEMENT MANUAL (4th ed. Jan. 2019), *Law, Advocacy & Litigation*, Chapter III, pg. 63, <http://www.pilpca.org/wp-content/uploads/2019/04/PILP-California-Housing-Element-Manual-Law-Advocacy-and-Litigation-4th-Edition-January-2019.pdf> [hereinafter PILP MANUAL].

132. The PILP MANUAL summarizes the civil rights origins of the housing element law in much greater detail. See also CAL. GOV. CODE § 65584(f)(1)-(4) (referencing definitions in HEALTH & SAFETY CODE §§ 50105 (very low-income), 50079.5 (low-income), and 50093 (moderate income)).

turn, are required to demonstrate how they will meet this allocated need in their housing elements.¹³³

Although the housing element law does not require that local governments actually build housing, they must make affirmative efforts to show that their zoning does not inhibit the creation and preservation of housing for lower-income households. Local governments must also demonstrate—through a parcel-specific inventory of sites—that the projected residential development capacity of the sites identified in the housing element can realistically be achieved. In the aggregate, the sites must demonstrate adequate capacity to accommodate all the jurisdiction’s RHNA. This mandate means that the inventory must identify sites zoned with densities sufficient to accommodate multi-family housing for lower-income households, with any barriers to the achievement of that density, including overly restrictive development standards, removed. If the jurisdiction cannot demonstrate adequate sites in its inventory to accommodate the need for lower-income households, it must commit to a program to rezone sites to allow multifamily housing by right, with minimum density and development standards.¹³⁴

The site inventory requirement has been termed “the principal legal weapon to combat exclusionary zoning practices.”¹³⁵ Because localities are required to pre-identify sites for affordable housing in their general plan, there is an opportunity to obtain community buy-in at the jurisdictional planning level. Once the housing element is adopted, the ability to deny affordable housing developments proposed on the sites listed in the inventory is limited, and the law contains a builder’s remedy for affordable projects consistent with the general plan and nevertheless denied. Recent housing element litigation has resulted in consequences to jurisdictions ranging from orders compelling approval of affordable housing developments facing NIMBY opposition, moratoriums on commercial building permits, and payment of significant attorneys’ fees.¹³⁶ Housing element law

133. *See id.* §§ 65300; 65583; 65584 *et seq.*; Cal. Dep’t Hous. & Cmty. Dev., Regional Housing Needs Allocation and Housing Elements (2020), <https://www.hcd.ca.gov/community-development/housing-element/index.shtml>; HOUSING FOR ALL: WESTERN CENTER ON LAW & POVERTY’S AFFORDABLE HOUSING MANUAL at 7.2 (S. Lynn Martinez & Madeline S. Howard eds., Jan. 2017), <https://wclp.org/wp-content/uploads/2017/04/Housing-for-All-Western-Center-on-Law-Povertys-Affordable-Housing-Manual.pdf>.

134. CAL. GOV. CODE §§ 65583(a); 65583(a)(3); 65583.2(a), (b), & (c); 65583(c)(1)(A); 65583.2 (h).

135. PILP MANUAL, *supra* note 131, at 63.

136. CAL. GOV. CODE § 65589.5 (k) contains the builder’s remedy. In *Gamble v. Fullerton* (Orange Cnty. Super. Ct. Case No. 30-2013-00675291), individuals experiencing homelessness sued the City of Fullerton for rejecting a year-round shelter. The case was based on allegations that Fullerton, motivated by discriminatory reasons, failed to establish proper by-right zones, required excessive development standards, and selected a zone for shelters that did not provide a suitable living environment. The claims included violations of the housing element obligation to zone by-right shelter sites (SB 2), inconsistency with the housing element, unlawful land use discrimination, unlawful housing

has been used by advocates over the years to achieve multiple victories in the struggle to assure each jurisdiction meaningfully advances housing for lower-income households.¹³⁷ Yet, for a variety of reasons detailed below, there have been barriers to full utilization of the law to achieve its goal of attaining “a suitable living environment for every Californian.”¹³⁸

ii. Historic, inequitable allocation of regional need

Although there are eighty-eight cities in the County of Los Angeles, a large bulk of the County’s RHNA has historically been assigned to one city: the City of Los Angeles.¹³⁹ Wealthier, more exclusive cities such as Beverly Hills have been allocated miniscule need; while areas such as Los Angeles, with greater population densities overall, and greater levels of rent-burden and overcrowding, have been asked to take on most of the regional housing need. For example, for its 2014–2021 planning period, the City of Beverly Hills was assigned only three units: one very low-income, one low-income, and one moderate-income unit, although the regional planning agency forecasted that the city would gain 300 households and 3,400 jobs.¹⁴⁰ In contrast, in the same period, Los Angeles City was allocated a regional housing need of 82,000 homes. This number represented almost half of the County’s entire need.

discrimination, and disability discrimination. To resolve the case, Fullerton agreed to provide zoning for by-right emergency shelter development and to dedicate one million dollars to rapid rehousing and extremely low-income housing. In *Emergency Shelter Coalition v. San Clemente* (Orange Cnty. Super. Ct. Case No. 30-2014-00758880), a group of advocates for unhoused persons sued the City of San Clemente for failing to adopt an adequate zoning ordinance as required by SB 2. San Clemente allegedly designated city-owned water towers, beach parking lots, civic buildings, and other public facilities to serve as shelter sites. San Clemente’s non-compliance resulted in a court order prohibiting the city from issuing building permits or zoning entitlements in key commercial areas until it complied with state law.

137. Housing element law was uplifted as a national model by the United Nations Committee on the Elimination of Racial Discrimination (CERD). Concluding Observations, at 2, UN CERD/C/USA/CO/6 (Mar. 7, 2008).

138. CAL. GOV. CODE § 65580(f).

139. The Regional Housing Needs Assessment Final Allocation Plan for the period between 2014 and 2021 shows that Los Angeles City was allocated an 82,000 regional housing need, with all of Los Angeles County being allocated a need of 179,000 homes. S. Cal. Ass’n Gov. (SCAG) Fifth Cycle Regional Hous. Needs Assessment Final Allocation Plan, 1/1/2014–10/1/2021 (Aug. 29, 2012), <https://scag.ca.gov/sites/main/files/file-attachments/5thcyclefinalrhnaplan.pdf?1602185724>.

140. City of Beverly Hills General Plan, 2014–2021 Housing Element A40–A41, <http://www.beverlyhills.org/cbhfiles/storage/files/1198609286369206648/BeverlyHills20142021HousingElementCombinedAppendices.pdf> (last visited Dec. 14, 2020); SCAG Regional Transportation Plan Growth (RTP) 2012–2035 Forecast Appendix (adopted Apr. 12, 2012), <http://dev.mwdh2o.com/pdf%202016%20background%20materials%20part%202/Appendix-Growth%20Forecast.pdf> (forecasting 300 new households between 2008 and 2020 and 3,400 new jobs in the same time period). See Next 10, Missing the Mark: Examining the Shortcomings of California’s Housing Goals, at 32, <https://www.next10.org/sites/default/files/2019-06/california-housing-goals-2019-4.pdf> (last visited Dec. 14, 2020).

iii. Inadequate production of lower-income housing

Historically, most jurisdictions have not been building sufficient housing for lower-income households despite the requirements of housing element law.¹⁴¹ Housing element compliance is generally associated with a greater mix of housing types.¹⁴² Indeed, one 2004 report notes that compliant jurisdictions “supplied between 78 and 92 percent of all multifamily permits issued in California.”¹⁴³ However, multifamily development does not guarantee homes affordable to lower-income households; and lower-income RHNA targets are rarely achieved. Because the system relies primarily on the market to provide housing, distribution of housing built, both by type and location, is largely dependent on the market. And production tends to follow job growth, depending more on the state of the overall economy than on housing element compliance.¹⁴⁴

Additional considerations exist with respect to the regional failure to build and preserve sufficient housing for lower-income households despite the mandates to zone for such sites in housing element law. First, as demonstrated by the Beverly Hills example, the state and regional bodies have failed to accurately and equitably estimate the projected need for housing for lower-income households. Second, while jurisdictions are required by housing element law to identify sites with sufficient zoning capacity to meet their assigned regional housing need, they are not required to ensure the units are in fact built.¹⁴⁵ Third, until recently, jurisdictions were not held to any meaningful requirements to actually preserve or replace existing affordable housing, resulting in hundreds of thousands of affordable homes being lost over the years.¹⁴⁶ Fourth, the law’s requirement to identify

141. NEXT 10, MISSING THE MARK: EXAMINING THE SHORTCOMINGS OF CALIFORNIA’S HOUSING GOALS, <https://www.next10.org/sites/default/files/2019-06/california-housing-goals-2019-4.pdf> (last visited Dec. 14, 2020).

142. *Id.*

143. Status of Housing Elements in California, 2004 State Department of Housing and Community Development report to the legislature.

144. Paul G. Lewis, *California’s Housing Element Law, The Issue of Noncompliance*, PUB. POL’Y INST. CAL. 67 (2003).

145. CAL. GOV. CODE §§ 65583, 65583.2. Note that, in 2017, California adopted SB 35 (Wiener), codified at CAL. GOV. CODE § 65913.4, requiring local streamlining of approvals for projects consistent with objective zoning standards providing some affordable housing. SB 35 qualifying projects are exempted from environmental review; this streamlining is only required of localities that have not met their RHNA. Prior to SB 35, there was no real consequence to not meeting the RHNA; now, with SB 35, localities that have not met their RHNA are required to give up local control over certain approvals, which theoretically creates a new incentive for localities to allow building.

146. See *supra* note 65. Housing elements must include mandatory programs to “[c]onserve and improve the condition of the existing affordable housing stock,” but the statute does not require prevention of loss. CAL. GOV. CODE § 65583(c)(4). The statute still creates an important organizing and advocacy opportunity. See PILP MANUAL, *supra* note 131, at 77 (“Implementation actions to conserve existing affordability must address demolition and conversion of units and can include requirement of replacement units; and “this subdivision provides an opportunity for communities to address displacement, including actions to control demolitions and conversions (including condominium

an inventory of adequate sites—effectively equating to minimum densities of between twenty and thirty units an acre in the Los Angeles region—does not go far enough.¹⁴⁷ Some advocates argue that the default densities are too low to assure feasibility of affordable development (the twenty unit per acre defaults in suburban jurisdictions being particularly problematic). Even more significantly, until recently, the law did not mandate or otherwise ensure that sites would be reserved for housing for lower-income households, instead assuming density as a proxy for affordability. Fifth, given market dynamics, Wall Street investors, all-cash purchasers, and developers are often able to beat out affordable developers and acquire feasible sites more quickly.¹⁴⁸ This land is then no longer available for affordable or supportive housing.

Finally, building housing for lower-income populations requires public funding and political will.¹⁴⁹ Between 2008 and 2017, California saw a sixty-nine percent decline in funding for affordable housing.¹⁵⁰ The 2012 elimination of redevelopment agencies meant loss of California's second largest source of affordable housing financing.¹⁵¹ Funding efforts have not

conversions) and requiring relocation benefits and replacement housing for persons displaced.”).

147. Memorandum from Glen A. Campora, Asst. Dep. Director, Div. Hous. Pol’y Dev., Cal. Dep’t Hous. & Cmty. Dev., Default Density Standard Option—2010 Census Update (June 20, 2012), https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/default_2010census_update.pdf.

148. Ngai Pindell, *Fear and Loathing: Combating Speculation in Local Communities*, 39 U. MICH. J. L. REFORM. 543 (2006), <https://repository.law.umich.edu/mjlr/vol39/iss3/5https://jacobinmag.com/2018/11/capitalism-affordable-housing-rent-commodities-profit>; see also LUSKIN SCHOOL OF PUBLIC AFFAIRS, *supra* note 3 (“After the 2008 financial crash, Wall Street firms were able to enter the residential real estate market at a previously unseen scale— buying up single-family homes and renting them out at high prices with unnecessary fees, often to the same people who had lost their homes . . . It is likely that Wall Street firms will act similarly in response to the Covid-19 crisis. . . . Wall Street stakeholders and firms are strategically positioned to buy up more housing in cities across the country.” (citations omitted)).

149. See Letter from Am. Plan. Ass’n Cal. Chap., *Notice of Support If Amended, to Senate Transp. & Hous. Comm.* (June 18, 2018), <https://www.apacalifornia.org/wp-content/uploads/2018/07/AB-1771-Support-STH-6-18-2018.pdf> (noting that without coupling funding for very-low, low-income and moderate-income housing with the RHNA process, the “goal of building enough housing to meet the RHNA allocations is not achievable”).

150. Ray Pearl, *California’s Affordable Housing Crisis Must Be Addressed*, SACRAMENTO BEE (Jan. 27, 2017), <http://www.sacbee.com/opinion/op-ed/soapbox/article128749824.html>; see also MCKINSEY GLOBAL 2019 *supra* note 29, at 49 (noting that, since 2008, cuts in federal and state funding have reduced investment in affordable housing in LA County by more than \$496 million annually, a drop of seventy percent).

151. PUBLIC COUNSEL, *GETTING THERE TOGETHER: TOOLS TO ADVOCATE FOR INCLUSIVE DEVELOPMENT NEAR TRANSIT* 13 n.74 (2012), http://www.publiccounsel.org/tools/publications/files/TOD_Advocates_Guide.pdf.

generated the amounts needed to address generational failures to accommodate and preserve housing for lower-income households. And while some jurisdictions have adopted measures to ensure affordable housing is included in market-rate developments (e.g., inclusionary housing), the private sector has largely failed to build affordable homes without such incentives or mandates.¹⁵²

But where one lives is not prescribed solely by zoning. Housing access, affordability, and accessibility are dictated by fundamental questions regarding land ownership, resource distribution, the need for regulation of Wall Street, intergenerational wealth, and a host of other factors, including the overarching effects of institutionalized racism.¹⁵³ Housing element law can be viewed as one important tool of many in a needed arsenal to combat housing inequality because of its emphasis on dictating use of land to match housing needs by income level—which correlates with race in California. As described below, recent reforms to the law that center on the needs of lower-income populations also address some of the concerns with the law's ability to preserve sites for affordable housing.

iv. Housing element reforms

In 2017, the California state legislature passed a historic bill package that increased affordable housing funding, streamlined development, and strengthened the housing element law. Amendments to housing element law further unlocked the law's potential to achieve more equitable distribution of housing for lower-income populations across the region.¹⁵⁴ In part, as described below, these amendments required jurisdictions to assess the ultimate use of sites (e.g., whether sites designated in the inventory to meet the lower-income RHNA are in fact used for that purpose) and mandated that affordable housing be built on sites in the inventory meeting certain criteria.

152. For a discussion on inclusionary zoning, see Vinit Mukhija et al., *Can Inclusionary Zoning Be an Effective and Efficient Housing Policy?*, 32 J. URB. AFFS. 229, 230 (May 2010); see also MCKINSEY GLOBAL, *supra* note 29, at 30 (noting that developers in Los Angeles today must charge about \$3,000 for a standard (970-square-foot) unit; these rents would be out of reach for anyone making less than 175 percent of the area median income).

153. Diana Budds, *Will Upzoning Neighborhoods Make Homes More Affordable?*, CURBED (Jan. 30, 2020), <https://archive.curbed.com/2020/1/30/21115351/upzoning-definition-affordable-housing-gentrification>.

154. NAT'L LOW INCOME HOUS. COAL., FROM THE FIELD: CALIFORNIA LEGISLATURE SIGNIFICANTLY EXPANDS HOUSING FUNDING (Sept. 18, 2017), <https://nlihc.org/resource/field-california-legislature-significantly-expands-housing-funding>.

The 2017 Bill Package included Senate Bill 166 (Skinner)¹⁵⁵ and Assembly Bill 1397 (Low).¹⁵⁶ Senate Bill 166 requires rezoning where an existing site in the inventory was originally dedicated for lower-income housing, but used for another purpose, unless the jurisdiction has identified sufficient capacity elsewhere in its inventory to meet its need for lower-income housing. And Assembly Bill 1397 gave additional force to the site inventory requirement by adding greater specificity on the issue of whether and how sites with existing uses can be included in the inventory for proposed redevelopment based on their realistic likelihood of being developed. It also added one-for-one replacement and twenty-percent inclusionary housing requirements on certain sites based on their prior uses.¹⁵⁷ These changes, particularly the inclusionary and replacement requirements in AB 1397, are quite consequential: if implemented and enforced meaningfully, they may begin to address some of the major concerns outlined above with housing element law failing to ensure sites are preserved for lower-income households.

v. Regional housing needs assessment reform

The 2017 changes to housing element law did not ultimately address the inequitable allocation of the regional housing need as between suburban and urban jurisdictions in the Southern California region. In 2018, the Legislature took up RHNA reform by requiring the state, its regional bodies, and local governments to identify RHNAs, create allocation plans, and implement production goals through a lens of affirmatively furthering fair housing; in other words, to act in ways that are materially consistent with fair housing goals and strategies.¹⁵⁸ To ensure against perpetuating overconcen-

155. Cal. Legis. Info., SB-166 Residential Density and Affordability, Legis. Counsel's Dig. (Sept. 29, 2017), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB166.

156. PUBLIC INTEREST LAW PROJECT, AB 1397: HOUSING ELEMENT LAW SITE IDENTIFICATION STRENGTHENED (Jan. 2018), <http://www.pilpca.org/wp-content/uploads/2018/04/PILP-Memo-AB-1397-Summary-Housing-Element-Sites.pdf>.

157. Shashi Hanuman, Overview of Selected Amendments to Housing Element Laws in 2017 Bill Package, APA L. A. Powerpoint Presentation, <https://apalosangeles.org/wp-content/uploads/AB-1397-and-SB-166.pdf>; see PILP MANUAL, *supra* note 131, at 53 ("AB 1397 creates additional requirements for jurisdictions seeking to rely on sites that have current residential uses, or where housing was demolished within the last five years. Specifically, sites that have, or in the past five years had, (1) deed-restricted affordable housing for low- and/or very low-income households, (2) rent-controlled housing, or (3) housing occupied by low- or very low-income households, are subject to the replacement housing requirements described in the Density Bonus Law. (§§ 65583.2(g)(3); 65915(c)(3).)").

158. AB 1771 (CAL. GOV'T CODE §§ 65584, 65584.01, 65584.04, 65584.05, 65584.06). *Affirmatively furthering fair housing* is defined as "taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in

tration of affordable housing in certain areas, the RHNA allocation process must now meet the objective of ensuring a “lower proportion of housing need to an income category when a jurisdiction already has a disproportionately high share of households in that income category.”¹⁵⁹ Accordingly, wealthier suburban jurisdictions now have increased total RHNA, and greater allocations of their RHNA to lower-income households as compared to prior planning cycles. For example, due to RHNA reform, Beverly Hills now has an allocated RHNA of over 3,000 units, over 1600 of which are allocated for lower-income households.¹⁶⁰

For housing elements, RHNA reform combined with California’s new obligation to affirmatively further fair housing means that all jurisdictions must now identify sites for lower-income households dispersed throughout the community. Site allocation should “serve the purpose of replacing segregated living patterns with truly integrated and balanced living patterns.”¹⁶¹ Multi-family housing sites designated for lower-income households are not to be concentrated in lower resource or high poverty areas. If included in those areas, additional programs are recommended, such as “place-based strategies that create opportunity in areas of disinvestment (such as investments in enhanced infrastructure, services, schools, jobs, and other community needs).”¹⁶²

vi. Looking forward

The role that suburban communities have played in the politics of exclusion cannot be discounted.¹⁶³ Imbedding the mandate to affirmatively further fair housing in California Planning and Zoning Law strengthens California’s housing element law and requires each of the eighty-eight cities in Los Angeles County—including suburban, historically exclusionary jurisdictions—to affirmatively grapple with overcoming patterns of

access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.” CAL. GOV’T CODE § 8899.50 (a)(1). This definition is taken directly from the 2015 HUD Rule. 24 C.F.R. § 5.152.

159. PILP MANUAL, *supra* note 131, at 2.8.

160. SCAG Fifth Cycle Regional Hous. Needs Assessment Final Allocation Plan, *supra* note 137.

161. Dep’t Hous. & Cmty. Dev. (Apr. 23, 2020) Technical Assistance Memo at 6.

162. *Id.*; *See also* AB 686 Summary of Requirements in Housing Element Law Government Code Section 8899.50, 65583(c)(5), 65583(c)(10), 65583.2(a). Olmstead Memo, *supra* note 130.

163. *See* Mallach, *supra* note 64 (“As many people have pointed out and extensively documented since the 1960s, suburban municipalities are all about zoning exclusion. Indeed, quite a few were created for just that reason. Vast amounts of suburban land are zoned for commercial and industrial uses, well beyond the potential need or demand. Multifamily housing is allowed sparingly, if at all.”); *see also* Allan Mallach, *Densifying Suburbs Is the Better Path to Housing Affordability*, SHELTERFORCE (Aug. 10, 2020).

segregation and foster inclusion in development and implementation of their 2021 housing elements.

With resources to monitor and enforce the law, as amended, it represents a powerful tool to help eradicate exclusionary barriers, to protect and preserve existing affordable housing and protect tenants at risk of displacement, and to ensure that limited land is used effectively to address the housing crisis by intentionally preserving it for lower-income households—disproportionately communities of color—in the Los Angeles region.

Ultimately, to be of service, these planning processes and reforms must center the people who have traditionally been excluded from opportunity. By law, jurisdictions must make a “diligent effort” to achieve public participation of all economic segments of the community in development of their housing elements.¹⁶⁴ How strongly these mandates are instituted and enforced, such that each of the County’s eighty-eight cities adequately plan and provide for their fair share of housing and shelter, will be critical in determining outcomes for the region.

D. Racial Impact Analysis

Housing element enforcement is one tool in the arsenal needed to ensure equal opportunity and stability to communities of color. Fair housing is also critically dependent on federal, state, and local housing, school, and transportation finance decisions. As described above, defunding of federal and state sources of affordable housing funding over the years has contributed to increasing levels of homelessness, speculative trends allowing land grabs, and tenants continuing to lose their homes at rates faster than such homes can be replaced.¹⁶⁵ All of this disproportionately impacts communities of color in Los Angeles and harms the region as a whole.

California’s affirmative obligation to further fair housing, as it intersects with the fair share housing requirements in housing element law, reflects a step in the direction of race equity, but more can be done. Using California’s AFH as a starting point, state and local jurisdictions should be required to analyze the effectiveness and impacts of proposed legislation from a race equity perspective, as well as commit to binding mitigations, using a race equity impact statement (REIA). REIAs are a strategy to help counter institutional racism in policy making and advance the goal of race equity.¹⁶⁶ They

164. CAL. GOV’T CODE § 65583(c)(8).

165. Prior to the pandemic, an estimated 500,000 tenants in California faced eviction every year. AIMEE INGLIS & DEAN PRESTON, CALIFORNIA EVICTIONS ARE FAST AND FREQUENT 5 (May 2018), https://actionnetwork.org/user_files/user_files/000/023/632/original/CA_Evictions_are_Fast_and_Frequent.pdf.

166. RACE FORWARD, RACIAL EQUITY IMPACT ASSESSMENT (2009), https://www.raceforward.org/sites/default/files/RacialJusticeImpactAssessment_v5.pdf.

have been adopted as policy-making tools in some cities and states, as well as in the United Kingdom.¹⁶⁷

On July 21, 2020, the County of Los Angeles gave a nod to this approach in its adoption of an anti-racist agenda that will guide, govern, and increase the County's ongoing commitment to fighting racism in all its dimensions, especially systemic racism experienced by Black residents. Among the directives in the motion is an explicit instruction to "evaluate existing County policies, practices, operations, and programs through a lens of racial equity in order to more effectively promote and support policies that prioritize physical and mental health, housing, employment, public safety, and justice in an equitable way for African Americans."¹⁶⁸

A recognition of the benefits of a race equity analysis, as well as the risks when race-specific data are not collected and disseminated, is found in a recent Housing Matters article:

"What gets measured and *explicitly named* gets addressed." When we, as translators, don't apply a racial equity lens to analyze housing policy and fail to include racially disaggregated data, we have the potential to break a key link that policymakers rely on to understand, acknowledge, and address racial inequities in housing policy and practice and risk obscuring and perpetuating structural racism."

Data should be "framed in a way that explicitly names and explores how structural racism causes these inequities," not in isolation. This, combined with an in-depth understanding of the specific housing and neighborhood experiences of Black, Indigenous, and People of Color, can help in the development of "targeted, antiracist policy solutions" and make meaningful progress toward racially equitable housing outcomes."¹⁶⁹

A thoughtfully structured race-equity impact analysis would ensure that the needs and perspectives of historically excluded populations come first in developing strategies to address housing inequities and crises. It would acknowledge the role of structural racism and incorporate BIPOC to lead solutions, including remedying harms caused, revisiting ineffective systems, and creating equitable pathways to future opportunities for all.

167. *Id.* at 1 (describing adoption of racial justice equity impacts in Seattle and King County, Wash.; a proposed racial impact process in St. Paul, Minn.; studies of racial and ethnic impacts of all new sentencing laws in Iowa and Connecticut; and a twenty-year-old national policy requiring racial impact assessments by all public agencies in the United Kingdom).

168. L.A. Cnty., Motion by Supervisor Mark Ridley-Thomas, Establishing an Anti-racist Los Angeles County Policy Agenda (July 21, 2020), <https://ceo.lacounty.gov/wp-content/uploads/2020/07/Motion-Establishing-An-Antiracist-LA-County-Policy-Agenda-7.21.20final.pdf>.

169. Some banks and intermediaries have also noted the need for race-specific strategies: AFFORDABLE HOUS. FIN., *A Call to Address Racial Inequity in Affordable Housing*, <https://www.housingfinance.com/finance/a-call-to-address-racial-inequity-in-affordable-housing> (last visited Dec. 17, 2020).

California has already committed to a race-equity lens by adopting the obligation to affirmatively further fair housing. We can create greater consistency and alignment by requiring policymakers to use the AFH data and conduct REIAs on proposed housing legislation. By combining recognition of the past impacts of structural racism and systems of inequity and oppression with race- and place-specific solutions, REIAs can help ensure that no one is left out as we strive to create healthy communities for all.

Conclusion

The United States is having a long overdue reckoning with systemic racism. During a global pandemic, several incidents of officer-involved murders of Black Americans including George Floyd and Breonna Taylor rose to national headlines, sparking outcry and protest. This, combined with pandemic's toll on BIPOC communities, has elevated long-standing conversations about structural racism and disparities in policing, health, housing, education, and employment. The theft of opportunities for BIPOC to build wealth, to maintain their health, and to build economic opportunities has had a devastating impact on the country.

Existing narratives, systems, and strategies have not been working. The market is not producing housing affordable to low-income communities and communities of color in the places that we need it, and we are rapidly losing existing affordable homes and the cultural diversity and vibrancy that Los Angeles is known for. An equitable recovery demands that we not fall back to the status quo. It demands that we rethink dominant narratives, including the use of an overly simplistic supply and demand narrative.

A race- and place-conscious production approach involves a commitment to community-led planning where communities most impacted by racist agendas of the past can acquire land, and inform, design, and lead the solutions for their neighborhoods, as demonstrated in diverse areas such as Boyle Heights, Little Tokyo, Vernon Central, and South LA, and as will be necessary as cities in the Southern California region begin to update their housing elements in 2021. Such an approach will advance development equitably, rather than shutter development entirely.

It also involves commitments to *prioritizing* enhanced tenant protections and keeping tenants housed; building sufficient housing affordable to lower-income populations; ending criminalization of poverty; protecting civil rights of those that are both housed and unhoused; using public land for public good; investment in previously disinvested communities; express strategies to combat institutionalized racism; and equity in employment and education structures and wages. And it will require all jurisdictions to take seriously their obligation to affirmatively further fair housing through adoption and implementation of meaningful housing elements in 2021.

A holistic, race- and place-conscious approach recognizes that people do not live in units. They live in homes, neighborhoods, and communities. As the work and advocacy of ACT-LA and its members demonstrate, such an approach helps ensure that voices from historically excluded communities are heard in the design of their communities—and that the designs are successful. It is a recipe for inclusion, equity, and growth for all.

Building a More Equitable Land Use Regulatory System: Toward a Twenty-First-Century Zoning Enabling Act

Brian J. Connolly & David A. Brewster***

Abstract.....	493
Essay	494
I. The Standard State Zoning Enabling Act.....	494
A. Demographic Shifts in the Early Twentieth Century	494
B. Zoning’s Emergence.....	495
II. Expansion of the Zoning Power: <i>Euclid</i> to the Present	497
III. Zoning’s Legacy of Exclusion.....	498
IV. A Standard State Zoning Enabling Act for Equity and Affordability	500
Conclusion	501

Abstract

In 1922, the U.S. Department of Commerce issued its first Standard State Zoning Enabling Act, a model law authorizing local governments to engage in land-use regulation. Authored during a period of rapid industrialization in U.S. cities, as well as high rates of European immigration and the Great Migration of Black Americans from the rural South to Northern industrial cities, the Act delegated to local governments the power to regulate and direct growth within their borders. The Act, last updated in 1926, has proven durable in its first century, as its principles and language are, even today, found in the zoning enabling laws of nearly every state. However, the broad power conferred to local governments under the Act—to engage in land use regulation for broad and undefined general welfare purposes such as maintenance of community character and property values—has brought about serious negative consequences for housing affordability, racial equity, and access to opportunity. This essay argues that a twenty-first-century zoning enabling law, focused on ameliorating high housing costs, addressing racial segregation, and providing access to opportunity for all communities, is needed for land use planning and regulation to respond to one of our most urgent social crises. The essay discusses the origins of the Standard State Zoning Enabling Act and its adoption into state laws; explains how zoning has been used to systematically segregate and preclude non-white and low-income communities from accessing economic opportunity; and offers suggestions for how an updated zoning enabling law could direct local governments toward more equitable land use regulations.

*Attorney, Otten Johnson Robinson Neff + Ragonetti, P.C., Denver, Colorado; Adjunct Professor of Law, University of Colorado Law School, Boulder, Colorado; Adjunct Professor of Law, University of Denver Law School, Denver, Colorado.

** Attorney, Otten Johnson Robinson Neff + Ragonetti, P.C., Denver, Colorado.

Essay

In 2020 and preceding years, U.S. media outlets regularly reported decreasing housing affordability, as the rise in home prices vastly exceeded wage growth. Concurrently, widely reported incidents of police brutality in major cities have revealed continued disparities in opportunity between white and non-white racial groups, and between rich and poor. These disparities are geographic in nature, a product of physical segregation according to race and income. Taken together, these storylines imply that the U.S. housing market has failed to produce adequate, affordable shelter in places that provide quality education and job opportunities for all people.

In debates as to the causes of and solutions to these dual crises, our highly localized land use regulation system—primarily zoning—has come into focus. This fractured system is a product of early twentieth-century policymaking informed by rapid population and industrialization in diversifying cities, and wealthy white families' desire to remove themselves from it. The Standard State Zoning Enabling Act (SSZEA), published by the U.S. Department of Commerce, was the foundational model law—adopted by nearly every state—that expanded the powers of local government to regulate all manner of land use. The result is a patchwork of local regulations that have, unfortunately, distorted housing development and created serious social and economic disparity.

Since the SSZEA's publication in 1926, no single national crisis has been so tied to local land-use regulation as the current combined crises of housing affordability and segregation. With no incentive to do otherwise, and with the broad authority envisioned by the SSZEA, local governments continue to use their zoning laws to thwart national, state, and regional goals of increasing housing affordability and desegregation. Just as rapid urbanization, social developments, and technological change preceded the original development of the SSZEA, the structural challenges faced by the United States today demand a revisiting of this seminal, yet highly pervasive and effective model law.

This essay proceeds in four parts. Part I discusses the historical origins of the SSZEA in the early 1920s and outlines its general structure. Part II examines zoning's development, including the promulgation of increasingly restrictive and intrusive zoning laws, since the SSZEA's publication and the limited legal protections against broad local zoning authority. Part III discusses zoning in the context of the current housing affordability crisis and national evaluation of racial segregation. Finally, Part IV suggests a need for a new SSZEA to guide state governments and, in turn, localities in creating more inclusive land-use regulation structures.

I. The Standard State Zoning Enabling Act

A. *Demographic Shifts in the Early Twentieth Century*

From the end of the Civil War into the early twentieth century, Black Americans fled the decimated post-war South searching for work, safety, and

community.¹ Many Black migrants settled in Northern cities, where industrial development provided employment opportunities.² During that same period, between 1900 and 1915, nearly fifteen million immigrants moved to the United States, largely arriving from non-English speaking European countries and primarily settling in urban areas.³

Population growth and diversification combined with industrialization and a new mode of transportation—the automobile—caused rapid change in American cities. By the 1920s, American cities were viewed as “gigantic hoppers” devouring the human spirit, with high pollution, more automobile traffic, and increasing congestion.⁴ Regardless of whether this observation was accurate, it is certain that, at that same time, American cities experienced greater racial and ethnic diversity than ever before.⁵

In response to this growth—and particularly the influx of Black residents—exclusion became a common feature of local governance. Although race-based municipal land use regulations were invalidated by the U.S. Supreme Court in 1917,⁶ local laws continued to contain exclusionary features.⁷ Combined with private restrictive covenants, these measures aimed to ensure that white neighborhoods and Black neighborhoods remained segregated.⁸

B. Zoning’s Emergence

In this context, in 1920, U.S. Secretary of Commerce Herbert Hoover, assembled and appointed an advisory committee to examine land-use regulation.⁹ Responding to urban population growth and its impacts,¹⁰ that committee formally adopted and issued the first SSZEA. Section 1

1. RICHARD ROTHSTEIN, *THE COLOR OF LAW* 39 (2017); Stewart E. Tolnay, *The African American “Great Migration” and Beyond*, 29 ANN. REV. SOC. 216 (2003).

2. Tolnay, *supra* note 1, at 216.

3. LIBRARY OF CONGRESS, IMMIGRANTS IN THE PROGRESSIVE ERA, <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/immigrants-in-progressive-era> (last viewed Oct. 13, 2020).

4. Lewis Mumford, *The Intolerable City: Must It Keep on Growing?*, HARPER’S MONTHLY MAG. 283, 293 (Feb. 1926); NAT’L HUMANS. CTR., BECOMING MODERN: AMERICA IN THE 1920s (last viewed Dec. 3, 2020), <http://americainclass.org/sources/becomingmodern/modernity/text5/text5.htm>.

5. LIBR. CONG., CITY LIFE IN THE LATE 19TH CENTURY, <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/city-life-in-late-19th-century> (last viewed Dec. 3, 2020).

6. *Buchanan v. Warley*, 245 U.S. 60 (1917).

7. ROTHSTEIN, *supra* note 1, at 41–48.

8. Neda N. Brisport, *Racism & Power: The Inaccessibility of Opportunity in the Educational System in the United States*, 70 NAT’L LAW. GUILD REV. 17, 23 (2013); Paul D. Carrington, *Moving*, 4 GREEN BAG 2D 451 (2001); David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 864 (1998).

9. Richard H. Chused, *Euclid’s Historical Imagery*, 51 C.W.R. L. REV. 597, 598–99 (2001).

10. *Id.* at 598–602.

of the SSZEA conferred broad powers upon local governments “[f]or the purpose of promoting health, safety, morals, or the general welfare of the community”¹¹ The comments to the SSZEA confirm that the terms *public health, safety, morals, and general welfare* were intentionally broad.¹² At its core, the SSZEA recommended conferring authority on local governments to divide their territory into zoning districts as “may be deemed best suited to carry out the purposes of the act,”¹³ assuming that the districts would be fixed for the purpose of keeping out undesirable development.¹⁴ To avoid haphazard regulation, the SSZEA also specified that the division of zoning districts must occur “in accordance with a comprehensive plan.”¹⁵

In addition, the SSZEA created procedures for establishing and administering zoning laws. Local public hearings were central features of the adoption and amendment of zoning laws.¹⁶ Further, the SSZEA also contemplates the establishment of both a zoning commission and a board of adjustment to provide recommendations regarding zoning amendments and to review variance requests, respectively.¹⁷

By 1930, thirty-five states adopted legislation based on the SSZEA,¹⁸ and, in 1996, the model law’s provisions were in effect, in some form, in forty-seven states.¹⁹ The SSZEA continues to inform the land use regulatory structure of most states and local governments today.

It is understandable why the SSZEA continues to be an influential model for U.S. land-use regulation. Nearly three-quarters of states adhere to “Dillon’s Rule,” which provides that local governments may act only where state law explicitly authorizes local action.²⁰ In these states, enabling acts confer explicit authority required for local government action. By contrast, in non-Dillon’s Rule states, local governments may take any action that does not conflict with state law. In these states, enabling acts unambiguously provide that local government powers conferred thereunder do not conflict with state law. In either circumstance, model acts are an important

11. U.S. DEP’T COM., A STANDARD ZONING ENABLING ACT § 1 (1926), available at https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growing_smart/pdf/SZEnablingAct1926.pdf [hereinafter SSZEA].

12. *Id.* § 1.

13. *Id.* § 8.

14. Edward J. Sullivan, *Out of the Chaos: Towards A National System of Land-Use Procedures*, 34 URB. LAW. 449, 452 (2002).

15. SSZEA, *supra* note 11, § 3.

16. *Id.* §§ 4–5.

17. *Id.* §§ 6–7.

18. 1 STUART MECK, MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS, PLAN. ADVISORY SERV. REP. NO. 462/463, 2 (1996).

19. *Id.*

20. *City of Clinton v. Cedar Rapids & M.R.R. Co.*, 24 Iowa 455, 475 (1868); MATTHEW SELLERS, COUNTY AUTHORITY: A STATE BY STATE REPORT, NATIONAL ASSOCIATION OF COUNTIES (Dec. 2010).

tool providing uniform and widely applicable frameworks authorizing local government action.

II. Expansion of the Zoning Power: *Euclid* to the Present

In the same year that the final SSZEA was published, the U.S. Supreme Court, in *Village of Euclid v. Ambler Realty Co.*, upheld zoning's constitutionality.²¹ There, the subject zoning code contained six classes of use districts, including districts allowing different types of housing.²² In its opinion, the Court espoused the virtues of single-family neighborhoods while decrying the alleged light-blocking, congestion-causing, and safety-defeating qualities of apartments.²³ With a nod to the underpinnings of the SSZEA, the Court concluded that zoning was a valid act of governmental authority inasmuch as it promoted "health, safety, morals, or general welfare."²⁴ In validating zoning under those pretenses, the Court ensured the SSZEA's longevity.

Since *Euclid*, the SSZEA's framework has provided the basis for expanding zoning to regulate not just the *use* of land, but *who* may use it and how they may do it. The Supreme Court has endorsed highly subjective aesthetic regulation²⁵ and concluded that zoning laws can define the word *family* to cap the number of individuals living together.²⁶ State and lower federal courts have further green-lighted expansions of the police power, finding, for example, that infrastructure limitations, character considerations, and even population control can support exclusionary zoning.²⁷ Additionally, local governments enjoy broad authority to impose exactions and fees on housing development.²⁸ And courts have universally rejected challenges to procedural requirements placed on zoning applicants, like special-use permits and discretionary site-plan reviews,²⁹ and popular referenda.³⁰

21. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

22. *Id.* at 380.

23. *Id.* at 394–95.

24. *Id.* at 395.

25. *See Berman v. Parker*, 326 U.S. 54 (1954).

26. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974).

27. *See, e.g., Golden v. Plan. Bd. of Ramapo*, 285 N.E.2d 291 (N.Y. 1972); *Const. Indust. Ass'n of Sonoma Cnty. v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975); *Schenck v. City of Hudson*, 113 F.3d 590 (6th Cir. 1997).

28. *See, e.g., Timothy M. Mulvaney, The State of Exactions*, 61 WM. & MARY L. REV. 169, 219 (2019).

29. *See, e.g., City of Colorado Springs v. SecurCare Self-Storage, Inc.*, 10 P.3d 1244, 1251–52 (Colo. 2000); *see also Barlow v. Plan. Bd. of Wayland*, 832 N.E.2d 1161, 1168 (Mass. App. 2005); *Town of Durham v. Cutter*, 428 A.2d 904, 908 (N.H. 1981); *Naumes, Inc. v. City of Chelan*, 339 P.3d 504, 507 (Wash. App. 2014).

30. *See, e.g., City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679 (1976); *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 571 (Cal. 1980); *R.G. Moore Bldg. Corp. v. Comm. for the Repeal of Ordinance R(C)-88-13*, S.E.2d 587, 592 (Va. 1990); *Taylor Properties, Inc. v. Union Cnty.*, 583 N.W.2d 638, 643 (S.D. 1998). In addition, many municipalities

Today, enabling laws based on the SSZEA combine with relatively modest constitutional limitations to grant many local governments considerable regulatory latitude. In many jurisdictions, that latitude results in exclusion and high costs on new housing. Although the Equal Protection Clause and the Fair Housing Act³¹ protect against overtly discriminatory practices,³² little stands in the way of zoning that favors nuclear families and wealthy, whiter populations. *Euclid's* imagery of apartment-free, single-family residential districts has guided and enabled American planning, regulation, and development for nearly a hundred years. Local governments, under the authority contemplated by the SSZEA, play an outsize role in fostering this pattern by, in many cases, zoning all or the majority of their lands for single-family detached housing.³³

III. Zoning's Legacy of Exclusion

This sprawling, low-density development of U.S. metropolises has been highly consequential. Demographic data and academic literature confirm that restrictive zoning policies enacted and enforced by local governments compound racial segregation patterns and bear much responsibility for the current housing affordability crisis.³⁴ These zoning laws include everything from prohibitions on multi-unit housing and accessory dwelling units, to large minimum lot sizes, large minimum house sizes, setback and open-space requirements, and procedural burdens on new housing developments. A 2018 study revealed a strong correlation between housing cost and the degree of land use regulation.³⁵ Unsurprisingly, this same study showed that higher-income households were likely to exist in highly regulated localities.³⁶ In other words, restrictive zoning is less responsive to increased demand, produces higher home prices, and favors wealthier households.³⁷ It follows that racial-minority households, which tend to be

enforce additional requirements, such as participation in neighborhood meetings as a condition to approval, which courts have noted without challenge. *See, e.g.,* *Citizens for Responsible Dev. v. City of W. Hollywood*, 45 Cal. Rptr. 2d 917 (Ct. App. 1995); *Campbell v. Kildew*, 115 P.3d 731, 734 (Idaho 2005); *75-80 Properties, L.L.C. v. Rale, Inc.*, 236 A.3d 545, 570 (Md. 2020).

31. 42 U.S.C. §§ 3601–3631 (2020).

32. *See, e.g.,* *Avenue 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 502 (6th Cir. 2016); *MHANY Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016).

33. *See, e.g.,* Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin* (Jan. 13, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3472145 (observing that, in a selected set of U.S. suburbs, ninety-one percent of land was zoned for single-family detached houses).

34. *See Zoning and Affordable Housing*, NAT'L HOUS. CONF., <https://nhc.org/policy-guide/zoning-and-affordable-housing> (last visited Oct. 28, 2020).

35. *See* Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSP. 3, 18 (2018).

36. *Id.* at 19.

37. *See id.*

less wealthy than white households, are likely to be excluded from communities with restrictive zoning.³⁸

Procedural requirements of zoning are also to blame. Administratively cumbersome and discretionary land use processes—common in virtually every local jurisdiction in the United States—increase development costs and deter the creation of new housing.³⁹ While these procedures alone can reduce housing production, they are particularly problematic where they are discretionary, take place in public hearing settings, and give voice to community opponents.⁴⁰

Despite exclusionary zoning's known effects, judicial remedies against these practices are limited. Neutral zoning practices that have the effect of discriminating against racial minorities or poor people are constitutionally permissible,⁴¹ and disparate impact analysis in Fair Housing Act cases faces significant hurdles.⁴² While some states have developed mechanisms for either challenging exclusionary zoning practices or pushing local governments toward more inclusionary practices,⁴³ barriers to implementing these goals remain high and the effect of these policies or judicial doctrines is limited.

Moreover, the law provides local governments remarkably little incentive to reevaluate exclusionary zoning policies—and actually encourages otherwise.⁴⁴ A typical suburban city council, elected by members of the community who ostensibly choose to live in a suburb to avoid urban density, is unlikely to accept new housing development (even where council members recognize the need for it) when the burdens of new housing could just as easily be placed on a neighboring jurisdiction. And, thus, the failings of the local land-use regulatory system to ensure that the market

38. Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDS NOTES, Bd. Gov'ts. FED. RES. SYST. (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm>.

39. Glaeser & Gyourko, *supra* note 36, at 7.

40. NAT'L HOUS. CONF., ZONING & AFFORDABLE HOUS., <https://nhc.org/policy-guide/zoning-and-affordable-housing> (last visited Oct. 15, 2020).

41. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 271 (1977).

42. See Brian J. Connolly, *Promise Unfulfilled? Zoning, Disparate Impact, and Affirmatively Furthering Fair Housing*, 48 URB. LAW. 785, 805 (2016) (citing *Tex. Dep't Hous. & Cmty. Affs. v. Inclusive Cmty. Proj.*, 576 U.S. 519 (2015)).

43. See, e.g., CITY OF PORTLAND, OREGON, CODE § 30.01.120 (2020); SEATTLE MUN. CODE, § 23.49.012 (2020); CITY OF MINNEAPOLIS, MINNESOTA, AMENDED AND RESTATED UNIFIED HOUSING POLICY (effective Aug. 1, 2020), [HTTP://WWW2.MINNEAPOLISMN.GOV/WWW/GROUPS/PUBLIC/@CPED/DOCUMENTS/WEBCONTENT/WCMSP-214877.PDF](http://www2.minneapolismn.gov/www/groups/public/@cped/documents/webcontent/wcmsp-214877.pdf).

44. John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 834 (2019).

can produce sufficient housing—and to allow the construction of housing for lower-income families—necessitates a broader response.⁴⁵

IV. A Standard State Zoning Enabling Act for Equity and Affordability

Nearly a century after its original publication, the combined affordability and segregation crises merit revisiting the SSZEA. The SSZEA's influence among state legislatures and in courtrooms makes it an appropriate laboratory through which to address systemic problems in the land-use regulatory system. Given that most states continue to enforce some version of the SSZEA, a modern SSZEA oriented toward equity and affordability could prove a worthy and influential undertaking. Whether published by a federal agency charged with revisiting the SSZEA, or by an influential non-governmental organization like the American Planning Association or Rocky Mountain Land Use Institute, a modern SSZEA promulgated by an authority of national prominence may catalyze change. Below, we suggest a series of concepts that might be incorporated into the model act. As with any well-considered undertaking, the preparation of a model act should be undertaken with input from experts, and is beyond the scope of this essay.

Recent state-level interventions to address the housing crisis offer guideposts for what a modern SSZEA might entail. Areas of reform have specifically included permissions for accessory dwelling units, limiting the reach of single-family detached zoning districts, encouraging density near transit facilities, limiting parking requirements, and comprehensive planning reforms. For example, California, Oregon, Washington, and Vermont have adopted state law reforms to ensure that accessory dwelling units are broadly allowed in residential areas.⁴⁶

Pro-housing advocacy efforts presently underway in various states could also guide an updated model law. For example, requiring local governments to zone at least a portion of their territory for two-, three-, or multi-family housing and eliminating subjective approval criteria for housing developments would ease restrictions and uncertainty.⁴⁷ Placing density floors on residential uses near transit centers and reducing required vehicular parking are other opportunities to encourage affordable housing development.⁴⁸ Finally, requiring local governments to ana-

45. *Id.* at 875.

46. CAL. HEALTH & SAFETY CODE, § 65583(c)(7) (2020); OR. REV. STAT. § 197.312(5)(a) (2020); WASH. REV. CODE § 43.63A.215(3) (2020); WASH. REV. CODE § 36.70A.400 (2020); VT. STAT. tit. 24, § 4412 (2020).

47. *See, e.g.*, DESEGREGATE CONN., SPECIAL SESSION 2020 (last viewed Nov. 29, 2020), <https://www.desegregatect.org/special20>; COLO. HOUS. AFFORDABILITY PROJECT, OUR PLATFORM (last viewed Nov. 29, 2020), <https://cohousingaffordabilityproject.org/our-platform>.

48. DESEGREGATE CONN., *supra* note 48; COLO. HOUS. AFFORDABILITY PROJECT, *supra* note 48. Increasing affordable housing opportunities in close proximity to transit centers

lyze housing need and plan effective responses—as is presently required in California—would provide greater information on which to base local decision-making.⁴⁹ Streamlining permitting processes and encouraging the development of below-market rate housing through density bonuses are other avenues by which housing development may be facilitated.⁵⁰ Any such reforms should be accompanied by statutory provisions for property owners to enforce enabling laws' limitations.

The incorporation of these concepts into the SSZEA would not itself precipitate a house-building spree or even force local governments to adopt pro-housing zoning laws. It would, however, address significant unevenness in housing processes and policy across states and localities. Although proponents of local authority decry state preemption of local zoning authority, practical benefits exist to state intervention. Perhaps most significantly, revisions to state enabling laws along the lines suggested above would remove some amount of housing decision-making from local elected officials, thus allowing them to avoid a lightning-rod issue and the electoral consequences that follow. Other benefits include more efficiency in development patterns, greater regulatory balance between local jurisdictions, and policy alignment between state goals and local government policymaking.

Conclusion

As was the case when the SSZEA was first promulgated in 1926, the identity of American cities is shifting. There is an undeniable nationwide affordable housing crisis and demand for racial equality. Modern exclusionary zoning practices employed by state and local governments throughout the country not only contribute to these social inequities, they exacerbate them. The regulatory structure rooted in the SSZEA actively incentivizes local government officials to advocate for and govern in accordance with the status quo. The durability of the SSZEA is to be applauded. But where the SSZEA served as the foundation for the previous century of zoning practices throughout the country, a modern version of the SSZEA can do the same today, in a manner that effectively addresses wealth and racial inequality.

would also assist with reducing carbon emissions and combating climate change, U.S. DEP'T TRANSP., PUBLIC TRANSPORTATION'S ROLE IN RESPONDING TO CLIMATE CHANGE (updated Jan. 2019), <https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/PublicTransportationsRoleInRespondingToClimateChange2010.pdf>, issues which also disparately impact minority households, Rachel Baird, *The Impact of Climate Change on Minorities and Indigenous People*, MINORITY RTS. GRP. INT'L (Apr. 2008), <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-524-The-Impact-of-Climate-Change-on-Minorities-and-Indigenous-Peoples.pdf>. Douglas Fischer, *Climate Change Hits Poor Hardest in U.S.*, SCI. AM. (May 29, 2009), <https://www.scientificamerican.com/article/climate-change-hits-poor-hardest>.

49. See *supra* note 47 and accompanying text.

50. YIMBY ACTION, YIMBY ACTION POSITIONS ON CALIFORNIA LEGISLATION, <https://yimbyaction.org/california-legislation> (last visited Nov. 29, 2020).

Excluded and Evicted: The Impact of Mass Incarceration on Access to Housing for Black and Latinx Tenants

*Sarah Carthen Watson**

I. Introduction.....	503
II. Rise of Mass Incarceration.....	504
III. Barriers to Housing Erected by Mass Incarceration	506
A. Overly Restrictive Criminal Background Screening.....	506
B. Nuisance and Crime-Free Ordinances.....	508
IV. Methods for Advocates to Challenge Overly Restrictive Criminal Background Screening and Nuisance/Crime-Free Ordinances.....	512
A. Local Advocacy	512
B. State-Level Advocacy and Preemption	515
C. Litigation	517
V. Conclusion.....	521

I. Introduction

In recent years, enormous swells of activism and scholarship have contributed to a national conversation regarding the impact of policing, police brutality, and mass incarceration on Black bodies in the United States. Specifically, evidence that policing and prison policy have been intentionally designed to control and subjugate Black bodies has redirected much of the conversation towards the injustice of these policies, and the impact of removing Black bodies from societal participation via imprisonment or murder at the hands of police. Fifty years out from the implementation of a set of policies known as “The War on Drugs” that ravaged Black communities, these communities are still reeling from the effects. Not only do people with drug convictions make up the majority of those in prison, but the majority of those people are people of color.¹ Compounded by excessive sentencing practices such as “mandatory minimums, combined with cutbacks in parole release,” the United States prison population exploded between 1980 and 2010.²

In addition to disproportionately incarcerating Black and Latinx people, this country has a documented fear of Blackness as inherently violent and destructive. When encountering unfamiliar Black male faces in particular,

*Associate Counsel, Fair Housing & Community Development Project, Lawyers’ Committee for Civil Rights Under Law.

1. THE SENTENCING PROJECT, CRIMINAL JUSTICE FACTS (2020), <https://www.sentencingproject.org/criminal-justice-facts> (last visited Nov. 5, 2020).

2. *Id.*

white people often have visceral and physical reactions of fear.³ By incarcerating significant numbers of Black and Latinx people, this country has found a way to permanently brand certain communities as dangerous. This branding continues once people are released from incarceration and seek to rebuild their lives by seeking housing and employment. Landlords use excessive and restrictive criminal-background screening practices to exclude tenants with even misdemeanor arrests or dropped charges on their records. Nuisance and crime-free ordinances take advantage of disparities in over-policing and fear of Blackness to penalize tenants with eviction if they reach a threshold of calls for law enforcement or are accused of criminal activity. Both types of policies create real and measurable barriers to housing for Black and Latinx people. Those concerned with this discriminatory racial impact—lawyers, housing service providers, community organizers—have taken many approaches to challenge these policies. Alone, neither local and state advocacy nor litigation can sweepingly eradicate these barriers. It will take a comprehensive strategy, with various stakeholders working together, to ensure that the brand of mass incarceration does not continue to burden those with criminal histories as they seek housing.

II. Rise of Mass Incarceration

Since the 1970s, the United States has deliberately emerged as the world leader in imprisoning its own people. Currently, “there are 2.2 million people in the nation’s prisons and jails—a 500% increase over the last 40 years.”⁴ The War on Drugs’ targeting of Black communities is directly responsible for this increase. This war, first declared by President Richard Nixon in 1971, marked a drastic expansion in federal drug enforcement and, in turn, the prison population.⁵ President Reagan took the War on Drugs to unprecedented heights in the 1980s, where his extensive public fearmongering campaign about the ills of drugs created the environment for harsher drug penalties and zero-tolerance policies.⁶ As a result, not only are there more people in prisons today for drug offenses than for all other offenses in 1980, but the “population under correctional control—on probation or parole—has tripled as well, an increase driven almost entirely by

3. PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 19 (2017) (“When people see black men they don’t know, they have a physical response that is different from their response to other people. Their blood pressure goes up and they sweat more. When a white person sees an unfamiliar black male face, the amygdala, the part of the brain that processes fear, activates.”).

4. THE SENTENCING PROJECT, *supra* note 1.

5. DRUG POLICY ALLIANCE, *A BRIEF HISTORY OF THE DRUG WAR* (2020), <https://drugpolicy.org/issues/brief-history-drug-war> (last visited Dec. 14, 2020) (“He dramatically increased the size and presence of federal drug control agencies, and pushed through measures such as mandatory sentencing and no-knock warrants.”).

6. *Id.*

drug convictions and other nonviolent crimes.”⁷ In waging this war, the federal government, aided by the Supreme Court in chipping away Fourth Amendment protections, flooded local police departments with funds and military style equipment.⁸ Those departments were then permitted by federal law to retain cash and assets recovered in drug cases, which “gave state and local police an enormous stake in the War on Drugs—not in its success, but in its perpetual existence.”⁹

The War on Drugs was not only designed to exist in perpetuity, but it was also designed to specifically target certain communities. The militarized tactics used to wage the War on Drugs have “been employed almost exclusively in poor communities of color.”¹⁰ Despite white people making up the vast majority of those who use and sell illegal drugs, “three fourths of all people imprisoned for drug offenses have been black or Latino.”¹¹ As a result, despite comprising only thirty-seven percent of the United States population, people of color make up sixty-seven percent of the United States prison population.¹² These racial disparities in arrests, convictions, and imprisonment, particularly for drug-related offenses, have created a “vast new racial undercaste—a system of mass incarceration that governs the lives of millions of people inside and outside of prison walls.”¹³

It is important to note that the policing of Black people is not limited to the state. Many white people view the police as their own personal security forces, which can lead to dangerous encounters with law enforcement for Black people doing nothing but simply existing. The recent wave of “Living While Black” cases demonstrate the lengths white people, backed up by the police, are willing to go to police and exclude Black people. The examples are endless: a white woman called 911 on a New York state senator while he was campaigning;¹⁴ two Black men were arrested while waiting for a meeting at a Starbucks Coffee shop;¹⁵ a white hotel employee called the police on a Black woman and her children for using the swimming pool they paid

7. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 62 (2010).

8. *Id.* at 76, 79.

9. *Id.* at 80.

10. *Id.*

11. *Id.* at 100

12. THE SENTENCING PROJECT, *supra* note 1.

13. ALEXANDER, *supra* note 7, at 105.

14. Madeleine Thompson, *She Called Cops When He was Campaigning While Black; He Filed a Bill to Criminalize Racially Biased 911 Calls*, CNN (Aug. 20, 2018, 5:38 PM), <https://www.cnn.com/2018/08/20/us/911-call-bill-trnd/index.html>.

15. Yon Pomrenze & Darran Simon, *Black Men Arrested at Philadelphia Starbucks Reach Agreements*, CNN (May 2, 2018, 10:40 PM), <https://www.cnn.com/2018/05/02/us/starbucks-arrest-agreements/index.html>.

for as guests;¹⁶ and, earlier last year, a white woman called the police on a Black man birdwatching in Central Park when he asked her to leash her dog and was caught on tape lying to the police in claiming that the man had physically attacked her.¹⁷ Not only is the state actively working to subjugate and disenfranchise Black people through over-policing and mass incarceration, but white people are able to harness the power of the criminal justice system to demand “that police set and enforce an entitlement to racial stratification in the form of a white right to exclude.”¹⁸ Particularly when coupled with a nuisance or crime-free ordinance, explained in more detail below, these encounters might be the reason that an individual gets evicted from their home.

III. Barriers to Housing Erected by Mass Incarceration

When someone is released from incarceration, the sentence is often long from over. A criminal conviction, particularly a felony conviction, operates as a branding tool that places that person “into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal.”¹⁹ Society has deliberately set up barriers to education, employment, civic participation, and even housing for those with criminal backgrounds. Moreover, the continual presence of mass incarceration threatens to criminalize people of color at various turns, which can have a direct impact on housing access. Two particularly pernicious examples—restrictive criminal background screening and nuisance/crime-free ordinances—provide stark examples of the grip mass incarceration holds beyond the confines of a cell.

A. Overly Restrictive Criminal Background Screening

Starting with the most straightforward, landlords across the country routinely use overly restrictive criminal background screening to exclude applicants with criminal histories from their properties. Whether done by the landlords themselves, or via a third-party screening company, landlords will set unreasonable parameters for applicants under the guise of protecting other tenants and property. Often, these policies take the form of “blanket bans,” or a complete and outright ban on any applicant who has any kind of criminal history. These bans exclude applicants regardless of the severity of the past criminal behavior, the time elapsed since the conviction, or any evidence of rehabilitation. In addition to outright blanket bans, many landlords impose functional blanket bans using excessive

16. Alisha Ebrahimji, *Hotel Employee Calls Police on Black Family Using the Pool as Guests*, CNN (July 1, 2020, 2:06 PM), <https://www.cnn.com/2020/07/01/us/hampton-inn-black-family-pool-trnd/index.html>.

17. Amir Vera & Laura Ly, *White Woman Who Called Police on a Black Man Bird-Watching in Central Park Has Been Fired*, CNN (May 26, 2020, 4:21 PM), <https://www.cnn.com/2020/05/26/us/central-park-video-dog-video-african-american-trnd/index.html>.

18. Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness As Nuisance*, 69 AM. U. L. REV. 863, 880 (2020).

19. ALEXANDER, *supra* note 7, at 96.

“lookback periods.” A lookback period is the set amount of time, in years, that a landlord will go back in considering criminal backgrounds. While some are more reasonable, such as three or five years, many landlords create functional bans by having lookback periods as long as fifty to ninety-nine years. Others may institute partial bans, such as bans on applicants with any type of felony conviction, which is often seen as more reasonable, despite many felonies being non-violent and the existence of one on someone’s record not likely determining whether they actually pose a risk as a tenant.

No matter the form, any policy that excludes applicants with a criminal history will, by definition, have a disparate impact on Black applicants because Black people are “more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences.”²⁰ In issuing guidance on the use of criminal-background screening, the U.S. Department of Housing and Urban Development (HUD) recognized this impact, explaining that “[b]ecause of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics.”²¹ HUD continued on to state that these types of policies should be evaluated according to a disparate-impact framework, which would require housing providers to show that their screening criteria serves a legitimate interest not served by any other less discriminatory alternative. Without such a justification, the HUD guidance declared that this type of practice would violate the Fair Housing Act.²²

The impact of these types of criminal background screening practices cannot be understated: they make a significant amount of housing unavailable to those with criminal convictions, who are disproportionately Black and Latinx. Again, the disparities among those with involvement with the criminal justice system are extremely stark. When people are then released from custody, being able to find housing is key to being able to establish one’s life. Policies that automatically or functionally exclude those with criminal histories then have a direct and discriminatory impact on the ability of people of color to find housing. For example, a study conducted by the Equal Rights Center in Washington, D.C., found that of the tests the center conducted of various area housing providers using testers with criminal histories, twenty-eight percent “revealed a criminal records screening

20. THE SENTENCING PROJECT, *supra* note 1.

21. U.S. DEP’T HOUS. & URB. DEV., OFFICE OF GEN. COUNSEL GUIDANCE ON APPLICATION OF FHA STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUS. AND REAL ESTATE-RELATED TRANSACTIONS 10 (Apr. 4, 2016).

22. *Id.* (“A discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act.”).

policy in place that may have an illegal disparate impact based on race.”²³ Based on the companies and types of housing that used these policies, the study found that nearly 5,000 units in the Washington, DC area—an area where it is already extremely difficult to find affordable housing, regardless of criminal history—“are unavailable to individuals with any felony conviction from any point in time, and to many individuals with a misdemeanor conviction.”²⁴

These collateral consequences to criminal convictions are, at their core, issues of fairness and justice. Regardless of one’s views regarding the goals of incarceration being punitive versus rehabilitative, it is fundamentally unfair to release someone from incarceration and then place barriers to every basic form of societal reintegration. Coupled with the racial disparities in arrests and convictions, these barriers reinforce racial subjugation by relegating Black and Latinx people with criminal backgrounds to certain neighborhoods, jobs, and positions in society.

B. Nuisance and Crime-Free Ordinances

Nuisance and crime-free ordinances are passed under the guise of keeping neighborhoods safe, with the discriminatory impact of penalizing low-income people of color and survivors of domestic violence. Though they can take various forms, nuisance ordinances generally operate by labelling “conduct associated with a property—whether by resident, guest, other person—a ‘nuisance’ and require or incentivize the landlord to abate the nuisance under threat of various penalties.”²⁵ One version places limits on the amount of calls for law-enforcement services to a particular property or unit. Once a property or unit has met the determined threshold and is declared to be a nuisance property, the city can order the landlord to take any number of abatement measures, including eviction of the tenant. If landlords refuse to abate the nuisance, they are often threatened with criminal or civil fines and suspension and/or termination of rental licenses and occupancy permits. Another common type deems certain activity on the premises as nuisance activity, and a certain number of instances can result in eviction. Often this includes a law-enforcement response or alleged criminal activity on the premises—regardless of whether a citation, arrest, or conviction occurs. Alarming, these ordinances often permit the eviction of tenants “regardless of whether [the] tenant was [a] victim of

23. EQUAL RIGHTS CENTER, UNLOCKING DISCRIMINATION: A DC AREA TESTING INVESTIGATION ABOUT RACIAL DISCRIMINATION AND CRIMINAL RECORDS SCREENING POLICIES IN HOUSING 6 (2016), <https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf>.

24. *Id.*

25. Kathleen Pennington, Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances, Presentation at the Office on Violence Against Women (Oct. 20, 2016).

criminal activity, including domestic violence,” and “regardless of where the alleged criminal activity occurred.”²⁶

Similar to the aforementioned type of nuisance activity, some jurisdictions have implemented strictly crime-free ordinances, where any alleged criminal activity on the property (and sometimes, even off the premises) is automatic grounds for eviction. The International Crime-Free Association, founded by former police officers, has been instrumental in marketing these Crime-Free Multifamily Housing ordinances and their associated elements to police departments and jurisdictions across the country. Currently, the program boasts operation in 2000 cities across 48 different states.²⁷ Marketed as an advertising and safety tool, the Crime-Free Multi-Housing Association offers to “certify” properties as “Crime-Free” if they attend required trainings and implement certain changes on the property.^{28,29} These changes include additional lighting in dimly lit areas, or additional mirrors/cameras in various areas of the premises.³⁰ Landlords in the program are also required to have all tenants sign a Crime-Free Lease Addendum, agreeing that they can be terminated if a member of the household or one of their guests commits a crime on the property. Additionally, when nuisance and crime-free ordinances are in place in one jurisdiction, they can reinforce one another. For example, in the city of Vista, California, when a property has crossed the established threshold for nuisance activity, the landlord is then required to enroll in the Crime-Free Multi-Housing Program.³¹

Facially, it may seem completely legitimate for landlords to regulate the behavior of tenants in this way, but many tenants are unfairly harmed by these ordinances. Even as it relates to the process itself, many of these ordinances have little to no procedural protection for tenants. Including limited avenues for appeal or challenging an eviction under the ordinance, the standard of proof for establishing a violation is often very low. For those that penalize nuisance activity based on calls for law enforcement, it is usually sufficient that a law-enforcement officer responded at all, regardless of whether the call was frivolous or ultimately resolved without a charge or conviction. In Fort Bragg, California, it is sufficient that an officer “respond[ed] to the property resulting in the issuance of citations or the

26. *Id.*

27. INT’L CRIME FREE ASS’N, CRIME FREE MULTI- HOUSING: KEEP ILLEGAL ACTIVITY OFF RENTAL PROPERTY, <http://www.crime-free-association.org/multi-housing.htm> (last visited Nov. 5, 2020).

28. *Id.*

29. While this discussion of the Crime Free Association’s programs focuses on its application to multifamily rental properties, the Association also markets these tools in a more limited fashion to a variety of housing types including mobile home and RV parks, condominiums, businesses, and self-storage facilities.

30. INT’L CRIME FREE ASS’N, *supra* note 27.

31. VISTA, CAL., MUN. CODE § 9.40.030.

making of arrests.”³² For those that penalize alleged criminal behavior, the ordinances do not require proof beyond a reasonable doubt as is required for criminal convictions. Many will allow for eviction by a much less rigorous standard, creating significant due process concerns. For example, in Oceanside, California, the standard for evaluating whether drug-related activity occurred on the premises is judged by a reasonable-person standard, including factors such as “steady traffic day or night to a particular unit.”³³

Victims of crime, and in particular survivors of domestic violence, are a group of tenants that are disproportionately harmed by these ordinances. The story of Lakisha Briggs of Norristown, Pennsylvania, is a painful example of the impact of these ordinances. Ms. Briggs called the police twice on a boyfriend who continued to show up to her apartment and violently assault her.³⁴ Norristown had a three-strikes rule for calls to law enforcement.³⁵ The last time that Ms. Briggs was assaulted, causing injuries so severe that she had to be airlifted to the hospital, she refrained from calling the police out of fear—not of her abuser, but of being evicted.³⁶ She described this dilemma, saying “If I called the police to get him out of my house, I’d get evicted. . . . If I physically tried to remove him, somebody would call 911 and I’d be evicted.”³⁷ Unfortunately, that is exactly what happened. A neighbor called the police, and, when Ms. Briggs came home from the hospital, there was an eviction notice on her door.

Additionally, when certain groups have heightened likelihood of interactions with law enforcement, these ordinances reinforce discrimination in a variety of ways. In spite of significant discussion about the impact and potential solutions for victims of crime and survivors of domestic violence, much less attention has been paid to the broader disparate impact of these ordinances based on race. Domestic violence itself disproportionately impacts Black women, who experience rates of domestic violence at higher rates than women of other races and are already less likely to seek help or resources,³⁸ and this discussion has already highlighted racial dispari-

32. FORT BRAGG, CAL., CODE § 6.12.040 (U).

33. OCEANSIDE, CAL., CODE § 20.33 (f)(2).

34. Lakisha Briggs, *I was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911*, GUARDIAN (Sept. 11, 2015, 6:45 PM), <https://www.theguardian.com/commentisfree/2015/sep/11/domestic-violence-victim-town-wanted-me-evicted-calling-911>.

35. *Id.*

36. *Id.*

37. Erik Eckholm, *Victims’ Dilemma: 911 Calls Can Bring Eviction*, N.Y. TIMES (Aug. 16, 2013), <https://www.nytimes.com/2013/08/17/us/victims-dilemma-911-calls-can-bring-eviction.html>.

38. Feminista Jones, *Why Black Women Struggle More with Domestic Violence*, TIME (Sept. 10, 2014, 2:04 PM), <https://www.mic.com/articles/192576/mercy-hospital-chicago-shooting-tamara-oneal-juan-lopez#.ufBRURJc9>. <https://time.com/3313343/ray-rice-black-women-domestic-violence>.

ties in interactions with the criminal justice system. Just as overly restrictive criminal-background screening disproportionately excludes people of color from finding housing due to these racial disparities, so do nuisance and crime-free ordinances disproportionately expel people of color from their existing housing.

These ordinances also act as an extended arm of mass incarceration and over-policing that are enforced disproportionately against Black and brown tenants. A study of nuisance and crime-free ordinances in Milwaukee, Wisconsin, found that properties in Black neighborhoods were cited one in sixteen times, while white neighborhoods were cited just one in forty-one times.³⁹ Additionally, white neighbors often remain fearful of Black and brown faces, and the aforementioned examples of Living While Black cases provide pertinent examples of how that fear could easily translate into someone losing their home. If a white neighbor calls the police on their Black neighbor, regardless of the frivolous nature of that call, that tenant may be subject to eviction if the threshold is met, they may be unfairly treated or detained by police in violation of a crime-free lease addendum, or they may even be subject to deadly police violence. Black people, compared to population share, are disproportionately stopped, arrested, and convicted of crimes.⁴⁰ Even if these charges or arrests are ultimately dismissed, those tenants may still be subject to eviction under a strikeout calls for service rule or a crime-free lease addendum.

More generally, the use and enforcement of these ordinances are tools of continued surveillance and geographical restriction of Black and Latinx bodies. Black and Latinx communities are often blamed for perceived increases in crime or deterioration of neighborhoods, which fuels fear in white neighbors and creates a perceived need for additional policing or local regulations to correct the alleged problem. Professor Deborah Archer astutely notes that “local laws are often more central than federal or state laws in creating and perpetuating racially segregated neighborhoods. Exclusionary local laws and policies are among the primary mechanisms used by predominantly White communities to ward off racial integration.”⁴¹ With nuisance and crime-free ordinances on the books, and documented disproportionate policing of Black and brown people, jurisdictions have created a mechanism to exclude Black people from certain communities.

The exclusion of individual Black and Latinx tenants as a result of nuisance and crime-free ordinances has further impacts on residential racial segregation in general. Archer further explains that racial segregation will be reinforced as “people of color excluded by crime-free ordinances will

39. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequence of Third-Party Policing for Inner-City Women*, 78 AM. SOCIO. REV. 117, 125 (2012).

40. NAACP, Criminal Justice Fact Sheet, <https://www.naacp.org/criminal-justice-fact-sheet> (last visited Nov. 5, 2020); see also THE SENTENCING PROJECT, *supra* note 1.

41. Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 178 (2019).

likely be squeezed into predominately minority communities” and that these policies may likewise have a chilling effect on integration, as “people of color who are excluded by crime-free ordinances in one community may also avoid seeking housing in other predominantly White neighborhoods for fear of intolerance, prejudice, and violence, a fear likely reinforced by their experience seeking housing in or eviction from communities with crime-free ordinances.”⁴² A case out of Maplewood, Missouri, demonstrates this potential impact. The city of Maplewood had a nuisance ordinance that declared that any tenant who was the subject of two or more calls for emergency service as a nuisance, regardless of whether they were a survivor of domestic violence or a victim of another crime.⁴³ Additionally, Maplewood required all tenants to have an individual occupancy license, rather than one that applies to the property.⁴⁴ Once a tenant crossed this threshold, not only could they be evicted, but their occupancy license could be revoked, meaning that the tenant would not be able to rent anywhere else in the city of Maplewood. Disproportionate enforcement of nuisance and crime-free ordinances on people of color can contribute to the exclusion of these tenants from entire neighborhoods and cities.

Lastly, nuisance and crime-free ordinances can work in tandem with restrictive criminal background screening policies to both exclude individual Black and Latinx applicants from housing as well as maintain residential racial segregation. If jurisdictions have nuisance or crime-free ordinances that could threaten a landlord’s occupancy permit or rental license, the landlord may be incentivized to exclude households where a member has a criminal history up-front due to a biased fear that that tenant may be more likely to be a nuisance or commit a crime while living on the property.

Housing is a fundamental right, and a fundamental source of stability. Without housing, someone may not be able to apply for a job, or even apply for a driver’s license. Barriers such as the ones discussed above provide yet another way for this country’s unjust criminal justice system to continue its subjugation and exclusion of Black and Latinx communities.

IV. Methods for Advocates to Challenge Overly Restrictive Criminal Background Screening and Nuisance/Crime-Free Ordinances

A. Local Advocacy

While relatively new to the public interest, legal services providers have been seeing the impact of overly restrictive criminal-background screening policies and nuisance/crime-free ordinances in the communities that they have served for years. Across the country, local advocacy by policy

42. *Id.* at 213.

43. *Id.*

44. ACLU, *Rosetta Watson v. Maplewood* (Apr. 10, 2017), <https://www.aclu.org/cases/rosetta-watson-v-maplewood>.

advocates, housing service providers, the media, and more have proven extremely effective in demonstrating the discriminatory and devastating impacts of these policies and targeting those impacts with local advocacy and legislation. The Twin Cities area of Minnesota, which also happens to be my hometown, provides two excellent illustrations of advocacy at work.

In Minneapolis, the city council was persuaded to pass an ordinance that greatly restricts the ability of landlords to conduct overly restrictive criminal-background screening. The ordinance provides landlords with the choice to either agree to do an individualized review of tenants with criminal histories—rather than automatic bans of any kind—or adopt the city’s set inclusive screening criteria.⁴⁵ If a landlord chooses to do individualized review, which involves a review of the nature and circumstances of the conviction and any evidence of rehabilitation, they must also agree to review any supplemental evidence provided by the tenant and provide a written justification for exclusion of the tenant.⁴⁶ Should they choose to use the inclusive screening criteria set by the city, landlords will be severely restricted in the type of convictions that they can use as a basis to exclude a tenant as well as how far back in time they can consider convictions. Under this criteria, landlords cannot exclude applicants based on arrests that did not result in convictions, convictions that have been vacated or expunged, juvenile determinations, misdemeanor convictions older than three years, and felony convictions older than seven years—excluding drug convictions, and violent offenses older than ten years.⁴⁷ Ordinances like Minneapolis’s provide an example of balancing the purported interests of landlords in the safety of their tenants and property, while restricting landlords’ ability to unfairly exclude those with criminal history who pose no risk as tenants.

A local advocacy effort to challenge nuisance and/or crime-free ordinances requires multiple avenues of attack and a coordinated effort of stakeholders. One potential avenue of attack is direct landlord education about the discriminatory impact of these ordinances, which can be powerful in areas where landlords are more receptive to examining fair-housing issues. This outreach can be done by local government agencies, legal services providers, or other organizations that work on fair housing issues. Additionally, outreach can be made to any landlord or realtor associations who produce model leases to ensure that their terms do not include restrictive nuisance or crime-free terms.

The southwest Minneapolis suburb of St. Louis Park provides a great example of a community of invested stakeholders working together to successfully advocate for repeal of a particularly pernicious crime-free policy. Enacted in 2008 under the rental housing ordinance, the policy allowed for a tenant’s eviction if they or a guest allegedly committed a crime,

45. MINNEAPOLIS, MINN., CODE § 244.2030(c).

46. *Id.* § 244.2030(e)(2).

47. *Id.* § 244.2030(c)(1).

regardless of whether the tenant was present, charged, or convicted of a crime.⁴⁸ In fact, over a five-year period from 2013 to 2018, two out of three tenants who were evicted under the policy were never even charged with a crime.⁴⁹ Additionally, “more than half of the tenants who were evicted without being charged were accused of possessing a small amount of marijuana or paraphernalia,” which carried a penalty equivalent to a speeding ticket in the state of Minnesota.⁵⁰ These data points reveal that St. Louis Park police were forcing roughly three households out of their homes per month for crimes that were never committed or that were so minor that they would be punished by a simple fine. Anecdotal evidence from legal service providers operating in the region suggests that despite the city being overwhelmingly white, the crime-free policy was enforced disproportionately against people of color.⁵¹

Legal services providers, local media, and even a few landlords mounted a several-year campaign against the ordinance. Two landlords sued the city, citing due process concerns related to the ordinance requiring landlords to evict tenants without any avenues for appeal.⁵² While the ordinance was amended to allow landlords to appeal, for many, that was not enough. One former legal aid attorney met with a local reporter to discuss his concern about the ordinance and its discriminatory impacts.⁵³ Several public records requests later, local news station KSTP released a story outlining the level of enforcement and impact of St. Louis Park’s ordinance. Just weeks later, the city appointed a working group to evaluate the ordinance, which later recommended complete repeal. In August of 2020, the St. Louis Park City Council voted to repeal the crime-free policy.⁵⁴ City by city, county by county, a combined and targeted advocacy effort can make a world of difference. By working to amplify the issues that they were seeing in their communities, local housing and legal services providers were able to shed light on an unjust crime-free ordinance and successfully advocate for repeal. As a result, renters throughout the city are no longer at risk of frivolous and discriminatory eviction.

48. *Evicted Before Convicted: St Louis Park Police Order Landlords to Force People from their Homes*, KSTP EYEWITNESS NEWS (Nov. 20, 2018, 10:26 PM), <https://kstp.com/news/evicted-before-convicted-st-louis-park-police-order-landlords-to-force-people-from-their-homes/5149900>.

49. *Id.*

50. *Id.*

51. Interview with Lawrence McDonough, Senior Minnesota Counsel, National Anti-Eviction Project, Lawyers’ Committee for Civil Rights Under Law (Oct. 15, 2020).

52. *Javinsky-Wenzek v. City of Saint Louis Park*, No. 0:11-cv-02228-JRT-JSM (D. Minn. filed Aug. 5, 2011).

53. Interview with Lawrence McDonough, *supra* note 51.

54. Kirsten Swanson, *Landlords, Housing Advocates Reflect on Repeal of Controversial Housing Ordinance in St. Louis Park*, KSTP (Aug. 16, 2020, 10:25 PM), <https://kstp.com/news/landlords-housing-advocates-reflect-on-repeal-of-controversial-housing-ordinance-in-st-louis-park-august-18-2020/5832132/?cat=1>.

The most significant limitation related to using a local advocacy strategy is scope. Advocacy efforts, no matter the size, require a great deal of organization, repeated appeal and engagement, and a lot of time. The result may ultimately be successful, but that success is limited to the city-level geographic area. Additionally, cities typically have fewer resources to allocate. While advocacy may be successful in advocating for repeal or revision of ordinances related to criminal background screening or nuisance/crime-free ordinances, cities may lack the resources to allocate for public education and enforcement to make the make the impact of the policies meaningful.

B. State-Level Advocacy and Preemption

Compared to small and even large city councils, state legislatures are uniquely positioned to harness greater levels of resources and provide relief to larger swaths of people in need. Additionally, state legislation can preempt the ability of individual cities or counties from enacting discriminatory or unfairly restrictive laws. For example, a few states have recently passed legislation to reduce the impact of both overly restrictive criminal background screening and nuisance/crime-free ordinances.

Aimed at broader collateral consequences of convictions in both housing and employment, advocates in Pennsylvania successfully lobbied for the Clean Slate Act that was passed in 2018. The Act provides for automatic sealing of certain criminal records, including “arrests that did not result in convictions, summary convictions from more than 10 years ago, and some second and third-degree misdemeanor convictions.”⁵⁵ Compared to some cities or states that have ramped up avenues for individuals to have records expunged—often on their own time or at their own expense—Pennsylvania has automated the process and removed an additional barrier to those with criminal backgrounds. The Clean Slate Act is a demonstration of how state legislators, with one sweeping motion, can remove significant barriers to housing or employment for an enormous number of people.

Quasi-state District of Columbia also serves as a great example, having passed the Fair Criminal Record Screening for Housing Act in 2016. The Act completely prohibits housing providers from inquiring about arrests that did not result in a conviction at all, and prevents providers from inquiring about an applicant’s criminal history prior to extending a conditional offer.⁵⁶ Once a conditional offer has been extended, a landlord is only permitted to inquire about certain convictions for serious offenses that occurred within the last seven years.⁵⁷ Landlords must consider six factors when evaluating an applicant’s criminal history:

55. R. Courtney, *5 Things to Know About Clean Slate*, CMTY. LEGAL SERVS. (July 10, 2019), <https://mycleanslatepa.com/5-things-to-know-about-clean-slate>.

56. D.C. Office of Human Rights, *Returning Citizens and Housing*, <https://ohr.dc.gov/page/returningcitizens/housing> (last visited Nov. 5, 2020).

57. *Id.*

(A) The nature and severity of the criminal offense; (B) The age of the applicant at the time of the occurrence of the criminal; (C) The time which has elapsed since the occurrence of the criminal offense; (D) Any information produced by the applicant, or produced on the applicant's behalf, in regard to the applicant's rehabilitation and good conduct since the occurrence of the criminal offense; (E) The degree to which the criminal offense, if it reoccurred, would negatively impact the safety of the housing provider's other tenants or property; and (F) Whether the criminal offense occurred on or was connected to property that was rented or leased by the applicant.⁵⁸

Only after consideration of these factors can a landlord withdraw a conditional offer, and must do so with a written justification, as well as notice to the applicant that they have the right to file a complaint with the DC Office of Human Rights (DCOHR).⁵⁹ The Act further provides for public enforcement of the Act via DCOHR and financial penalties to be levied against landlords who violate the Act. Several 2020 Democratic presidential candidates included these types of policies in their platforms, advocating for "ban the box" initiatives that would limit the ability of landlords to inquire about prior criminal convictions, especially before a conditional offer of housing has been provided.⁶⁰

With regard to nuisance and crime-free ordinances, states have taken measures to eliminate or lessen their discriminatory impact. As discussed earlier, much of the discussion and action around nuisance and crime-free ordinances have been directed at protecting survivors of domestic violence and other victims of crime from being evicted after calling for emergency service. In California, housing advocates, including the National Housing Law Project, successfully lobbied for a state level carve-out for survivors of domestic violence or victims of crime. Signed into law in 2018, AB-2413 amends the California tenancy law to void any law or lease provision that limits or penalizes a tenant or resident's "right to summon law enforcement assistance as, or on behalf of, a victim of abuse, a victim of crime, or an or an individual in an emergency."⁶¹ Following the aforementioned case of Norristown, Pennsylvania, resident Lakisha Briggs and her subsequent lawsuit against her city, Pennsylvania took a similar step in shielding survivors of abuse and victims of crime from eviction. Pennsylvania municipalities are now entirely preempted from enacting ordinances that "penalize a resident, tenant, or landlord for a contact made for police or emergency assistance by or on behalf of a victim of abuse, . . . a victim of crime, . . . or an individual in an emergency."⁶²

58. *Id.*

59. *Id.*

60. Stephen R. Miller, Housing Policy Ideas from the 2020 Presidential Candidate Platforms (Mar. 3, 2020) (unpublished), available at <https://ssrn.com/abstract=3547833> or <http://dx.doi.org/10.2139/ssrn.3547833>.

61. CAL., CIV. CODE § 1946.8(c).

62. 53 PA. CONS. STAT. § 304(b) (2020).

Provisions like these are most certainly a benefit and necessity for those in need of emergency assistance, victims of crime, and survivors of domestic violence, but these kinds of carve-outs only go as far as to remedy the discriminatory disparate impact of these ordinances on women, who disproportionately experience domestic violence. While Black women experience higher rates of domestic violence than other races,⁶³ this type of preemption or carve-out does nothing to counter the broader discriminatory racial impact of nuisance or crime-free ordinances. Calls for emergency assistance may not always be tied to an emergency or an actual crime being committed, as many of the “Living While Black” cases show. Any policy that penalizes interactions with law enforcement will, due to drastic racial disparities in our criminal justice and policing systems, disproportionately and negatively impact people of color. Failure to rein in these kinds of ordinances allows for continued eviction and exclusion of Black and Latinx tenants from their homes.

C. Litigation

Finally, litigation can serve as an important tool in the arsenal for challenging both overly restrictive criminal background screening policies and nuisance/crime-free ordinances. Two recent cases, in particular, highlight the success of litigation against both individual housing providers and applicant-screening companies who engage in restrictive background screening. In October 2019, our team at the Lawyers’ Committee for Civil Rights Under Law, along with co-counsel from the Washington Lawyers’ Committee for Civil Rights and Urban Affairs and law firm BakerHostetler, filed a suit against Kay Management Co., a property owner and manager with properties all across Maryland and Virginia. A Black couple and their children had been living in one of their Virginia properties for years without incident. They applied for a larger unit and were informed by Kay Management staff that they would be subject to a credit and background check, which revealed minor convictions (speeding tickets, personal possession of drugs) from almost a decade earlier. Not only was their application for a new unit denied, but they were issued a notice to vacate and had to move. The couple sought assistance from Housing Opportunities Made Equal of Virginia (HOME), who engaged in several tests of Kay Management’s various properties. The tests revealed Kay Management had a blanket ban on all applicants with criminal backgrounds.

Our co-counsel team then brought suit on behalf of both the individuals and HOME as an organizational plaintiff, alleging that Kay Management’s blanket ban violated the Fair Housing Act because it had a disparate impact based on race. In our complaint, we were able to show that in the geographic area where the building was located, Black and Latinx people were significantly more likely to have criminal histories due to disparities in

63. Jones, *supra* note 38.

the criminal justice system.⁶⁴ As such, a policy that categorically excluded applicants with criminal histories would have a disparate impact based on race. The case ultimately settled, resulting in a drastic overhaul of the criminal background screening policy. Rather than a blanket ban, Kay Management's new policy "implements a 5 year look-back for most crimes; 12 years for homicide-related offenses and forcible felony sex-related offenses; 10 years for felony drug/narcotics-related offenses involving sale, distribution, or manufacturing; and 25 years for those listed on the sex offender registry."⁶⁵ Additionally, Kay Management will conduct individualized review of applicants with criminal histories in accordance with the HUD Guidance on the subject. While not a sweeping law that would impact the entire city or state, the new policy will impact tenants in the 12,000 apartments that Kay Management owns,⁶⁶ which significantly opens up more housing opportunities for Black and Latinx applicants in the Maryland and Virginia area.

As the willingness to challenge overly restrictive background screening increases, so do the justifications landlords espouse to justify their policies. With the rise of third-party screening companies, many landlords argue that they are not liable for any discriminatory impact because they just do what the software instructs them to do. *Connecticut Fair Housing Center v. Corelogic Rental Property Solutions* begs to differ. Corelogic's "CrimSafe" rental software performs credit and background checks on applicants on behalf of landlords. The software then spits out a "yes" or "no," telling the landlord whether to accept or reject an applicant. The individual plaintiff in this suit was a mother who had been living at a Connecticut housing complex when her son was injured in an accident that left him severely disabled. She applied for tenancy on his behalf so he could live with her as she cared for him. Using CoreLogic software, the apartment management denied his application and refused to provide any information as to why. The woman later found out the application was denied based on CoreLogic's background check that surfaced her son's dropped shoplifting charge from years earlier.⁶⁷

The suit alleges that CoreLogic violated the Fair Housing Act under a disparate impact theory. However, because the Fair Housing Act typically applies to actual housing providers, the question presented is whether third-party screening companies used by landlords, such as CoreLogic, can

64. *Mara B. Kniaz v. Kay Mgmt. Co.*, No. 19-CV-01343-LO-IDD (E.D. Va. filed Oct. 23, 2019).

65. Press Release, Housing Opportunities Made Equal of Virginia, HOME, Kay Management Company, and Former Tenants Reach Settlement Regarding Criminal Background Screening Policy That HOME Alleged Disproportionately Excluded Black and Latinx Housing Applicants (July 16, 2020) (on file with author).

66. *Kniaz*, *supra* note 64.

67. *Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC*, No. 3:18-CV-705 (VLB) (D. Conn. Aug. 7, 2020).

be held liable for discrimination under the Fair Housing Act, just like individual housing providers. Litigation remains ongoing, and both the disparate impact and disparate treatment claims survived a motion for summary judgment filed by Defendants.⁶⁸ With the rise of third-party screening companies, this case is an important one to watch. The ability to hold screening companies and the landlords that use them accountable for discrimination can go a long way to limiting the barrier that overly restrictive criminal-background screening policies create for applicants with criminal histories.

There are, however, several limitations to a litigation-based approach.⁶⁹ To start, a client is needed. While many are impacted by these ordinances, it can be difficult to locate a client without being plugged into local housing and legal services organizations. Even then, if someone is unqualified for legal-aid assistance based on their financial or immigration status, it may be hard to find them all. Without knowledge of a specific tenant who has been evicted, the investigative process can be long and sometimes costly. Different types of policies or ordinances have their own specific challenges as well. For nuisance ordinances, once an ordinance is located in a city or other municipality, records requests will be necessary to establish how often and against whom the ordinance is being enforced. One may be able to narrow down a specific property or client that way, provided that the city responds to the request in a full or timely manner. To challenge overly restrictive criminal background screening, once a client or property is identified, in order to demonstrate a disparate impact, an expert will likely have to conduct specific statistical analysis of the area where the challenged policy operates. Upfront fees of experts can be very costly. In addition to expert costs, litigation itself is a very long, drawn-out, and costly process. Filing fees, expert fees, discovery related costs, and attorney hours all contribute to the expense. From investigation to settlement or trial, the process can last multiple years, and that does not take into account potential appeals. Attorneys should be prepared to explain this issue to potential clients, knowing that it may impact their decision to serve as a plaintiff.

Litigation can also be limited in the scope of the resolution's impact. While challenging a nuisance or crime-free ordinance can result in the invalidation of the ordinance as a whole, if the parties reach a settlement, that settlement may or may not have a broader impact beyond the individual client. The Maplewood, Missouri, suit is an example of a settlement that included revision of the ordinance, but in other cases a municipality may only be willing to pay damages or offer some other form of relief to

68. *Id.*

69. This section discusses numerous limitations of a litigation-based approach. Generally, plaintiffs who have been denied housing or evicted via these types of policies will have standing to sue. While there may be some circumstances in which standing issues arise, this discussion purposefully omits discussion of potential standing issues, as it would require a client-specific analysis that is beyond the scope of this article.

the plaintiff. Similarly, with regard to criminal background screening policies, without a law prohibiting or limiting such screening, litigation would likely be on a provider-by-provider basis. Any resolution may therefore only apply to the plaintiff, and it may not result in a change in policy by the provider or at any other property. Litigation can, however, play a role in highlighting the discriminatory impact of these policies and spur other forms of advocacy to go beyond the courts to remedy the issue at the state or local level.

Last, one significant potential limitation to the use of litigation in these types of cases is the looming elephant in the room—the future of the disparate impact rule. Disparate impact liability, or the liability for even facially neutral policies or practices that have a disparate impact on members of protected classes, has been recognized under the Fair Housing Act across all nine appeals circuits.⁷⁰ In 2013, the Obama administration promulgated a regulation codifying the three-step burden shifting framework for evaluating disparate impact claims. First, the plaintiff must show “that a challenged practice caused or predictably will cause a discriminatory effect.”⁷¹ The burden then shifts to the defendant to show “that the challenged practice is necessary to achieve one or more substantial, legitimate, non-discriminatory interests.”⁷² Even then, the plaintiff has the opportunity to demonstrate that those interests can be served “by another practice that has a less discriminatory effect.”⁷³ Additionally, the Supreme Court formally recognized the availability of disparate impact claims in the 2015 *Texas Department of Housing & Community Affairs v. Inclusive Communities* decision, and, while the Court favorably cited the 2013 regulation several times, it did not explicitly establish or endorse a standard for evaluating disparate impact claims.⁷⁴

In 2019, under the direction of HUD Secretary Ben Carson and President Donald Trump, HUD published a Notice of Proposed Rulemaking that would make significant revisions to disparate impact rule. After receiving over 45,000 comments,⁷⁵ the majority of which urged HUD not to make the proposed changes, the final rule was published in September 2020. This new rule essentially guts disparate impact liability in favor of defendants. Specifically, the rule eliminates liability for policies or practices that perpetuate segregation, drastically raises the pleading standard for plaintiffs to practically insurmountable burden, significantly lessens the burden of defendants and adds additional defenses to liability that have no basis

70. *Tex. Dep’t Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 535 (2015).

71. 24 C.F.R. § 100.500(c) (2013).

72. *Id.*

73. *Id.*

74. *Tex. Dep’t Hous. & Cmty. Affs.*, 576 U.S. at 527.

75. 85 Fed. Reg. 60,289 (Sept. 24, 2020).

in case law or previous regulations.⁷⁶ Three lawsuits have been filed to declare the changes arbitrary and capricious under the Administrative Procedure Act, one of which also filed to enjoin implementation of the rule.⁷⁷ In that case, *Massachusetts Fair Housing Center & Housing Works v. HUD*, the plaintiff has successfully moved for preliminary injunction, staying implementation of the rule for now.⁷⁸ However, because President Trump was ultimately not reelected, the crusade against disparate impact will likely end, as there is a significant chance that under President Joe Biden's administration, HUD will take steps to reinstate the disparate impact rule in a manner similar to the 2013 Obama regulation.

V. Conclusion

Our criminal justice system is designed not only to target communities of color, but also to be purely punitive, both while individuals are incarcerated and once they have been released. Rather than maximize use of rehabilitative and diversion programs, our system incarcerates hundreds of thousands of overwhelmingly Black and Latinx people for minor crimes, addictions, or even for just being too poor to afford bail. Once released, our society then brands those who have criminal backgrounds in manners that prevent them from accessing even basic necessities post-release, such as housing and employment. Landlords use restrictive screening to outright exclude applicants from housing opportunities. Over-policing of Black and brown communities works in tandem with nuisance and crime-free ordinances to attach eviction consequences to interactions with law enforcement. The extensive use of both types of policies across the country has real and drastic impacts on the ability of those with criminal backgrounds and other Black and brown tenants to find safe and affordable housing. Lawyers, organizers, and housing service providers must work together on comprehensive strategies to highlight the discriminatory racial impact of these post-incarceration barriers. These efforts will require a combination of targeted litigation and state and local advocacy to ensure that housing, a fundamental necessity, is available to all, regardless of past, present, or future interactions with the criminal justice system.

76. *Id.* at 60,332 (to be promulgated at 24 C.F.R. § 100.500).

77. *Mass. Fair Hous. Ctr. & Hous. Works, Inc. v. U.S. Dep't Hous. & Urb.an Dev.*, No. 1:20-cv-11765 (D. Mass. filed Sept. 28, 2020); *Nat'l Fair Hous. Alliance v. Carson*, No. 3:20-cv-07388 (N.D. Cal. filed Oct. 22, 2020); *Open Cmty.s. All. v. Carson*, No. 3:20-cv-01587 (D. Conn. filed Oct. 22, 2020).

78. *Mass. Fair Hous. Ctr. and Hous. Works, Inc. v. HUD*, No. 3:20-cv-11765-MGM (D. Mass. Oct. 25, 2020) (order granting preliminary injunction).

The Harms of Liminal Housing Tenure: Installment Land Contracts and Tenancies in Common

*Sarah Schindler & Kellen Zale**

I. Tenancies in Common as a Tool of Gentrification	525
II. Installment Land Contracts as Harmful Predatory Lending	528
III. TICs and ILCs—Harming Non-Owners	533

Many legal doctrines use housing tenure—whether someone is a homeowner or tenant—as a determinant of legal rights. These doctrines also often treat homeowners more favorably than similarly situated residential tenants. For example, disaster aid is made available to homeowners more often and in larger amounts than it is to tenants; a disproportionate amount of land in most U.S. cities is zoned for single-family residential use (which is mostly owner-occupied) as compared to multifamily residential use (which is mostly tenant-occupied); and state and local laws typically require that homeowners receive notice of nearby changes in land use, but have no similar notice requirement for tenants.

Our research has revealed that, overall, residential tenants are treated less favorably than homeowners across a wide range of property laws and policies. The less favorable treatment of tenants under the law has widened the wealth gap, worsened the affordable housing crisis, and subsidized homeownership by shifting costs to renters. Furthermore, the disparate treatment of renters and owners has the most dramatic impact on low-income people and people of color—especially Black and Latinx families—who are more likely to be renters, not by choice, but because of deep-rooted structural barriers to ownership.

Of course, housing tenure is not always as simple as homeowner or tenant, fee simple or leasehold estate.¹ Rather, many liminal forms of land

*Sarah Schindler is the Maxine Kurtz Faculty Research Scholar and Professor of Law at the University of Denver Sturm College of Law. Kellen Zale is an associate professor at the University of Houston Law Center. Research for this article was supported in part by a grant from the University of Houston Division of Research.

1. See, e.g., Madeleine Parker & Karen Chapple, *Revisiting Rent Stabilization in the Neighborhood Context: The Potential Impact of Rent Regulation on Community Stability and Security in the New York Metropolitan Region*, 46 *FORDHAM URB. L.J.* 1137, 1149 (2019) (“Discussions of housing tenure, traditionally referring to the arrangement of housing ownership and occupancy, are often viewed in terms of a simple dichotomy of renting versus ownership.”); Jake Wegmann et al., *Breaking the Double Impasse: Securing and Supporting Diverse Housing Tenures in the United States*, 27 *HOUS. POL’Y DEBATE* 193 (2017) (suggesting a range of housing tenure types).

tenure status fall somewhere on this spectrum between owner and renter. This essay will discuss two of those liminal forms of housing tenure: Tenancies in Common (TIC) and Installment Land Contracts (ILC).² While TICs and ILCs have long been thought of as niche aspects of the U.S. housing market—and their negative impacts assumed to be correspondingly limited—in fact, both TICs and ILCs are becoming increasingly prevalent. For example, while the use of TICs to avoid condo conversion laws has long been associated with the high-priced San Francisco housing market,³ they have become more widespread as housing costs increase in other areas of the country.⁴ And while lower-income communities of color have long been targets of ILCs, in recent years, ILCs have penetrated a greater variety of housing markets.⁵ Firms that focus on ILCs and closely related rent-to-own arrangements have attracted Silicon Valley venture funding,⁶

2. ILCs are also known as Contract for Deed, Land Contracts, or Land Installment Contracts.

3. See *infra* Arnold, note 15.

4. For example, the use of TICs is becoming popular in Los Angeles. See Hannah Madans, *TIC Deals, an Affordable Alternative to Condos, Are Increasingly Popular*, L.A. BUS. J. (July 27, 2020); see also LIVEWORK DENVER, CO-BUY CURIOUS? CO-BUYING AND COMMUNITY HOUSING IN DENVER, <http://liveworkdenver.com/co-buying-and-community-housing-in-denver> (last visited Nov. 30, 2020). Law firms and mortgage companies are also increasingly including explanations of TICs on their websites, indicating a likely rise in popularity. See, e.g., SAALFELD GRIGGS, *Advantages and Risks of Tenancies in Common* (Nov. 28, 2012), <https://sglaw.com/advantages-and-risks-of-tenancies-in-common> (weighing the risks of TICs to provide information to their client base in Salem, Oregon); Mary Purcell, *Can't Afford a Home? Consider Buying One with Friends*, ROCKET HOMES (Sept. 10, 2018), <https://www.rockethomes.com/blog/home-buying/cant-afford-home-consider-buying-with-friends>; LAW OFFICE OF KRISTINA M. REED, *Joint Ownership Agreements*, <https://www.kristinareed.com/joint-ownership-agreements.html> (last visited Nov. 30, 2020) (providing information for their client base in Sacramento, CA). Additionally, sites like “gocobuy.com” are search engines designed to match potential TIC owners with the perfect type of joint ownership depending on which parties are looking. See CoBuy, <https://www.gocobuy.com> (last visited Nov. 30, 2020). This phenomenon is finding success outside of the United States as well, with people in Brisbane, Australia, co-buying with strangers in order to break into the property market. Lucy Stone, *Queenslanders Buy with Strangers to Break Into Property Market*, BRISBANE TIMES (May 31, 2018), <https://www.brisbanetimes.com.au/national/queensland/queenslanders-buy-with-strangers-to-break-into-property-market-20180530-p4zig1.html>.

5. See *infra* notes 30–33 and accompanying text.

6. See Matthew Goldstein, *Divvy Homes Says Rent-to-Own Deals Work. Next Year Will be the Test*, N.Y. TIMES (Nov. 25, 2020), <https://www.nytimes.com/2020/11/25/business/divvy-homes-real-estate-homes.html?referringSource=articleShare> (“With the backing of investors like the Silicon Valley venture capital firms Andreessen Horowitz and Caffeinated Capital, as well as a Singaporean sovereign wealth fund, Divvy has grown rapidly, now renting more than 1,500 homes in nine markets, including Atlanta, Cleveland, Cincinnati, Memphis and Phoenix.”). Rent-to-own financing is similar to ILCs, but, instead of the buyer automatically becoming the owner if all payments and obligations have been satisfied at the end of the term (as with ILCs), in rent-to-own arrangements, the

and secondary markets have developed for investors to buy and trade these types of properties.⁷

We argue that the growing prevalence of TICs and ILCs is part of a larger, previously unrecognized pattern that we have identified wherein the law offers more protections to homeowners than to similarly situated tenants and other non-owners. Furthermore, the growing prevalence of TICs and ILCs has disproportionately weakened housing security and protections for poor people and people of color.⁸

Part I of the essay will describe the way that TICs—a form of ownership—have been used to displace renters who are often low income people and people of color. It will also suggest that constitutional concerns may pose an obstacle to challenging the use of TICs. Part II will discuss the use of ILCs in recent years, which not only fail to provide the protections of mortgage law, but also often put purchasers in an even more precarious position than they would be in if they had the more traditional protections of landlord/tenant law. Part III concludes by explaining how these two examples should be situated within a much larger body of law that systematically treats tenants, and other non-owners, as second-class citizens.

I. Tenancies in Common as a Tool of Gentrification

In certain tight housing markets, strangers looking to purchase an entry-level property will sometimes pool their resources to buy into a Tenancy in Common (TIC).⁹ A TIC is a form of co-ownership “where two or more per-

buyer typically has an option to purchase at the end of the term. See Tony Guerra, *Contract for Deed vs. Lease to Own*, SF GATE (2020), <https://homeguides.sfgate.com/contract-deed-vs-lease-own-35560.html>. ILCs are sometimes referred to as “contract for deed.” See *Installment Land Contract*, BLACK’S LAW DICTIONARY, http://blacks_law.enacademic.com/14038/installment_land_contract.

7. See Matthew Goldstein & Alexandra Stevenson, *How a Home Bargain Became a ‘Pain in the Butt’ and Worse*, N.Y. TIMES (July 7, 2017) (describing Harbour Portfolio Advisors, “one of the nation’s largest contract for deed firms” which has “sold many of those homes—often with existing long-term installment contracts in place—to other investment firms . . . to a wide array of investors, including hedge funds, small investment firms, mom-and-pop investors and even one Bitcoin entrepreneur”).

8. JEREMIAH BATTLE, JR., SARAH MANCINI, MARGOT SAUNDERS & ODETTE WILLIAMSON, NAT’L CONSUMER L. CTR., *TOXIC TRANSACTIONS: HOW LAND INSTALLMENT CONTRACTS ONCE AGAIN THREATEN COMMUNITIES OF COLOR* (2016), <https://www.nclc.org/images/pdf/pr-reports/report-land-contracts.pdf> (“The homebuyers entering into these transactions are disproportionately . . . people of color and living on limited income. Many are from immigrant communities.”).

9. Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 331, 400–01 (1994) (noting “the increased use of tenancies in common by strangers in residential settings to make housing more affordable. . . tenants in common often . . . have no particular personal relationship other than a common economic goal. Accordingly, the use of tenancy-in-common ownership as a means to pool resources to purchase property for investment and commercial use is not new.”).

sons are entitled to property in such a manner that they have an undivided possession but several freeholds . . . [and] there is no right of survivorship."¹⁰ Each cotenant¹¹ owns the entire property and has the right to possess the entire property. Further, many banks will not provide loans for this type of TIC ownership.¹² Thus, a TIC is a type of liminal housing tenure: while TICs provide full ownership rights, both ownership and possessory rights are shared. This places TICs somewhere in between the traditional concept of property ownership as a "sole and despotic dominion"¹³ of control, and a cooperative form of ownership with shared possession, which has been described as a "third way" of housing tenure.¹⁴

While TICs can be used for a variety of normatively unobjectionable reasons, increasingly, they are being used to get around condominium conversion ordinances. Condo conversion ordinances, like rent control ordinances, seek to limit the number of rental units that leave the market. These ordinances often make it difficult for property owners to convert existing buildings, single family homes, or apartments into condominiums, with only a set number of conversions being permitted per year.¹⁵ Thus, if a per-

10. 7 AM. JUR. LEGAL FORMS 2d § 75:1; *see also* United States v. Craft, 535 U.S. 274, 279–80, (2002) ("The common law characterized tenants in common as each owning a separate fractional share in undivided property. . . . Tenants in common may each unilaterally alienate their shares through sale or gift or place encumbrances upon these shares. They also have the power to pass these shares to their heirs upon death. Tenants in common have many other rights in the property, including the right to use the property, to exclude third parties from it, and to receive a portion of any income produced from it.").

11. Those who own a TIC are referred to as cotenants, although they are not renters.

12. "[C]omplexities limit the ability of banks and other lenders to resell TIC loans. Fannie Mae and Freddie Mac won't purchase them. That's one reason why only two banks—Sterling Bank and National Cooperative Bank—offer such 'fractional' TIC loans in Los Angeles, and there is no 30-year fixed-rate option, only adjustable-rate loans . . ." Andrew Khouri, *You Can Buy 'Cheap' in L.A. but You Won't Own Your Home and May Oust a Renter*, L.A. TIMES (Dec. 30, 2019, 6:00 AM), <https://www.latimes.com/business/story/2019-12-30/tenancy-in-common> [<https://perma.cc/UR7T-FYBY>].

13. 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, ch. 1, at 207 (George Sharswood ed., 1889) (describing a property right as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe").

14. *See, e.g.*, Lisa T. Alexander, *Community in Property: Lessons from Tiny Homes Villages*, 104 MINN. L. REV. 385, 393 (2019) (describing "stewardship" as what this article might refer to as a type of liminal housing tenure: "a new housing tenure . . . that deviates from essentialist property theorists' quintessential core of exclusive, long-term, individual ownership"); CHARLES GEISLER & GAIL DANEKER, PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP xiv (2000) (defining "third way" housing as including cooperatives).

15. *See, e.g.*, Alvin L. Arnold, *Tenancy-in-Common: Caution Advised*, 41(21) MORTG. & REAL EST. EXECS. REP. 3 ("The initial impetus for residential TICs in San Francisco was as a way to bypass rent control laws that made it extremely difficult to convert properties to traditional condominiums."). Of note, due to a backlog of condo conversion applications, San Francisco has temporarily suspended their conversion lottery. *See* Pakdel v.

son wants to convert their apartment building into condos and sell them off individually, but is unable to do so due to a conversion ordinance, they might instead sell to a group of people who agree to purchase as TICs.

TICs are often less expensive than condos because all cotenants are legally entitled to occupy the entire property. To avoid awkward situations, those purchasing into TICs typically sign contracts with their cotenants, establishing certain parts of the property for the exclusive use of a certain cotenant. Doing so essentially ensures that the individual cotenants in the TIC each have the functional equivalent of a privately owned condominium, but at the reduced cost of a TIC. Thus, “[b]y purchasing apartments as TICs and agreeing to live in the separate units, individuals have been able to circumvent the condominium conversion restrictions by creating de facto condominiums.”¹⁶

The result of all this is that an owner of a multi-unit rental building is able to sell to a group of people who will purchase as Tenants in Common, thus becoming owners as well. But this sale effectively removes those former rental units from the local supply of apartments.¹⁷ The result is that renters lose their homes, while the TIC purchasers gain a (comparatively) inexpensive place to live.¹⁸ In response to this trend, some governments have attempted to impose moratoria prohibiting TICs for larger buildings, given that they have the potential to decrease the amount of rental housing stock, just as condo conversions do.¹⁹ But using legislation to limit conversion from a rental property to a TIC will likely face an uphill legal battle in the form of a takings challenge.²⁰ According to the U.S. Supreme Court, regulations are more likely to

City & Cty. of San Francisco, 952 F.3d 1157, 1161 (9th Cir. 2020) (“In 2013, the San Francisco Board of Supervisors acted to clear this backlog by enacting Ordinance 117-13 . . . , which suspended the conversion lottery until 2024 and replaced it with the ECP [Expedited Conversion Program].”).

16. Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and A Call for Default Rule Reform*, 1994 WIS. L. REV. 331, 446 n.211 (1994). This type of TIC is sometimes referred to as a “space-assignment co-ownerships (SACO).” See Andy Serkin, BLOG, <https://andysirkin.com/tenancy-in-common-tic/general-information/clear-answers-and-explanations>.

17. Marcia Rosen & Wendy Sullivan, *From Urban Renewal and Displacement to Economic Inclusion: San Francisco Affordable Housing Policy*, 25 STAN. L. & POL’Y REV. 121, 134 (2014).

18. See Andrew Khouri, *You Can Buy ‘Cheap’ in L.A. But You Won’t Own Your Home and May Oust a Renter*, L.A. TIMES (Dec. 30, 2019, 6:00 AM), <https://www.latimes.com/business/story/2019-12-30/tenancy-in-common> [<https://perma.cc/UR7T-FYBY>].

19. Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 331, 446 n.211 (1994); Rosen & Sullivan, *supra* note 17, at 157 (“In January 2014, local legislation was also proposed to regulate the conversion of rental units to fractional TIC ownership, driven by concerns over the contribution of TICs to evictions and buyouts and the removal of rent controlled units from the rental pool. . . . The legislation proposes to amend the Planning Code to create a definition of “fractional ownership” of buildings with two or more dwelling units (TICs) and require Planning Department approval of conversions from single to fractionalized ownership.”).

20. According to one prominent San Francisco land use and real estate lawyer, “In a series of cases decided between 1986 and 2007, California appellate courts have

work as a taking if they infringe on “established property rights.”²¹ TICs are a traditional form of common law property ownership, and thus they would squarely fit within an “established property right,” making any ordinance that limited the use of TICs vulnerable to a takings challenge.²²

As a result, traditional property law doctrine protects the rights of the building’s initial sole owner in her sale to a group of new co-owners, and protects those new cotenants as owners of an established property right, but fails to protect the building’s existing rental tenants, who will wind up being removed from their rental units.²³ Thus, the treatment of TICs under the law rewards ownership and harms tenants, contributing to gentrification and a lack of affordable rental units in neighborhoods where this structure has become popular.

II. Installment Land Contracts as Harmful Predatory Lending

An installment land contract functions much like a high-interest, seller-financed loan, but without the protections that mortgage law offers. The

struck down every law (including zoning) that attempted to prohibit or restrict SACO TIC conversions. Most of the legal community believes that it is now settled California law that cities and towns are not permitted to ban or regulate SACO TICs.” See Andy Serkin, *Clear Answers and Explanations on Tenancy in Common (TIC)*, SIRKIN LAW (Sept. 4, 2020), <https://andysirkin.com/tenancy-in-common-tic/general-information/clear-answers-and-explanations>.

21. See Sarah Schindler & Kellen Zale, *How the Law Fails Tenants (and Not Just During a Pandemic)*, 68 UCLA L. REV. DISC. 147, 154 n.32 (2020) (“See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 722 (2010) (“[I]t is not true that the new ‘common-law tradition . . . allows for incremental modifications to property law,’ . . . so that ‘owners may reasonably expect or anticipate courts to make certain changes in property law.’ . . .” (citations omitted)); *id.* at 736 (Kennedy, J., concurring in part) (“It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights.”). But see Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U.L. REV. 601, 604 (2015) (“The idea that ‘established property rights’ are completely immune from deprivation, limitation, revision, or even regulation (with or without compensation) has alarmed many scholars as well as some of the Justices.”); see also Kenneth Stahl (@kookie13), TWITTER (Dec. 31, 2019, 9:08 AM), <https://twitter.com/kookie13/status/1212058011260178432> [<https://perma.cc/QSE4-QWQU>] (discussing the use of TICs to avoid condo conversion ordinances and the legal implications of that approach).

22. See, e.g., David Rich, *Betting the Farm: The Tic Turf War and Why Tics Constitute Investment Contracts Under Federal Securities Laws*, 1 WM. & MARY BUS. L. REV. 451, 453 (2010) (“Tenancies-in-common are one of the oldest forms of interests in real estate.”); *United States v. Craft*, 535 U.S. 274, 279–80, (2002) (“English common law provided three legal structures for the concurrent ownership of property that have survived into modern times: tenancy in common, joint tenancy, and tenancy by the entirety. . . . The tenancy in common is now the most common form of concurrent ownership.”).

23. Of course, a municipality could adopt an ordinance that limits the removal of tenants when property is sold under certain circumstances [such as the Ellis Act of California].

seller of a home will provide the buyer with access to the property that is for sale, a high-interest loan, and a pledge to convey the deed to the purchaser after a set number of years (typically twenty to thirty years), so long as the purchaser makes monthly payments on the loan.²⁴ During the term of the agreement, the buyer is building no equity in the property. Yet at the same time, the buyer is responsible for repair and maintenance, property taxes, and insurance.

Some sellers use ILCs to sell homes that could not even be legally rented due to their being severely dilapidated. Whereas residential rental units must be clean, safe, and fit for human habitation pursuant to the implied warranty of habitability, that same requirement does not apply to properties sold under ILCs.²⁵ Thus, ILCs provide another example of the law favoring a homeowner at the tenant's expense: the owner is permitted to enter into a long-term contract to sell their property pursuant to an ILC, and receive monthly payments from the buyer/tenant, even though the owner would not be permitted to lease the property due to the recognition (in most states) that residential tenants are entitled to habitable premises.

A number of other concerns are associated with ILCs. For example, a traditional home purchase with a mortgage would include an inspection, as well as an appraisal, to ensure that the bank is not lending more than the house is worth. However, ILCs typically do not include such terms or requirements. Thus, purchasers under an ILC lack the protections that purchasers under a standard financing agreement receive. Similarly, although deeds are typically recorded, ILCs are often not (and are sometimes even drafted in such a way that they cannot be recorded).²⁶ This can lead to title problems. For example, after the ILC contract is signed by the buyer/tenant, the seller may still take out a mortgage loan on the property or encumber it in other ways, as the seller is still the record owner. Thus, even if the buyer/tenant is up to date on their installment payments, the property could be foreclosed upon and sold off.²⁷

Due to a number of structural barriers and racist policies, it has long been difficult (and often, impossible) for Black people in the United States to obtain mortgage loans.²⁸ In part because of these policies, and the resulting lack of intergenerational wealth within many BIPOC and their families, most Black and Latinx people rent.²⁹ However, others have sought

24. Editorial, *The Racist Roots of a Way to Sell Homes*, N.Y. TIMES (Apr. 29, 2016), <https://www.nytimes.com/2016/04/29/opinion/the-racist-roots-of-a-way-to-sell-homes.html>.

25. BATTLE ET AL., *supra* note 8.

26. BATTLE ET AL., *supra* note 8, at 8 (noting that land contracts are rarely recorded in public land records).

27. *Id.*

28. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017).

29. U.S. CENSUS BUREAU, *QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, FIRST QUARTER 2020*, at 9 tbl.7 (2020), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf> [<https://perma.cc/F3PK-FDMU>].

alternative forms of financing in order to obtain housing. Of those BIPOC that do purchase or attempt to purchase property, a large number do so through tools like ILCs.³⁰ However, these purchasers are not freely choosing to use an ILC because it is the most advantageous financing instrument. Rather, because they do not have access to conventional mortgage lending, one of the least protective tools to acquire ownership of a home is forced upon them. For example, many Black families lost their homes during the foreclosure crisis because many of them had been targeted with subprime loans. Thus, a number of these families now lack a sufficient credit rating to qualify for a traditional loan and are therefore targeted for ILCs.³¹ Immigrant populations and those who are not proficient in English are also targeted with these tools.³²

Although ILCs are often thought of as tools that were common in the past, their use is on the rise again.³³ This is especially true in the wake of the financial crisis; investment companies are using them to pass on run-down homes that they purchased at foreclosure sales.³⁴ According to one investigation, in Detroit in 2015, more people bought homes using ILCs than they did using traditional mortgages.³⁵ In Minneapolis and St. Paul, the use of

30. Historically, this was perhaps the most common way for Black families to purchase property. See Emily Badger, *Why a Housing Scheme Founded in Racism Is Making a Resurgence Today*, CHI. TRIB. (May 16, 2016, at 7:12 AM), <https://www.chicagotribune.com/business/ct-contract-selling-resurgence-20160513-story.html> (“Chicago lawyer Mark Satter . . . helped organize black Chicagoans to fight the practice [of ILCs] in the 1950s. He estimated then that about 85 percent of homes bought by black in Chicago were bought on contract.”). Even today, however, this is a common tool in communities of color. See BATTLE ET AL., *supra* note 8 (“In mid-2016, the National Consumer Law Center (NCLC) conducted a series of interviews with attorneys across the nation about their land installment contract cases. Almost universally, the advocates reported that the land contract buyers were largely or exclusively families of color: African-American or Latino homebuyers.”); see also Badger, *supra* (“In its earlier incarnation, it was an explicitly racist form of exploitation. And now it is victimizing the same groups again: mostly lower income and minority home buyers who can’t access traditional credit.”).

31. Lizbeth Cordova, *Contract for Deed Sales Killing the American Dream*, CORNELL J.L. & PUB. POL’Y: ISSUE SPOTTER (Mar. 1, 2018), <http://jlpp.org/blogzine/contract-for-deed-sales-killing-the-american-dream> (“Contract for deed sellers typically target low-income would-be buyers who do not have the credit rating necessary for a traditional loan.”).

32. BATTLE ET AL., *supra* note 8 (“Immigrants and limited English proficient populations are especially at risk for this type of financing as they search for affordable housing without access to conventional financing.”).

33. See generally Cori Harvey, “We Buy Houses”: Market Heroes or Criminals?, 79 MO. L. REV. 649 (2014).

34. See Matthew Goldstein & Alexandra Stevenson, *Market for Fixer-Uppers Traps Low-Income Buyers*, N.Y. TIMES (Feb. 20, 2016), <https://www.nytimes.com/2016/02/21/business/dealbook/market-for-fixer-uppers-traps-low-income-buyers.html> (noting that by 2016, more than three million people had used ILCs to purchase a home, particularly concentrated among in the Midwest and South, and ILCs had begun drawing attention).

35. Badger, *supra* note 29.

ILCs increased fifty percent in the six-year period during and following the mortgage crisis.³⁶ And a bit earlier, ILCs were purportedly becoming more common than leases for low-income residents in East St. Louis, Illinois, in the 1980s.³⁷ Of note, these cities also have large BIPOC populations.³⁸

A small number of states³⁹ have sought to protect the buyer/tenant by treating ILCs more like mortgages, and providing the protections that a mortgagor receives under mortgage law.⁴⁰ Other commentators have argued that ILCs should in fact be treated more like leases, offering the purchasers more typical tenant protections.⁴¹ But overall, there is little regulation of ILCs. Although scholars have suggested that they can and should be regulated by the Consumer Financial Protection Bureau (CFPB), that has not yet happened.⁴² One area for further study involves *why* the CFPB has failed to

36. BATTLE ET AL., *supra* note 8 (noting that “land contract sales in the Twin Cities had increased 50% from 2007 to 2013”).

37. Kaplan, *Bond for Deed: Practice Called Solution and Problem for Poor Seeking Homes*, BELLEVILLE (ILL.) NEWS-DEMOCRAT, July 27, 1986, B3.

38. Detroit’s population is currently eighty-two percent Black. See DETROIT, MICH. POPULATION 2020, WORLD POP. REV. (2020), <https://worldpopulationreview.com/us-cities/detroit-mi-population>. Minneapolis’s current estimated population contains over forty-one percent BIPOC. QUICK FACTS: MINNEAPOLIS CITY, MINN., U.S. CENSUS BUR., <https://www.census.gov/quickfacts/minneapoliscityminnesota> (last visited Jan. 8, 2021). Although the cited article was from 1986, the population of East St. Louis in 2000 was over ninety-seven percent Black. QUICK FACTS: EAST ST. LOUIS CITY, ILL., U.S. CENSUS BUR., <https://www.census.gov/quickfacts/fact/table/eaststlouiscityillinois/LND110210> (last visited Jan. 8, 2021).

39. “Oklahoma and Texas are the only states that have legislatively barred forfeiture (and in Texas, only if the contract is recorded). In a small number of other states, like Ohio, the seller must proceed with a foreclosure in lieu of forfeiture if the buyer has paid for five years or has paid twenty percent of the original purchase price” BATTLE ET AL., *supra* note 8, at 9.

40. See Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low Income Purchaser*, 62 N.Y.U. L. REV. 293 (1987) (“Courts have attacked forfeiture clauses with vigor, most often by granting to purchasers some or all of the protections enjoyed by mortgagors under state mortgage law: the rights to reinstate contracts after default, to redeem property, to seek restitution of excess payments, and, in some cases, even to demand foreclosure.”).

41. See, e.g., *id.* at 293 (“[I]n certain, defined circumstances, courts should look beyond the form of a residential installment land contract and construe the transaction as a lease, [and] . . . the court should impose on the vendor-landlord the same obligations that residential landlords have-to maintain the leased premises in habitable condition.”); Cordova, *supra* note 30 (“If these sellers want to insist that they are not lenders and do not have to face federal compliance laws, then they must agree to be landlords and be responsible for all traditional landlord responsibilities. This would include making sure that the property is in a condition for human living.”).

42. The NCLC noted that “the CFPB has the authority to issue a comprehensive regulation under section 129(p) of the Truth in Lending Act (TILA), 15 U.S.C. § 1639(p), which mandates that the CFPB issue regulations addressing practices which are either: 1) unfair or deceptive in the mortgage marketplace, or 2) seek to evade TILA’s regulation. A land

regulate ILCs, given that our legal system provides robust mortgage protections. This may be due to the last administration, during which the CFPB was less assertive in its role as a regulatory body.⁴³ Or, as with so many other areas of housing law where legal protections and programs implicitly or explicitly favored whites,⁴⁴ race may be part of the explanation for the disparities in legal treatment: as discussed above, typical purchasers under ILCs are most often lower-income people of color. Regardless, ILCs present

installment contract is considered 'credit' for purposes of TILA because it creates a debt (the purchase price) and defers its payment." The seller in a land contract meets the definition of a "creditor" under TILA if he or she is a person who "regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments (not including the down payment) and to whom the obligation is initially payable." *BATTLE ET AL.*, *supra* note 8, at 12. In May 2016, the CFPB "assigned two enforcement lawyers to investigate the prevalence of seller-financed home transactions and determine whether the terms of some deals may violate federal truth in lending laws." Matthew Goldstein & Alexandra Stevenson, *Contract for Deed Lending Gets Federal Scrutiny*, N.Y. TIMES (May 10, 2016), <https://www.nytimes.com/2016/05/11/business/dealbook/contract-for-deed-lending-gets-federal-scrutiny.html>. Despite this apparent interest, the CFPB has not promulgated any regulations for ILCs. Indeed, the only ruling related to ILCs removed a specific example of an "installment land sales contract that would not be considered an extension of credit" from regulation C and instead "provided more generally that installment land sales contracts, depending on the facts and circumstances, may or may not involve extensions of credit rendering the transactions closed-end mortgage loans." 82 Fed. Reg. 43088, 43093.

43. Nicholas Confessore, *Mick Mulvaney's Master Class in Destroying a Bureaucracy From Within*, N.Y. TIMES MAG. (Apr. 16, 2019), [HTTPS://WWW.NYTIMES.COM/2019/04/16/MAGAZINE/CONSUMER-FINANCIAL-PROTECTION-BUREAU-TRUMP.HTML](https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html) (discussing the Republican party's 2016 platform describing the CFPB as a "rogue agency" with "dictatorial powers unique in the American Republic"). Enforcement actions have also fallen significantly. See Jana Herron, *Consumer Protection Wanes Under Trump, Reports Find*, USA TODAY (Mar. 13, 2019), <https://www.usatoday.com/story/money/2019/03/13/consumer-protection-actions-cfpb-ftc-and-cpsc-decline-under-trump/3142905002>. Of note, the CFPB has taken one enforcement action against a company using ILCs, although not following the framework laid out by the NCLC in its report. On June 23, 2020, the CFPB announced that they had settled with Harbour Portfolio Advisors, LLC, a company offering ILCs, and two other companies that furnished consumer credit report information to credit-reporting agencies. CONSUMER FIN. PROT. BUR., *CONSUMER FINANCIAL PROTECTION BUREAU SETTLES WITH CONTRACT FOR DEED COMPANIES FOR ENGAGING IN DECEPTIVE ACTS AND PRACTICES AND VIOLATING CREDIT REPORTING RULES* (June 23, 2020), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-settles-companies-engaging-deceptive-acts-practices-violating-credit-reporting-rules>. The companies were accused of deceptive acts and of violating consumer credit rules when they told consumers who complained about errors in their credit report that the consumers would have to file a dispute with the consumer credit reporting agency. *Id.* This ran afoul of the Fair Credit Reporting Act. The settlement, though, amounted to a slap on the wrist, with Harbour only agreeing to pay a \$25,000 penalty to the CFPB, and the two other firms agreeing to jointly pay \$10,000 to the CFPB. *Id.*

44. See, e.g., ROTHSTEIN, *supra* note 28.

an example of a type of liminal housing tenure, wherein the seller under the ILC has robust legal rights, as full-fledged owners typically do, while the buyer/tenant is treated even more poorly than a typical tenant in a more standard landlord/tenant relationship.

III. TICs and ILCs—Harming Non-Owners

TICs and ILCs are examples of property tools that serve to enrich owners of real property at the expense of non-owners. Although TICs are a traditional form of property ownership, they are increasingly being used in a somewhat novel way to remove additional units of housing from the rental market and displace renters. In this way, TICs function as a tool that contributes to gentrification, tilts the playing field toward ownership by allowing would-be homeowners to enter the market at a lower price point, and makes it harder for non-owners to find rental housing.⁴⁵ Indeed, in Los Angeles, a city with an acute affordable housing shortage, “[a]ll of the TICs that have sold or are for sale . . . have been converted from older rent-controlled apartment buildings and bungalow courts.”⁴⁶

ILCs are another a tool that problematically props up ownership while harming the liminal, would-be owners who seek to purchase under an installment contract. ILCs allow owner/sellers to profit off of properties that are in poor condition, including those that would not even meet the requirements under the implied warranty of habitability in many states. Furthermore, most ILCs have a “forfeiture clause,” meaning that, if the buyer misses a payment, the seller can retake possession of the property and the buyer/tenant forfeits all of their payments, as well as any repairs or “sweat equity” that they have invested in the home.⁴⁷ This process is typically faster (and less protective of the ILC buyer) than a mortgage foreclosure would be: the seller does not have to sell the property, observe notice and redemption rights, or file a court case.⁴⁸ Indeed, this process might even be faster than eviction in some jurisdictions.

Thus, both TICs and ILCs stack the deck in favor of owners and harm non-owners, though they do so in different ways. While TICs reduce the availability of rental housing stock, ILCs create a precarious path to quasi-ownership. There are, of course, public policy reasons that might support

45. Andrew Khouri, *You Can Buy ‘Cheap’ in L.A. But You Won’t Own Your Home and May Oust a Renter*, L.A. TIMES (Dec. 30, 2019, 6:00 AM), <https://www.latimes.com/business/story/2019-12-30/tenancy-in-common> [https://perma.cc/UR7T-FYBY] (noting that the TIC trend “exacerbates [the] affordable housing crisis”).

46. Jenna Chandler, *TICs Could Change LA’s Housing Market—For Better, and Worse*, LA CURBED (Aug. 8, 2019), <https://la.curbed.com/2019/8/8/20751845/tenancy-in-common-los-angeles-rental-girl>.

47. BATTLE ET AL., *supra* note 8 (noting that “homeownership through these deals was often a mirage, and buyers lost their homes, their down payments, their sweat equity, and the money they paid for repairs, maintenance, insurance, and interest”).

48. Amy Bullock, *Installment Contracts*, ATT’Y TITLE GUAR. FUND (2021), <https://www.atgf.com/tools-publications/pubs/may-2002-atgarticlesinstallment-contracts>.

property law's tendency to reward and encourage homeownership, or to treat homeowners more favorably than renters under certain circumstances. For example, homeownership is the most readily accessible means for most families to build wealth, and it provides other types of economic stability in ways that renting may not.⁴⁹ However, our research suggests that many of the laws that distinguish based on housing tenure do so without being grounded in any property-theory justification, and in spite of the owners and renters at issue being otherwise similarly situated. Furthermore, in part because of the structural racism that has permeated property law in the United States from its earliest foundations,⁵⁰ these policies have the most dramatic impacts on low-income people and people of color.

While TICs and ILCs may have once been minor features of the U.S. housing market, these liminal forms of housing tenure are becoming increasingly prevalent, and they have disproportionately negative impacts on poor people and people of color. Although a full discussion of how TICs and ILCs might be reformed and their negative impacts mitigated is beyond the scope of this essay, our analysis suggests some potentially constructive legal and policy responses. For ILCs, this might include the Uniform Law Commission developing a model law for ILCs that is cognizant of the risks to purchasers. States could then adopt such laws, rather than leaving the parties to ILCs to the vagaries of individual state contract law.⁵¹ For TICs, this might include statutory extensions of tenant protections under condo conversion laws to tenancy-in-common conversions. More broadly, we must rethink the use of housing tenure status as a determinant of legal rights, and reconceptualize legal doctrines that unjustifiably provide homeowners with greater legal protections and access to shelter than similarly situated tenants and other non-owners.

49. See, e.g., Christopher E. Herbert et al., *Is Homeownership Still an Effective Means of Building Wealth for Low-income and Minority Households (Was It Ever)?*, JOINT CTR. FOR HOUS. STUD. HARVARD UNIV. (Sept. 2013), <https://www.jchs.harvard.edu/sites/default/files/hbtl-06.pdf> (analyzing the evidence in favor of and against homeownership as means of building wealth for low-income and minority households and concluding that despite risks involved in homeownership for these groups, a strong association exists between homeownership and accumulating wealth); Laurie S. Goodman & Christopher Mayer, *Homeownership and the American Dream*, 32 J. ECON. PERSP. 31, https://www.urban.org/sites/default/files/publication/96221/homeownership_and_the_american_dream_0.pdf (concluding that although other mechanisms exist to achieve upward mobility, homeownership remains the principal way for families in the United States to build wealth and economic stability).

50. See generally *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); ROTHSTEIN, *supra* note 28.

51. See Goldstein & Stevenson, *supra* note 7 (discussing a possible proposal to do so by the Uniform Law Commission).

Race and Housing: The Great Betrayal Revisited and Repaired.

Two Proven Approaches and a New Proposal for Low-Income Homeownership

Jessica Grobman-Morales,* Anthony R. “Andy” Parrish, Jr.**
& Carol L. Zeiner***

I. Introduction.....	535
II. The Background of Housing Policy Failure	537
A. Perpetual Renters.....	537
B. Section 8: The Best Rental Deal Around, but Not So Good for Black People Who Want to Access Safer Neighborhoods with Better Schools	537
i. The Unacceptable Verdict	541
ii. Psychological Impacts	541
III. Alternatives in Low Income Housing	542
A. Support from Legal Theory.....	542
B. The CGLDC and Wind & Rain Homeownership Models	543
C. The Habitat for Humanity Model	545
D. Similarities and Differences	545
E. Outcomes	546
F. Gentrification.....	546
G. The Future for Habitat, Wind & Rain, and CGLDC Models	547
IV. A New Model for Homeownership: “The Village”	547
A. The Village	548
B. What Would Becoming a Resident of The Village Mean?	549
C. Equity	550
D. Other Advantages of The Village	551
E. The Crucial Difference	552
F. Challenges, and the Key to The Village’s Success: Demonstration Project	552
Conclusion	553

I. Introduction

A promise made by Abraham Lincoln to the former enslaved persons was broken. That promise—land ownership—was one of the goals of Reconstruction. Land ownership represented freedom, a tangible stake in America, opportunity, and a way to keep and build upon this foundation through work. It was to be accomplished through the Southern Homestead Act of 1866,¹ which was enacted in response to a plea from Southern Black

*Jessica Grobman-Morales, JD Candidate, St. Thomas University School of Law, May 2022. Ms. Grobman-Morales has prior experience as a social worker and teacher and as a short-term resident of Section 8 housing as a child.

ministers that freed slaves be given land to work that would result in the accumulation of “generational wealth.”² The cancellation and rescission of “40 acres and a mule” for the newly freed people³ has reverberated down the years to today’s income inequality and Black Lives Matter movements.

The issues of housing and poverty are inextricably linked. Housing is not merely a roof over one’s head and a place to sleep. It intersects with access to health care, job opportunities, personal safety, interaction with the criminal justice system, and high-quality education for children. It is a path to a better life. It is a necessity.

Racial unrest once again has gotten everyone’s attention. Let it motivate us to implement practical solutions—housing solutions that address poverty and the attendant lack of opportunity. We can do this by harnessing what we have learned from past affordable housing successes, combined with what we have learned from psychology, social science, and related legal theory as to what enables human beings to thrive.

This essay first will focus on the most serious problems faced by Black low income renters, including those with Section 8 vouchers: virtually all the rental alternatives create a perpetual cycle of poverty with no way out. Next, this paper will describe the highly adverse human impacts that being locked into permanent renter status, with no effective choices, has on some families. It will then contrast this situation with the psychological benefits to all families of having viable self-determined choices to improve their futures. The essay will then touch on legal theory supporting such affordable housing alternatives.

Next, the essay will examine two affordable housing programs that, in addition to Habitat for Humanity, have succeeded in lifting a subset of lower income families out of dependence and poverty in Miami-Dade

**Anthony R. “Andy” Parrish, Jr., JD, LLM (tax), commercial real estate broker, developer, and builder. President and founder of Wind & Rain, Inc., Miami, Florida. Current member of the City of Miami Planning, Zoning and Appeals Board

***Carol L. Zeiner, Professor of Law, St. Thomas University School of Law, Miami, Gardens, Florida. Professor Zeiner has extensive law practice experience representing developers of large-scale projects, and a public college, in the planning, acquisition, and assemblage of sites for expansion.

The authors thank Research Assistant PaulMarie E. Bobb and St. Thomas University School of Law Faculty Services and Reference Librarian John J. O’Donnell for their research assistance. The authors especially thank Dr. Marvin Dunn, Professor Emeritus, Florida International University, historian, education expert, and civil rights leader, for his guidance, without which this paper and many of the concepts contained in the new proposal would not have been possible. The authors thank Maureen Ruggiero, Chief Development Officer of Miami Habitat for Humanity, for her comments on an earlier draft of this essay.

1. 14 Stat. 166 (1866); *see also* UNITED STATES SENATE, THE CIVIL WAR: THE SENATE’S STORY, https://www.senate.gov/artandhistory/history/common/civil_war/Homestead_Act.htm (last visited Oct. 30, 2020).

2. MARVIN DUNN, A HISTORY OF FLORIDA THROUGH BLACK EYES 72 (2016).

3. *Id.*

County, Florida. Interestingly, these successful programs evidence the human flourishing derived from autonomy as described in psychological theory.

Finally, this essay will propose a new model that blends the best of Section 8 with the two affordable housing models described herein. It, too, is grounded in principles that empower families to set and achieve goals of their own choosing.

II. The Background of Housing Policy Failure

A. Perpetual Renters

Black people,⁴ as a group, have been subjected to private redlining, mortgage discrimination, and government-backed programs that have segregated and excluded them from reaping the benefits of owning the shelter in which they live.⁵ Thus, they have been deprived of the means to accrue equity and, consequently, the opportunity to build generational wealth.⁶

The vast majority of Black people have been relegated to the status of perpetual renters, with housing choices that do not include homeownership. Instead, the choices are limited to being: a tenant in the private sector (frequently at rents absorbing more than fifty percent of household income, or of a slumlord, or both); a tenant of public housing; or, a tenant of subsidized housing. Many are at the lowest level of the social and economic strata. Even the federal government's preferred affordable housing model today is based on the rental model. Its primary and largest housing program for the poor is the Housing Choice Vouchers Program, more often known as Section 8.⁷

B. Section 8: The Best Rental Deal Around, but Not So Good for Black People Who Want to Access Safer Neighborhoods with Better Schools

The intent of Section 8, which, as of 2019, was serving over 2.2 million families and individuals, is to help low-income families find stable housing in safe neighborhoods.⁸ These families should not be paying more than the thirty percent of Adjusted Gross Family Income⁹ for a residence in an area

4. For purposes of this article, the term "Black" people includes all those of the African diaspora.

5. See A 'Forgotten History' Of How the U.S. Government Segregated America, NAT'L PUB. RADIO (May 3, 2017, 12:47 P.M.), <https://www.npr.org/transcripts/526655831>.

6. *Id.*

7. See 24 C.F.R. pt. 982 (2020) (HUD regulations for Section 8); Low Income Housing, General Program of Assisted Housing, 42 U.S.C. § 1437f (2020); see also CTR. ON BUDGET & POL'Y PRIORITIES, UNITED STATES FEDERAL RENTAL ASSISTANCE FACT SHEETS (Dec. 10, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/12-10-19housing-factsheet-us.pdf> (last visited Dec. 2, 2020); Alana Semuels, *Is Ending Segregation the Key to Ending Poverty?*, ATL. 5 (Feb. 3, 2015), <https://www.theatlantic.com/business/archive/2015/02/is-ending-segregation-the-key-to-ending-poverty/385002>.

8. U.S. DEP'T HOUS. & URB. DEV., SECTION 8 RENTAL CERTIFICATE PROGRAM, <https://www.hud.gov/programdescription/cert8> (last visited Oct. 30, 2020).

9. *Id.*

that is generally acknowledged to be appropriate for human health, safety, and welfare. Section 8 incentivizes private landlords to provide decent shelter to these families in exchange for rent, paid in part by the tenant, and in part by the local administrators of the federally funded program.¹⁰

The program is immensely popular with families who often have no other choice for decent shelter,¹¹ and also with certain landlords in more impoverished areas where a good tenant is merely one whose rent check arrives each month.¹² Waiting lists are long, and sometimes closed.¹³ Yet, as compared with the other types of rentals mentioned above,¹⁴ Section 8 is generally the best alternative.

Section 8 has a number of design and application flaws.¹⁵ The worst, for Black people, is its ineffectiveness to deliver the freedom to choose the kinds of housing and locations that provide access to healthy social, educational and economic opportunities for themselves and their children.¹⁶

Rents in safe neighborhoods with good schools may be so high as to exclude Section 8 tenants.¹⁷ Critically, landlords need not accept Section 8 vouchers, and far fewer landlords in safe neighborhoods do accept them,

10. Erin M. Graves, National Low Income Housing Coalition, *Rooms for Improvement: A Qualitative Metasynthesis of the Housing Choice Voucher Program*, 26 HOUS. POL' DEBATE 346, 347 (2016), <https://nlihc.org/sites/default/files/Rooms-for-Improvement.pdf>.

11. Abby Vesoluis, *A Mask for Racial Discrimination. How Housing Voucher Programs Can Hurt the Low-Income Families They're Designed to Help*, TIME (Feb. 20, 2020, 7:28 AM), <https://time.com/5783945/housing-vouchers-discrimination> (“Getting a Housing Choice Voucher . . . can feel like hitting the lottery[,]” because federal funding is insufficient to provide vouchers for all eligible households).

12. See Graves, *supra* note 10, at 354; Semuels, *supra* note 7, at 2–3.

13. Graves, *supra* note 10, at 355; Vesoluis, *supra* note 11.

14. Tenants in the private sector, frequently at rents absorbing more than fifty percent of the family income, or of a slumlord (or both), or tenants of a public housing project, or tenants of other subsidized rental programs.

15. See *infra* notes 43–44 and accompanying text (describing the Therapeutic Design of Law and the Therapeutic Application of Law).

16. Section 8 is frequently described as “giving recipients the freedom to choose the kinds of housing and locations that best meet their needs,” in healthy neighborhoods that offer opportunities for the recipients and their children. See, e.g., Graves, *supra* note 10, at 10, 12–14 (stating that “qualitative data does not support the fundamental assumption that the program allows recipients to ‘exercise free and full location choices,’” and noting racial issues and source of income discrimination); *Strengths and Weaknesses of the Housing Voucher Program, Congressional Testimony before the Subcomm.on Housing and Community Opportunity, of the H. Comm. on Financial Services* (June 17, 2003) (statement of Margery Austin Turner, testifying that the program has not been as effective “in promoting residential mobility and choice among minority recipients as [it has] been for whites”), available at <https://www.urban.org/sites/default/files/publication/64536/900635-Strengths-and-Weaknesses-of-the-Housing-Voucher-Program.pdf>.

17. Landlords can request a “reasonable rent study” to allow a rent beyond the fair market rent for the greater area, thus making the property available under Section 8. *But see* Semuels, *supra* note 7, at 2 (stating that “many landlords of buildings in nicer neighborhoods will do anything to keep voucher-holders out”).

especially in areas where properties rent quickly. Section 8 vouchers carry the stigma of poverty.¹⁸ Landlords in middle class, white areas fear that Section 8 tenants will not be reliable and will bring with them the problems associated with poverty: crime, dysfunctional families, drug abuse, and poorer functioning schools, to name a few. They fear that with Section 8 will come overly burdensome government inspections,¹⁹ and possibly greater wear and tear on the units.²⁰ They fear that Section 8 will reduce the rents that other tenants are willing to pay²¹ and thus will drive down their property value. Neighboring property owners, too, fear adverse impacts on property values.²² “We don’t accept Section 8” can be a guise for racial discrimination in rental housing.²³

Immediate need for something as essential as housing forces drastic measures for immediate solutions, even if it means passing up on longer-term benefits.²⁴ Families, poor but lucky enough to receive a coveted Section 8 voucher, must find a landlord willing to accept it within sixty to ninety days, although voucher holders can request an administrative extension. As a result, most time-pressured Section 8 voucher holders are driven back to the poor, unsafe, neighborhoods with failing schools from which they were trying to escape.²⁵ Furthermore, local administrators frequently are not strict in enforcing standards for safe, sanitary housing, and voucher holders routinely are stuck in unsafe, unsanitary rentals.²⁶

Although a Section 8 family technically is allowed to move, they cannot actually do so because of the lack of better Section 8 alternatives. If they complain too much, the landlord may retaliate, despite anti-retaliation statutes, habitability laws, and protections within Section 8 itself. Even if the

18. See, e.g., Vesoluis, *supra* note 11; Semuels, *supra* note 7, at 1; Barbara Ann Teater, *Qualitative Evaluation of the Section 8 Housing Choice Voucher Program, The Recipients’ Perspective*, 10 QUALITATIVE SOC. WORK 503 (2011), available at https://www.researchgate.net/publication/258182439_A_Qualitative_Evaluation_of_the_Section_8_Housing_Choice_Voucher_Program_The_Recipients’_Perspectives.

19. See, e.g., Vesoluis, *supra* note 11 (describing significant loss of income to landlords due to lengthy housing authority delays in inspecting properties, a prerequisite to approving and beginning a Section 8 lease); Graves, *supra* note 10, at 354 (same).

20. See, e.g., YOUNG MGMT. CORP., 6 COMMON PROBLEMS LANDLORD[SIC] FACE WHEN RENTING TO SECTION 8 TENANTS (2020), <https://www.ymcorp.com/problems-section-8-rental-properties>.

21. See, e.g., Balance Small Business, *6 Risks of Renting to Section 8 Tenants* (June 25, 2019), <https://www.thebalancesmb.com/renting-to-section-8-tenants-disadvantages-2124975>; Semuels, *supra* note 7, at 3.

22. See Angela Caputo, *Broken Homes: Cashed Out*, CHI. REP. (July 1, 2013), <https://www.chicagoreporter.com/cashed-out>.

23. Vesoluis, *supra* note 11, at 2, 3.

24. Semuels, *supra* note 7, at 2.

25. Graves, *supra* note 10, at 355-56.

26. Caputo, *supra* note 22.

landlord does not retaliate,²⁷ landlords who do not remediate unsatisfactory conditions to housing quality standards initially face rent abatement. However, if the landlord spends significant funds improving the property, the landlord may raise the rent so that the property no longer qualifies for the resident's voucher. Finally, if the local housing authority administering Section 8 cites the landlord and the deplorable conditions are not corrected, the landlord will be disqualified from the Section 8 program, and the government will no longer subsidize the tenant's rent. The tenant then faces eviction for failure to pay the full rent.²⁸

Under Section 8's priority ranking system, "low income" families are differentiated from "extremely low income" and "very low income" families. Families having income of eighty percent or more of Area Median Income²⁹ are not eligible for Section 8 assistance.³⁰ "Low income" families are rarely assisted by Section 8 because these families are its third priority. The second priority, "very-low-income" families, may also fail to receive assistance. Even some first priority "extremely low income" families will fall through the cracks. Any family in any of the three categories that fails to obtain needed rental subsidy is then relegated to seeking other public housing, such as that under the federal Low Income Housing Tax Credit program, or entering the private rental market. Without the Section 8 subsidy, housing in the private market presents its own dilemma. One must choose between rents costing much more than thirty percent of adjusted gross family income, thus leaving little left over for survival above the subsistence level; or, choosing properties with lower rents in deplorable, unsafe, unsanitary condition.

The catch does not stop there. So long as a voucher holder qualifies, Section 8 will continue to provide rental subsidy to her. However, if she desires something better for her family, and through her efforts achieves better paying employment, she will likely find her seventy percent rental subsidy to be decreased and her thirty percent rent portion increased. Thus, her pay and income increase may largely go toward rent until her income level disqualifies her for rental assistance. Also, if the impoverished neighborhood improves through the efforts of its residents, or gentrifies because of its location, rental units are likely to be bought by new owners who refuse Section 8. Even without change in ownership, rents are likely to increase. Section 8 tenants, and all other low income renters, will find themselves displaced, without the financial benefit of equity that would accrue for property owners.

Thus, the vast majority of low-income families of all Section 8 "categories," as well as those in public housing or renting in the private market,

27. Retaliation should not occur under a locally administered Section 8 program that is run properly.

28. Vesoluis, *supra* note 11; Caputo, *supra* note 22.

29. A figure calculated for each geographic area and periodically recalculated.

30. These families may qualify for other subsidy programs.

cannot escape the status of perpetual renter. They cannot accumulate savings or generational wealth. Societal practices, culture, and all forms of social media connect status and respect with one's wealth. Accordingly, certain housing options, including Section 8, have only served to reenforce feelings of prejudice, powerlessness, and the notion that one's socioeconomic status will always be the overarching factor of how respect is given and earned.

i. The Unacceptable Verdict

People who are low income are often subjected to systemic oppression. They are deprived of the means to accrue equity and, therefore, of the opportunity to build generational wealth that comes from owning the shelter in which one lives. Too many also are left without the ability to bring about effective, opportunity-producing change in their rental housing situation. It is especially so for Black people, against whom the "we don't accept Section 8" excuse too often is used as a mask for racial discrimination.

ii. Psychological Impacts

"Denying people a sense of control over important areas of their lives can have strongly negative consequences."³¹ It can lead to what Martin Seligman has labeled "learned helplessness, comprised of three interlocked things: [f]irst, an environment in which some important outcome is beyond control; second, the response of giving up; and third, the accompanying cognition: the expectation that no voluntary action can control the outcome."³² It produces feelings of passivity and depression, and can lead to severe somatic malfunctions, and even death.³³ Having one's decisions made by "the system," without achievable workable alternatives that one can choose, is inevitably infantilizing and perpetuates dependency.³⁴

In stark contrast, "there is considerable psychological value in allowing people to make choices for themselves."³⁵ Self-determination in significant aspects of one's life contributes to psychological well-being.³⁶ Self-determined choices are more satisfying and suitable than those that are compelled. Moreover, the act of selecting goals and objectives is itself an important ingredient in the attainment of those goals. It produces motivation, individual effort, self-monitoring and self-evaluative mechanisms,

31. Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1765 (1992).

32. MARTIN E.P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH* xvii (1975).

33. Winick, *supra* note 31, at 1765 (citing EDWARD L. DECI, *THE PSYCHOLOGY OF SELF-DETERMINATION* 209 (1980)).

34. See JOEL FEINBERG, *SOCIAL PHILOSOPHY* (1973).

35. Winick, *supra* note 31, at 1755.

36. See Amy D. Ronner & Bruce J. Winnick, *Therapeutic Jurisprudence: Issues, Analysis, and Applications: Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499, 502 (2000).

commitment, and positive expectancies. The effect of goal-setting is one of the most robust findings in psychological literature.³⁷ The nineteenth-century philosopher John Stuart Mill suggested that autonomous decision-making is necessary to realization of an individual's full potential.³⁸

III. Alternatives in Low Income Housing

Can there be other alternatives in affordable housing that empower individual choice, end the cycle of dependency, and create opportunity to accumulate equity? The answer is a resounding and demonstrable "Yes!" Successful alternatives have already proven themselves, and this article proposes another viable model based on these precedents.

A. Support from Legal Theory

A number of legal theories could support the affordable housing alternatives presented here. We highlight just one: therapeutic jurisprudence.

Therapeutic jurisprudence is an interdisciplinary approach to law that analyzes the effect of laws and legal processes on the emotional and related physical well-being of the persons involved.³⁹ It is international in scope and used in over 100 areas of law.⁴⁰ It proposes "that positive, therapeutic effects are desirable and should generally be a proper aim of law, and that antitherapeutic effects are undesirable and should be eliminated, so long as other values such as justice, due process, and various constitutional values can be fully respected."⁴¹ Thus, it focuses on the dignity of the individual, and his or her wellbeing, yet it does so without minimizing the obligations and rights contained in law.⁴²

Therapeutic jurisprudence values practicality, respect, voluntary decision-making, and the relational well-being of the communities involved

37. Winick, *supra* note 31, at 1756–59 (1992).

38. *Id.* at 1764 (citing JOHN STUART MILL, ON LIBERTY (Currin V. Shields ed., 1956)).

39. See BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 3 (1997). Many sources refer only to mental and psychological health. See Susan Daicoff, *The Comprehensive Law Movement*, 19 TOURO L. REV. 825, 837 (2004) (referring to people's emotional lives and psychological well-being); David B. Wexler, *Therapeutic Jurisprudence*, 20 TOURO L. REV. 353, 356 (2004) (noting "law's influence on emotional life and psychological well-being"). We believe that most would agree that the reference to "physical health" refers to the impact of psychological harms on physical health. See Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 17 (1997) (stating that "law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects.").

40. See *About the ISTJ*, INT'L SOC'Y FOR THERAPEUTIC JURIS. (June 30, 2020), intl.tj.com/about/therapeutic-jurisprudence.

41. WINICK, *supra* note 39.

42. See Carol L. Zeiner, *Getting Deals Done: Enhancing Negotiation Theory and Practice Through a Therapeutic Jurisprudence/Comprehensive Law Mindset*, 21 HARV. NEGOT. L. REV. 279, 291 (2016).

in each legal matter.⁴³ In addition to analyzing laws, it is valuable in the design/reform of laws, and processes (referred to as the Therapeutic Design of Law, or "TDL"). It is vital in guiding how laws and processes actually are put into effect in practice (referred to as the Therapeutic Application of Law, or "TAL"). Although it is preferable that both TDL and TAL be present in laws and legal processes, TAL is essential and can ameliorate the effects of laws designed without TDL.⁴⁴

It is clear that housing arrangements that keep the poor locked in poverty, and that thwart individuals' choices to achieve better, are highly anti-therapeutic. Despite its intent, many aspects of Section 8 lack therapeutic design. Section 8's application is even more antitherapeutic. In stark contrast, the alternatives described below, especially the proposed approach that has the potential to provide self-determined options further down into the Section 8 pool of participants, are highly therapeutic.

It is not surprising that the proven approaches described in this article are all in accord with the findings of social science and psychology, and with the legal theory of therapeutic jurisprudence. The same is true of the newly suggested solution. Notably, all these models are based on *ownership* of the shelter in which one resides.

B. The CGLDC and Wind & Rain Homeownership Models

Two successful ways of promoting low income households into homeownership were initiated in the 1990s in the Miami area, in the adjacent historic Bahamian neighborhoods of MacFarlane Homestead and West Coconut Grove. In the MacFarlane neighborhood, comprised of a dozen blocks in the City of Coral Gables, the Coconut Grove Local Development Corporation (CGLDC) built two dozen well-designed houses on donated, mostly adjacent, lots and made them available to local Black residents at a subsidized price, with a small down payment, and a low interest mortgage provided by the municipality. All quickly sold, and almost all are still occupied by the original families today.

Inspired by CGLDC's success in MacFarlane, a small private development company called Wind & Rain in 1994 bought a vacant lot in nearby

43. See *id.* at 291 (practicality, respect); Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1, 5 (2006) (relational wellbeing of communities) (cited in Carol L. Zeiner, *A Therapeutic Jurisprudence Analysis of Government's Directives on Student to Student Campus Rape*, 47 J. OF LAW & ED. 427, 437–38 (2018)); Ronner & Winnick, *supra* note 36, at 502 (voluntary decision-making).

44. WINICK, *supra* note 39, at 3–10; see also Marc W. Patry, *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439, 440 (1998); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 831 (David B. Wexler & Bruce J. Winick eds., 1996).

West Coconut Grove at auction for \$3500 and placed a sign on it “Why Rent When You Can Own?”⁴⁵

Wind & Rain’s two partners designed a 1200 sq. ft. 3BR/2BA fully equipped house and convinced the City of Miami to create a “soft 2nd mortgage” program for half of the \$78,000 purchase price, with the other half to be provided at market rate by commercial banks eager to get Community Reinvestment Act⁴⁶ credits without any default risk. All the would-be homebuyers had to do was save \$3000 for the down payment (a painful, major commitment for minimum wage earners) and not get a raise before closing which might disqualify them under City guidelines based on HUD’s thirty percent standard.

Wind & Rain did this model sixteen times over ten years⁴⁷ on scattered lots within the sixty-block area known as West Coconut Grove. The adjusted gross income of these families averaged in the low \$20k range, which was the amount two parents each making minimum wage working forty hours per week earned at that time. The buyers included a mail carrier, a cook, a retired roofer, a local private school teacher, a handyman, and a nurse’s assistant. The thirty-year mortgage monthly payment, including principal, interest, real estate taxes, and insurance (PITI) averaged in the \$500’s/mo., which was close to the equivalent of local rent at the time. The fixed interest rates of the “soft 2nd” mortgages funded by the City ranged from zero percent to three percent, based on the number of family members and gross family income—a kind of “Goldilocks” calculation. Qualifying the applicants was performed by the CGLDC.

Both neighborhoods improved in terms of appearance and quality of life.⁴⁸ CGLDC’s and Wind & Rain’s overall intention was to stabilize the neighborhood primarily for the existing Black residents. CGLDC’s houses concentrated in MacFarlane did just that. There has been almost no gentrification there. However, the scattered site homes built by Wind & Rain in the much larger district of West Grove gave hope not only to their new homeowners but also to developers looking for cheap lots to redevelop.

45. Charles Rabin, *Developer Revitalizes West Grove Neighborhood*, MIA. HERALD (Aug. 31, 2000), available at <https://www.windandrainhomebuilders.com/articles/Developer%20Revitalizes%20West%20Grove%20Neighborhood.pdf>.

46. See Robert B. Avery et al., *The Performance and Profitability of CRA-Related Lending*, FED. RSRV. BANK CLEVELAND (2000), <https://www.clevelandfed.org/en/newsroom-and-events/publications/economic-commentary/economic-commentary-archives/2000-economic-commentaries/ec-20001101-the-performance-and-profitability-of-cra-related-lending.aspx>.

47. See Laura Morales, *Building Ties with Homes*, MIA. HERALD, Mar. 27, 2005, at 3GR, available at <https://www.windandrainhomebuilders.com/articles/BuildingTiesWithHomes.pdf>.

48. Like owners of Habitat for Humanity homes, the families residing in the homes began to enjoy the health, economic, and educational benefits associated with home ownership. See Miami Habitat for Humanity informational flyer, Fall 2020 (on file with authors).

A wildfire of real estate speculation ignited; with every sale, the price of vacant lots escalated rendering the “soft 2nd” mortgage program unable to bridge the cost of Wind & Rain’s otherwise modestly priced houses.

Developers began by buying and then demolishing modest homes on duplex-zoned lots and replacing them with twin townhouses, each selling for \$800,000 and up. The phenomenon of “Black Flight”⁴⁹ appeared in this historic Black neighborhood that had been stable for over five generations. As of 2020, the asking price of a single lot in West Grove was not less than \$250,000. Black residents are disappearing, pushed out by developers taking advantage of both market forces and loose enforcement of zoning regulations.⁵⁰ Section 8 rental units have completely disappeared. CGLDC and Wind & Rain homeowners are being offered up to \$400,000 to sell the homes that they had bought for under \$100,000. Approximately three quarters of Wind & Rain’s original buyers remain in their homes.

C. *The Habitat for Humanity Model*

Miami’s only other successful affordable homeownership model is the global Habitat for Humanity (“Habitat”) not-for-profit model whose local affiliate, Miami Habitat, has built more than 950 homes for Black first-time buyers in Miami since its inception. Most of these homes are single-family detached homes occupied by their original owners.

D. *Similarities and Differences*

More similarities than differences exist among the Habitat approach and those of CGLDC and Wind & Rain. The major differences, beside Habitat being funded by a large base of contributors locally and nationally, are that cash down payments are replaced by “sweat equity” in Habitat homes, with volunteers assisting the homeowners-to-be in the construction of them, and Habitat homeowner mortgages are at zero percent. Like Habitat, however, both CGLDC and Wind & Rain provided financial education for prospective homeowners and carefully screened them to ensure that applicant families could successfully take on the responsibilities of homeownership. Also, like Habitat, their mortgages included provisions to discourage predatory lenders who might try to “refinance” first-time homeowners out of their homes.

49. See David Winkler & Andy Parrish, Editorial, “Up-zoning” Means Black Folks Leave, MIA. TIMES (Feb. 20, 2020), https://www.miamitimesonline.com/opinion/editorials/up-zoning-means-black-folks-leave/article_e3bb8c00-53f3-11ea-ba17-b7605774c6b8.html.

50. Linda Robertson, *What’s Wrong with This New Home in the West Grove? Neighbors Want It Demolished*, MIA. HERALD (July 10, 2020, updated July 13, 2020), http://www.miamiherald.com/news/local/community/miami-dade/coconut-grove/article_244129587.html.

Most important, monthly mortgage payments were kept approximately to “the equivalent of rent,” just like Habitat has always done.⁵¹

E. Outcomes

Whatever else one may think about Section 8 and its goal of providing safe and decent housing for low income families, there can be no doubt that homeownership for some of these families is worth the effort to try something different. CGLDC, Wind & Rain, and Habitat have all conclusively demonstrated that homeownership for certain low income families, those making seventy percent of Area Median Income and up, stabilizes those families, improves their neighborhoods, and generates equity and generational wealth. That equity, after ten years, averages in the six figures. Homeowners are a source of pride and a role model for their children, who are more likely to continue their education past high school. Mortgage defaults are minimal. Success breeds success, for everyone.

F. Gentrification

CGLDC and Wind & Rain have been criticized for spurring gentrification.⁵² Ironically, this criticism is partially true in that the homeownership these programs created dramatically improved their neighborhoods, making them more desirable. However, the real cause of gentrification is market-driven. In Miami, as land prices everywhere have soared, Miami’s Black renters have suffered the most. Landlords have increased rents to keep up with increasing real estate taxes based on the new assessments from higher “comparable” sales. While well-located, close in, “high and dry” neighborhoods are at long last attracting private redevelopment, this new development has caused rampant land speculation, rapid rent escalation, and gentrification.⁵³ For example, generations of Haitian immigrants who made a neighborhood for themselves in Little Haiti on land that private developers once avoided are now being displaced without compensation because they are, and always have been, renters. There is no earned wind-fall for them as there would be for any owner of a CGLDC, Wind & Rain, or Habitat home should they decide to sell, and no generational wealth accumulated to be passed on to their children. The fruits of their labor have all been spent on just surviving, and much of that on rent.

Some degree of gentrification in cities like Miami is expected with a huge influx of wealthier residents arriving every year. However, it can be slowed considerably. The lessons to be learned from CGLDC, Wind &

51. Habitat keeps its buyers’ mortgage payments at thirty percent of income, which is usually less than what Habitat buyers were paying for rent before they became Habitat homeowners.

52. Resales of many Habitat homes are restricted to sales to other low-income buyers, which deters gentrification.

53. Anthony Parrish & David Winker, *We Can Still Save Little Haiti from Gentrification, but It Takes Political Will*, MIA. HERALD (Feb. 5, 2020), <https://www.miamiherald.com/opinion/op-ed/article239952228.html>.

Rain, and Habitat for Humanity is that homeownership by Black families, particularly when clustered in close proximity, deters private market speculation by slowing “Black Flight” as Black families take pride both in their homes and in their neighborhood. Land speculators then are forced to deal with the fact that these Black families are anchoring their neighborhoods because they love them and can afford to stay in them.

And, of course, there is another side to gentrification. Depending on how long the Black homeowners have owned their homes, and arrangements made with their builders, these homeowners, like any others, have the freedom to cash in and obtain their windfall from their active participation in the American Dream.

G. The Future for Habitat, Wind & Rain, and CGLDC Models

Habitat continues to flourish in the Greater Miami area, although the rising cost of land is of concern. The Wind & Rain and CGLDC approaches are no longer viable in Miami because the cost of land would drive the prices of homes beyond what could be borne by low income buyers without soft second mortgages in principal amounts well into the six figures. However, in parts of the United States where land prices are more reasonable, there is no reason that the Wind & Rain and the CGLDC approaches could not be duplicated with the same success that they have enjoyed in Miami. We highly recommend these approaches wherever they are economically viable, with the modification that the homes be clustered in close proximity to one another.

IV. A New Model for Homeownership: “The Village”

Section 8’s three-tiered ranking system prioritizes the most impoverished families, as noted above. By contrast, the new model presented here allows low-income families of any priority level to “work the land” and to acquire equity. It is a variation on “rent to own” that encourages Section 8 voucher holders to become homeowners by voluntarily participating with other voucher holders to create a collaborative community. We call it, as a working title, “The Village.”

The reasoning supporting this proposal is that the benefits of autonomous decision-making can occur at any income level.⁵⁴ Because more family income tends to alleviate so many other disadvantages, two-parent families with each adult earning minimum wage are “better” candidates, statistically, for becoming homeowners than a single parent working part-time. To date only families making seventy percent of Area Median Income and up have been considered to be candidates for achieving homeownership under any and all existing publicly subsidized housing programs. The Village is designed to level the opportunity playing field for all low-income families of all three categories.

54. See *supra* notes 31–38 and accompanying text (describing importance of autonomous decision-making to psychological health and accomplishment of goals).

A. The Village

For our first demonstration project, we propose thirty-two two-story dwelling units, following the path pioneered by the renowned architectural firm DPZ in Tavernier, Florida.⁵⁵ The Village model does not work for high-rise buildings because, among other factors, elevators and fire access drive up costs, and community spaces become more remote.

Persons of all low income levels would be eligible for residency as tenants, provided that they meet the requirements of Section 8, pay their rent and, in addition, pay ten percent more in what we call Residency Dues. They would also agree to abide by the rules and regulations of The Village and attend mandatory homeownership preparation classes. While legal title/ownership of the underlying land would remain in perpetuity in a Land Trust, residents would, when ready, have the opportunity to own “the roof over their head.”

We envision the following necessary components for The Village:

1. **Land Trust.** Judging from Blue Water, to build thirty-two units, The Village would require about 2.5 acres of land. The land itself would be owned in perpetuity by a Land Trust and purchased or donated by private or public donors, just as occurs today in municipalities and states across the nation. The Village separates the living units from the land underneath so that the resident families neither bear the burden of buying the land nor of paying the real estate taxes for it, as the Land Trust is non-profit and the homes built upon it are paying taxes on just the “sticks and bricks.” In addition, use of a Land Trust would ensure that should gentrification occur in the surrounding neighborhood, The Village would continue in existence so long as the Village residents choose to live there and enjoy the benefits of *their* neighborhood, including appreciation of the value of their homes.

2. **“Sticks and Bricks”.** The thirty-two homes, whether detached or semi-detached townhouse types, would all be two-story, both to conserve land for communal use and to allow the family to be completely “in charge” of all interior maintenance and living conditions (no overflowing bathtubs or uncontrollable noise from neighbors above). Their Residency Dues, when added to their utility bills, should still be less than forty percent of adjusted gross family income and would still qualify the tenant for the maximum allowable Section 8 rental assistance. In the event an “extremely low income” tenant’s utility bills cause the forty-percent limitation to be exceeded, the Village Board would be authorized to use its reserves to pay the excess portion of that tenant’s utility bills. Most important, their willingness to pay Residency Dues signifies that family’s commitment to participate in the primary goal of The Village: achieving independence from public assistance.

55. *Blue Water*, DPZ CoDESIGN, <https://www.dpz.com/projects/blue-water> (last visited Dec. 8, 2020).

3. *Communal Spaces.* The Village would have a multi-purpose “common room” of sufficient size to hold Village meetings of all adult residents. There would also be, at a minimum, a children’s playground and a sitting area for adults, both heavily landscaped and appropriately designed. It is of critical importance that all Village residents be able take pride in and ownership of the entire Village.

4. *Village Rules and Budget.* While initial management of The Village would be provided by those administering the Land Trust, management would, after all families have moved in and gotten to know each other, be taken over by the residents themselves, with an elected board of officers. The residents themselves would vote on such things as rules and regulations, while enforcement thereof would be the responsibility of the Board. Residents would vote on admission of qualified new residents if and when vacancies occur. The Board would have an annual operating budget to maintain and pay utilities for the Village common areas, and to manage the Village just as any homeowners’ association would. The operating budget would be funded by Residency Dues.

5. *The Village’s Supporting Residents.* All villages need a few special residents to help them thrive. The Village would have at least three of its thirty-two homes reserved as rental units for three categories of Supporting Residents households headed by (a) a police officer, (b) a medical professional, or (c) a public-school teacher. Fortunately, these Supporting Residents would have the same primary need for affordable shelter as the Section 8 residents. They would also have police, hospital, and school board funding to pay or supplement their rent. All Supporting Residents would be selected with the idea of sharing their knowledge and contacts with all Village residents. The police officer would have the added responsibility to rebuild the tumultuous relationship between marginalized communities and law enforcement by providing community liaison with local authorities, while continuing to have arresting authority within The Village’s grounds.

B. What Would Becoming a Resident of The Village Mean?

All families would have to be interviewed, qualified, and educated as to the requirements of participation in The Village, and the responsibilities that they would be undertaking, including the possible penalty of separation from The Village⁵⁶ for failure to meet those responsibilities.

All families would be required to pay Residency Dues for as long as they reside in the Village, either as renters or homeowners or Supporting Residents. In addition, until renters have become homeowners, they would pay the “tenant portion” of their Section 8 rent with the “subsidized

56. Non-renewal of lease or eviction, if a tenant; and sale of the unit at appraised value, less liens and the homeowner’s share of the mortgage (described *infra*), if an owner.

portion" paid by Section 8.⁵⁷ Both parts would be paid each month to the Land Trust. The Land Trust would use these rental payments to service the permanent loan on all of The Village's thirty-two units.

While undeniably harder for "extremely low income" and "very low income" families, it is hoped that the majority of The Village families will qualify to become homeowners before their maximum Section 8 eligibility expires in five years. Upon switching from being a renter to a homeowner, the family would assume 1/32 of the balance of the obligation of that thirty-year mortgage while the Land Trust remains as overall guarantor. The mortgage lender would be required to agree to these possible thirty-two assumptions at the time of making the original loan to the Land Trust.

Supporting Residents' rents would also be paid to the Land Trust. The excess of rents collected over debt service would be invested by the Land Trust in Treasuries and held as reserves or for other uses approved by the Village Board.

As presently allowed under Section 8 guidelines, families may receive up to five years of rental subsidy, which may then be extended on a case-by-case basis. All residents would be held strictly accountable for paying their respective obligations in full and on time. Everyone would acknowledge this obligation in writing before being admitted for residency. For renters, the ultimate penalty for unexcused failure to pay either rent or Residency Dues is eviction. For homeowners, the failure to pay the mortgage is a forced sale to the Land Trust, and failure to pay Residency Dues would result in a lien on their home which must be paid off in full with interest before any equity can be paid to that family.

For all resident families, the penalty for violation of Village Rules and Regulations (after vote by Village Board) would result in appropriate penalties, possibly all the way up to termination of residency by whichever legal avenue is appropriate. Everyone must know that the success of The Village depends on everyone's cooperation and full participation.

The primary thing for all Village residents to understand is that they should use their potential five years of subsidy to improve their financial circumstances. All human beings use their energy to "Look out for Number One." The Village would tap into that energy, renewing the vitality and determination needed to achieve an oftentimes unachievable goal: homeownership. From that point on, a Village family would begin to accrue equity in their homes.

C. Equity

As a new homeowner begins to make mortgage payments of both principal and interest, the principal portion of the payment begins to accrue as equity. Also, if the home appreciates in value, that also results in an increase in equity.

57. Over the five-year duration, the initial 30/70 ratio may be adjusted as families improve their income.

If the homeowner, for whatever reason, decides to sell and leave The Village, how much would that accrued "equity" be worth? It would be stipulated in The Village By-laws to be the Sale Price less 1/32 of the unamortized total cost of construction of The Village. In addition, at any time a homeowner family decides to put their unit on the market, The Village would have the right to buy the unit for fair market value, based on appraisal,⁵⁸ with the accrued equity going to the unit owner.

All residents would thus have every reason to make sure that they maintain their living quarters. The administrators of the Land Trust would pay for all insurance, real estate taxes, common area maintenance, and building exteriors for whichever units are rentals and for however long they remain so. Utilities, such as water and electric, are separately sub-metered to ensure that each family learns that conservation pays personal dividends. If utility bills begin to push any family beyond forty percent of AGI, the Village Board can investigate as to the cause and take appropriate action to remedy or assist.

All families are responsible for doing their part to maintain decorum and the attractiveness of The Village, with abusers subject to penalties prescribed in The Village's rules of conduct, including, in extreme cases, expulsion by vote of a majority, or possibly a super-majority, of the members of The Village.

D. Other Advantages of The Village

Two other important advantages of The Village are to be considered: shared transportation and multi-generational families under the same roof.

Van services are often the missing link to supplementing public transportation. More municipalities are reducing off-street parking requirements for developments near public transportation. Reducing vehicle parking on site and substituting van service either by an outside vendor or by a Village-owned van would free up more space in The Village for communal gardens or entrepreneurial activities that have been shown by the Kibbutz model to be successful for families to thrive.

Another characteristic of low-income neighborhoods is that the elderly often resist or cannot afford to go to retirement homes, preferring to stay close to their families. The Village's two-story homes (with one ground floor bedroom and bath) would be conducive to having a grandmother under the same roof with her single child and grandchildren, sometimes with the welcome addition of her Social Security check. Keeping extended families together helps both the families and their neighbors.

It is clear that a path to homeownership is needed for families to break the cycle of the "rent trap." Not all renters will choose this path, especially with the ten percent "extra" Residency Dues. Neither will all families, during their maximum five-year Section 8 tenancy, succeed in achieving the

58. Less liens and the remaining balance on the homeowner's assumed share of the mortgage.

required level of financial success to become homeowners, but we have no doubt that The Village concept would be welcomed by most Section 8 voucher families.

E. The Crucial Difference

What makes The Village different from other Section 8 rental programs tried since 1974 is the opportunity for homeownership.

Homeownership in The Village pre-supposes two things: (1) that the family no longer requires any public subsidy to pay the monthly mortgage amount; and (2) that the monthly mortgage payment is approximately the same as the monthly "Payment Standard" for the home the family is converting from rental to homeownership. The first is the responsibility of the family, to wean themselves from dependence on Section 8. The second is made possible by allowing the family to take advantage of the thirty-year fixed rate mortgage obtained by the Land Trust to take out the construction loan to build The Village.

How is this financially possible? While all projections are subject to Mark Twain's adage "Figures lie and liars figure," we believe the answer is in the innovative planning and structure of The Village. The cost savings in constructing The Village, as opposed to thirty-two single family detached homes, means that the construction loan should come in around \$6.5 million. When converted to a permanent loan at five percent, the debt service, fully amortizing over thirty years, is around \$35,000/mo. Divided by thirty-two, the family's monthly payment (P&I) would be around \$1,100/mo. With \$35/mo. for Residency Dues, \$300/mo. for taxes, and \$100/mo. for insurance, the PITI would be slightly over \$1,500/mo., which typically would be at or well below the Section 8 approved Payment Standard⁵⁹ for all residential units in the vicinity of The Village.

Meanwhile, the fair-market value of the average Village residential unit, starting at \$200,000 actual construction cost (excluding land), would have increased during that five-year period to over \$230,000, assuming just three percent/yr. appreciation. That represents \$30,000 of accumulated wealth for a low-income family who lives in The Village and succeeds in taking advantage of the homeownership opportunity being offered.

F. Challenges, and the Key to The Village's Success: Demonstration Project

Most novel ideas face challenges; so does this one. Among them are the transaction's structure, and practical obstacles yet to be encountered. The main obstacle, however, is within the design of Section 8 itself. It will be necessary to revisit Section 8 Project-Based programming so that The Village can operate as a demonstration model.

It takes time to succeed sufficiently to break out of the rent trap, and the five years provided by Section 8 should be sufficient, provided a family's housing costs remain at thirty percent of income, and the family's efforts,

59. As determined and set by the local housing authority.

based on the motivational factors described above, are effective. Thus, the family must be able to keep their Section 8 voucher until income reaches \$60,000, or the five-year period expires, whichever happens first. The problem arises because Section 8 vouchers are restricted to households not making more than eighty percent of Area Median Income.

The “numbers” in Miami-Dade County provide an example. As of 2020, Area Median Income in Miami-Dade County is \$59,100. Perhaps in five years, Area Median Income will have risen to the \$75,000 level required to allow families to receive the Section 8 voucher until they meet the homeowner threshold. However, in order to construct The Village as proposed in this essay, Section 8 rental subsidies would need to be available to Village families regardless of Area Median Income, until the family income reaches \$60,000, or the five-year period expires, whichever occurs first. Thus, The Village would need to be the equivalent of Project Based under Section 8 to allow this novel demonstration project to proceed.

What about costs to Section 8 and, ultimately, to the taxpayers? If the Area Median Income remains lower than \$75,000 for the duration of the five years, the additional costs to Section 8 and the taxpayers would continue to go down as the family’s income increases. If the family reaches the \$60,000, the taxpayers would no longer bear the cost of supporting this family. The family would be free of the rent trap, have instant equity in their home, and would be on their way to accumulating generational wealth. Their children would have the benefits of belonging to a household of a homeowner.

If a family is not successful in reaching the \$60,000 threshold level for homeownership, the cost to the taxpayers would be the additional support provided for whatever time period within that five years that the family’s income surpasses the Area Median Income. This would be a small price to pay for the likelihood that a family can be forever free from public dependency. What would be the outcome for families that fail to reach the threshold needed to become a homeowner? That family would have received some additional support *if* their family income ever surpassed eighty percent of the Area Median Income. Regardless, that family would have obtained a full five years of Section 8 rental in good quality housing in a safe enclave, surrounded by like-minded families, all striving for success and the wellbeing of their families. This outcome would be considered optimal under the typical Section 8 subsidized rental program, as presently structured.

Conclusion

The authors of this essay are betting that, given the chance, and with up to five years to accomplish it, many low-income families will be able to rise from requiring rental subsidy just to put a roof over their heads, to earning \$60,000 per year, and owning that roof.

It is at least a start on the “40 acres” promised to Black families more than eight generations ago.

“Don’t Blame Stokely Carmichael”: The Need for Federal Fair Housing Leadership

Heather R. Abraham*

“If they turn out to be barn burners, do not blame Stokely Carmichael.”
—Senator Philip Hart after a failed cloture vote
on the Fair Housing Act, February 20, 1968

Abstract.....	555
Introduction	555
The Far-Reaching Implications of Federal Leadership.....	557
A Cross-Agency Imperative	558
Ghosting the Affirmative Mandate	561
The President’s Fair Housing Council	561
The Current Landscape	563
The Value of Cabinet-Level Coordination.....	564
Conclusion	566

Abstract

President Joe Biden recently issued a series of executive actions to address racial inequity in housing. Among them, he acknowledged the government’s discriminatory housing practices that contributed to today’s persistent residential segregation and directed the federal government to allocate resources to address the historic failure to invest in communities of color. These actions are historic in two ways—their indictment of the federal government’s unclean hands and recognition of the need for federal leadership to affirmatively repair its damage. This essay explores what these broad proclamations should yield in practice. It advocates elevating fair housing from one department to a cabinet-level coordinating body, similar to the President’s Fair Housing Council.

Introduction

Racism casts a long shadow over us. In the shadow, our fears multiply and aspirations cower. Occasionally, however, we enter pivotal moments of collective questioning and reckoning that embolden us to think beyond the shadow’s edge. In this collective moment of race consciousness, our country is grappling with its racist past and reconsidering the systems that

*Heather R. Abraham (habraham@buffalo.edu) is Director of the Civil Rights & Transparency Clinic and Associate Professor at the State University of New York (SUNY) at Buffalo School of Law. Her scholarship focuses on civil rights and fair housing litigation and policy.

perpetuate it. These rare moments deserve nothing less than bold ideas that reframe, reevaluate, reimagine, and reinvent.

This essay responds to the moment by asking what we can do to elevate fair housing in the national conversation by literally moving the issue to the center of decision-making power.¹ It advocates a scaffolding of administrative law that does not currently exist, featuring cabinet-level fair housing coordination, agency directives, and interagency memoranda of understanding. This missing infrastructure has the potential to change the tenor of the conversation within the administrative state and renew attention to the extreme racial segregation that plagues our country—one of our most persistent national problems that underlies countless other inequities.²

Virtually every federal agency administers programs that perpetuate segregation. This essay explores interagency coordination as one way to meaningfully advance fair housing, with an emphasis on an existing legal mandate to desegregate our neighborhoods found in the Fair Housing Act. That often overlooked affirmative duty—known as the “affirmatively furthering fair housing” or “AFFH” mandate—applies broadly to *all* federal agencies that administer or regulate “programs or activities relating to housing and urban development.”³ “Cabinet-level” coordination, as used in this essay, refers to legally defined cooperation between the heads of agencies at the direction of the president. This proposal would be similar to one empirical model, the President’s Fair Housing Council—a short-lived coordinating committee established by President Clinton in 1994.⁴ It is distinguishable from establishing a new independent agency.⁵

This essay also addresses the fundamental question of *why*—what are the outcomes this proposal might accomplish that the current system

1. The term *fair housing* is distinguishable from *affordable housing*, although they are commonly confused. Fair housing refers to open housing choice that is not restricted based on a protected class status like race, color, or national origin, as opposed to housing that is financially “affordable.” See, e.g., 42 U.S.C. § 3604; Stephen Mendendian, *Fair Housing and Affordable Housing Are Not the Same Thing*, BERKELEY BLOG (Jan. 8, 2020), <https://blogs.berkeley.edu/2020/01/08/fair-housing-and-affordable-housing-are-not-the-same-thing-the-trump-administrations-latest-attack-on-integration>.

2. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* (1993); RICHARD SANDER, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, *MOVING TOWARD INTEGRATION* (2018).

3. 42 U.S.C. § 3608(d). The Fair Housing Act contains two provisions collectively known as the AFFH mandate. Subsection 3608(d) broadly addresses all agencies, while 3608(e) addresses HUD’s specific duties.

4. This essay draws on the President’s Fair Housing Council as an empirical example, but there are many ways that the White House could integrate fair housing leadership into the Cabinet. For more on this point, see *infra* on the value of cabinet-level coordination.

5. E.g., THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY 19 (Dec. 2008) (proposing an independent fair housing agency).

cannot? The answer is best understood in two stages: the first is building the administrative law infrastructure to identify and ameliorate the perpetuation of segregation through federal investments—grantmaking and loans—and federal regulation of private actors. The second stage is measuring the on-the-ground housing desegregation outcomes. This essay necessarily focuses on the former, as our country has yet to build an infrastructure to enforce the AFFH mandate.

The legal machinery that cabinet-level coordination is likely to produce includes memoranda of understanding between agencies for monitoring and enforcing potential fair housing violations, new reporting requirements, and—critically—agency-specific regulations defining the legal contours of the AFFH mandate, informed by HUD’s expertise and AFFH rulemaking experience. Virtually none of this framework exists.

Cabinet-level attention to fair housing is a stark contrast from the status quo. Currently, fair housing is buried within one agency—the U.S. Department of Housing and Urban Development—which has a dubious track record in its own programs, let alone a record of lobbying other agencies to prioritize fair housing. Restructuring is more than symbolic. It would produce superior outcomes through better detection, documentation, and amelioration of fair housing violations, and would elevate AFFH enforcement across relevant agencies—not just HUD—as *already* required by statute. Thus, this essay is about effective implementation of an existing legal mandate.

This may seem like an inside-the-beltway bureaucratic solution, not bold reconstruction. But our country has never invested the necessary attention and resources to systemically assess how it perpetuates segregation through government spending, let alone built a legal structure to end its racist influence. This essay’s proposals should be viewed as the first stage in a multi-step assessment and reallocation of resources. Ultimately, the AFFH mandate would be more effective if implemented as proposed. This essay therefore examines the AFFH mandate’s broad application across federal agencies as a starting place for reimagining federal fair housing leadership. It concludes by evaluating the utility of cabinet-level coordination from three perspectives: policy, process, and practice.

The Far-Reaching Implications of Federal Leadership

The lack of federal fair housing leadership is palpable. Its absence permeates our social order in myriad ways. It permits an inequitable allocation of resources that influences where people live, their access to education, employment, capital investment, and social networks, and ultimately shapes the worldview that they pass on to their children. These factors reinforce racial segregation as they widen the gaps between us, from wealth to life span. Bottom line, the government’s history of inaction on fair housing has countenanced the hyper-segregation that plagues us today.

In the floor debate over the original Fair Housing Act, one senator presciently noted the far-reaching consequences of federal inaction. The U.S.

Senate had just failed to muster the necessary two-thirds cloture vote to overcome a filibuster. By 1968, Southern Democrats had stymied multiple attempts to pass fair housing legislation.⁶ Exasperated by the impasse, Senator Philip Hart—known as “the Conscience of the Senate”⁷—evoked the frustration of a Black father who must tell his children he cannot buy a home because of his race: “I do not know what effect [the government’s failure to pass a bill] will have on his children. However, if they turn out to be barn burners, do not blame Stokely Carmichael.”⁸

Senator Hart’s admonition has renewed relevance today. Over fifty years later, there remains a glaring absence of federal commitment to reducing neighborhood segregation. As the federal government fails to provide meaningful leadership to reduce neighborhood segregations, citizens have taken to the streets in protest to express their undeniable frustration that the same discrimination that plagued their parents and grandparents plague us today. It resonates for another reason too: it underscores the opportunity of the moment. If this country is going to “build back better,” it will achieve little unless it addresses housing segregation.⁹

A Cross-Agency Imperative

The Fair Housing Act has two distinct but complementary mandates. The first is anti-discrimination—equal treatment on the basis of protected class like race, color, and national origin—and the second is reducing segregation, which is expressed in the government duty to proactively allocate resources to deconstruct segregation.¹⁰ The latter, the AFFH mandate, is a one-of-a-kind civil rights directive that requires federal agencies, and state and local grantees by extension, to take steps to undo segregation. It is Congress’s acknowledgment of the federal government’s role as a primary architect of the residential segregation patterns of today. The mandate boldly declares that all executive departments and agencies “shall administer their programs and activities relating to housing and urban development . . . in a manner *affirmatively* to further the purposes of [fair housing],” the origin of the acronym “AFFH.”¹¹

6. *E.g.*, Walter F. Mondale, *THE GOOD FIGHT: A LIFE IN LIBERAL POLITICS* 64 (2010) (“A lot of smart people had concluded that this was a lost cause.”).

7. *See, e.g.*, *Senator Philip A. Hart Dies at 64; Was Called ‘Conscience of Senate’*, N.Y. TIMES, Dec. 27, 1976, at 75.

8. 114 CONG. REC. S3424 (daily ed. Feb. 20, 1968) (statement of Sen. Hart).

9. Joe Biden’s 2020 presidential campaign slogan was “Build Back Better,” www.joebiden.com/build-back-better.

10. *See, e.g.*, Raphael Bostic & Arthur Acolin, *Affirmatively Furthering Fair Housing: The Mandate to End Segregation*, in *THE FIGHT FOR FAIR HOUSING* 190–91 (Gregory D. Squires ed., 2018) (describing the dual mandates); 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale) (elaborating on the Act’s second objective as replacing ghettos with “truly integrated and balanced living patterns”).

11. 42 U.S.C. § 3608(d) (emphasis added).

Although its language is succinct, the AFFH mandate "is not as nebulous as it may appear at first glance."¹² A well-established body of federal case law construes its meaning: "[E]very court that has considered the question [has held that the AFFH mandate imposes] an obligation to do more than simply refrain from discrimination (and from purposely aiding discrimination by others)."¹³ It "reflects [Congress's] desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." Today, it is undisputed that the mandate requires affirmative steps beyond mere non-discrimination.¹⁴

Critically, the mandate's plain language extends beyond HUD. It covers "all" departments and agencies that administer or regulate "programs or activities relating to housing and urban development," which, as later discussed, is most.¹⁵ Legislative history reinforces the mandate's breadth. As introduced, "the Act would have established [HUD] as the sole authority for enforcing the Act."¹⁶ But the proposed single-agency approach "was severely criticized in both houses of Congress and was a principal point of objection during the filibuster on the bill. As a result, the bill was amended in the course of Senate debate to diffuse administrative authority to the other departments and agencies. . . ."¹⁷ In other words, from the outset, the AFFH was intended as an interagency imperative.

Despite the mandate's cross-agency application, HUD has been the primary target of fair housing advocacy. And reasonably so: HUD plays a foundational role in administering and regulating community development programs. But the affirmative duty to desegregate communities (1) has a broader statutory reach, as a legal matter, and (2) would be more effective, as a practical matter, if implemented across all housing and community development programs, not just HUD's.

12. Civil Rights Authority of the Board, Office of the General Counsel, Office of Thrift Supervision, 1972 WL 125725, at *33 (June 30, 1972).

13. N.A.A.C.P., Boston Chapter v. Secretary of Housing & Urban Development, 817 F.2d 149, 155 (1st Cir. 1987) (then-First Circuit judge Stephen Breyer). For discussion of early appellate jurisprudence, see Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's 'Affirmatively Further' Mandate*, 100 Ky. L.J. 125, 137–44 (2012).

14. Even the Trump administration's rule repealing the Obama-era regulation readily acknowledges this statutory interpretation. Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,902 (Aug. 7, 2020).

15. 42 U.S.C. § 3608(d).

16. See *supra* note 11. It is also noteworthy that the only legislative amendment that Congress has made to the AFFH mandate is to clarify its broad application by inserting language explicitly stating that it applies to "any Federal agency having regulatory or supervisory authority over financial institutions." Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 7, 102 Stat. 1619 (1988).

17. *Id.*

So why have fair housing advocates focused almost exclusively on HUD?¹⁸ It is not because advocates are unaware of the mandate's broad application. Rather, it is pragmatism within the existing administrative structure. They have lobbied HUD to promulgate an AFFH-specific regulation as one concrete step toward AFFH enforcement. But it is time to rethink this strategy. Perhaps HUD is the wrong target for, or at least a distraction from, the overarching goal of bringing all agencies to the table.

The U.S. Department of Transportation illustrates why interagency collaboration is critical to reducing housing segregation. In 2008, a bipartisan National Commission on Fair Housing and Equal Opportunity endorsed an interdisciplinary cabinet-level approach. It emphasized that an interagency effort is necessary because it operates "beyond the housing-related agencies delineated in the Fair Housing Act to include virtually every other cabinet agency whose work may directly or indirectly affect housing."¹⁹ The complicated reality is that access to fair housing is constrained by layers of

government policies and systems that have adapted entrenched patterns of metropolitan segregation. For example, transportation systems designed in the 1970s to shuttle suburban workers into the central city may need to be retooled to support new community and residential patterns [and] federal education grants may need to consider fair housing plans and voluntary school integration efforts.²⁰

Transportation and education investments are just two ready examples.²¹

While it may surprise some readers, virtually all agencies have some role in regulating or administering housing or community development programs, even the Department of Defense.²² Thus, interagency collaboration is not simply the model that Congress chose, it is also the more effective implementation strategy.

18. Advocates have initiated AFFH litigation against other agencies, like the U.S. Department of Treasury, which administers the Low Income Housing Tax Credit program. *See, e.g.,* Inclusive Communities Project v. Dep't of Treasury, No. 19-10377 (5th Cir.).

19. *E.g.,* THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY 51 (Dec. 2008).

20. *Id.*

21. For more information on how layers of government policies shape segregation, see Megan Haberle, Peter Kye & Brian Knudsen, REVIVING AND IMPROVING HUD'S AFFIRMATIVELY FURTHERING FAIR HOUSING REGULATION: A PRACTICE-BASED ROADMAP, POVERTY & RACE RESEARCH ACTION COUNCIL (Dec. 2020), at 2, 8–9, <https://prprac.org/pdf/improving-affh-roadmap.pdf>.

22. *See, e.g.,* Gwendolyn A. Wilson, *Reconstructing the Department of Defense's Approach to Fair Housing: Extending the AFFH Mandate to the Non-Military Civilians DOD Now Houses*, 44 PUB. CONT. L.J. 529 (2015).

Ghosting the Affirmative Mandate

A distinctly modern phrase seems well-suited to capture the federal government’s listless relationship with the AFFH mandate: “ghosting.” At first, the attractive new mandate garnered interest, but, after a while, the government stopped calling—nay, texting. The government’s efforts to carry out the new mandate began—and abruptly ended—during the Nixon administration.²³ Across the next five decades, there are countless examples of how the federal government downplayed, or outright ignored, its affirmative obligations. Foremost among them is HUD’s failure to promulgate a substantive AFFH regulation for nearly fifty years.²⁴ (And when it did, the subsequent administration repealed it.)

There are two notable exceptions. One was an attempt in the 1990s to bring fair housing into the president’s cabinet.²⁵ This essay revisits that effort. The second was a notice-and-comment rulemaking during the Obama administration. As of today, neither has created lasting change.²⁶ The former was neglected in a crowd of competing priorities and the latter was repealed by the Trump administration.

The through line is federal inaction. Time and again, the government has failed to respond in proportion to the persistent problem that segregation remains. Fair housing needs to be reinserted into the president’s national agenda.

The President’s Fair Housing Council

One way to elevate fair housing is to reinstate the President’s Fair Housing Council. The President’s Council was originally established by President Clinton in 1994.²⁷ Its mission was to improve implementation of the Fair Housing Act, with particular emphasis on the AFFH mandate.²⁸ It consisted of the heads of nearly every executive department.²⁹

If you don’t remember the President’s Council, you’re not alone. Investigative Reporter Nikole Hannah-Jones summarizes its history in three short sentences: “Hobbled by the Monica Lewinsky scandal, the Clinton administration had little appetite for a public fight over integration. The

23. See Heather R. Abraham, *Fair Housing’s Third Act: American Tragedy or Triumph?*, 39 *YALE L. & POL’Y REV* 1, 19–22 (2021).

24. *Id.*

25. *E.g.*, Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994) (establishing the President’s Fair Housing Council);

26. See generally Abraham, *supra* note 23.

27. Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994).

28. See *id.*

29. See *id.*

President's Fair Housing Council, as far as anyone can recall, met only once. It took no action."³⁰

The President's Council was one component of a broader effort to implement the mandate. The underlying executive order—which has never been formally revoked—and accompanying presidential memorandum direct “the heads of departments and agencies, including the Federal banking agencies, to cooperate with the Secretary of Housing and Urban Development” to take two immediate actions:

- (1) Identify effective “ways to structure agency programs and activities to affirmatively further fair housing” and
- (2) “promptly negotiate memoranda of understanding with [the HUD Secretary] to accomplish that goal.”³¹

In other words, beginning in 1994, each agency was required to examine and assess its programs to affirmatively address how those programs perpetuate segregation and then negotiate MOUs with HUD to prosecute fair housing violations by grant recipients and regulated entities. It also mandated that every agency promulgate its own agency-specific AFFH regulation.³²

The executive order likewise directed the President's Council's to conduct a comprehensive review of the “design and delivery” of federal programs “to ensure that they support a coordinated strategy to affirmatively further fair housing . . . [and] propose revisions to existing programs or activities, develop pilot programs and activities, and propose new programs and activities to achieve its goals.”³³ For efficacy, it further instructed the President's Council to work with private parties by making efforts to “gain the voluntary cooperation, participation, and expertise of . . . private industry.”³⁴

As to HUD, the executive order directed the Secretary to undertake “stronger measures to provide leadership and coordination in affirmatively furthering fair housing in Federal programs.”³⁵ Among them, HUD was required to review all its programs to “assure that they contain the

30. Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>.

31. Memorandum on Fair Housing, 30 WEEKLY COMP. PRES. DOC. 114–16 (Jan. 17, 1994); see also Exec. Order No. 12,892, 59 Fed. Reg. 2939, (Jan. 17, 1994), §§ 2-201, 2-202, 2-203, 3-302, 4-402, 5-501.

32. Exec. Order No. 12,892, 59 Fed. Reg. 2939, § 4-402 (“[T]he head of each executive agency shall publish proposed regulations providing for the administration of programs and activities relating to housing and urban development in a manner affirmatively to further fair housing As soon as practicable thereafter, each executive agency shall issue its final regulations.”).

33. *Id.* § 3-302.

34. Memorandum on Fair Housing, *supra* note 31, at 116.

35. *Id.* at 115.

maximum incentives to affirmatively further fair housing and to eliminate barriers to free choice where they continue to exist.”³⁶

The Current Landscape

The Clinton administration also intended to promulgate a comprehensive HUD regulation to define the government’s minimum AFFH duties, and those of its grantees.³⁷ To that end, it issued a proposed regulation, but it was never finalized.³⁸ It did, however, issue preliminary regulations establishing the “Analysis of Impediments” process for federal government grantees.³⁹ That process has been extensively criticized as toothless and has since been repealed.⁴⁰

Where we stand today is fairly clear: There is no compulsory Analysis of Impediments and no comprehensive AFFH regulation. These regulations have been replaced by a perfunctory “rational basis” certification process for grant recipients that eliminates any race-conscious analysis.⁴¹ Likewise, there is no President’s Council or comparable interagency enforcement. Nevertheless, the political landscape has changed. During his first week in office, President Joe Biden issued a series of executive actions to address racial inequity in housing.⁴² Among them, he specifically directed HUD to reexamine the Trump administration’s rollback of the AFFH regulation.⁴³ In the meantime, what remains is a corpus of federal authority on which to build AFFH regulations in each federal agency. This authority includes: (1) the AFFH mandate’s broad statutory language, 42 U.S.C. § 3608, (2) decades of case law interpreting the mandate, and (3) strategic and practical lessons learned from unsuccessful attempts at reform, and their progeny—in other words, a lot of good ideas in waiting.

36. *Id.*

37. See Department of Housing and Urban Development Regulatory Plan, U.S. Gov’t Printing Office (Nov. 14, 1994) (discussing the proposed AFFH regulation and timeline).

38. See Fair Housing Performance Standards for Acceptance of Consolidated Plan Certifications and Compliance with Community Development Block Grant Performance Review Criteria, 63 Fed. Reg. 57,882 (Oct. 28, 1998).

39. See Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,902 (Aug. 7, 2020) (enumerating the Clinton regulations as currently codified).

40. *Id.* at 47,900.

41. See 85 Fed. Reg. at 47,904 (“Thus, grantee AFFH certifications will be deemed sufficient provided they took any action during the relevant period rationally related to promoting fair housing . . .”).

42. See, e.g., Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

43. Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies (Jan. 26, 2021), www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies.

The Value of Cabinet-Level Coordination

Structured cabinet-level coordination and legally defined interagency relationships are the *sine qua non* of AFFH enforcement. Building that administrative-law scaffolding would be a manifest improvement over the status quo, but its efficacy is in the details. As an entry point, this essay examines the potential value of cabinet-level coordination on three levels: policy, process, and practice. For this essay, “policy” refers to the position the government formally adopts on housing segregation, “process” means the operating procedures the government establishes to achieve its policies, and “practice” denotes actual implementation of those procedures, which may not serve the articulated policy.

As a matter of policy, reinstating the President’s Council—or adopting some form of cabinet-level coordination—sends the clear message that fair housing is a critical issue of national importance. It visibly elevates fair housing in a way that calls for more public accountability if the government fails to deliver. It also communicates commitment, setting the tone that segregation is a complex problem that cannot be buried in HUD. These public commitments have independent value and should not be dismissed as solely symbolic.

An enabling directive can declare substantive policy. In the case of the original President’s Council, the executive order directed each agency to prioritize desegregation through a series of specific steps like negotiating MOUs with HUD. A powerful directive could declare it the policy of every agency to not perpetuate segregative patterns and, instead, to take steps to undo those patterns through strategic reinvestment. It might adopt a race-conscious rubric, for instance, to evaluate each program’s effect on neighborhood segregation.

Second, as to process, cabinet-level reform has procedural benefits. Standardizing procedures was the principal achievement of the Obama-era AFFH regulation.⁴⁴ It set benchmarks, timelines, assessment tools, and submission procedures.⁴⁵ It normalized procedures with an eye toward long-term compliance by state and local HUD grantees. Structures that normalize the most critical processes within agencies—complaints, investigations, and enforcement actions among them—are critical to long-term change. Many agencies are siloed to the point that interagency collaboration is unnatural, especially if housing programs are not central to the agency’s self-identity. The more that these collaborations are defined and employed, the better the AFFH enforcement. Finally, it bears noting that these directives will be more effective coming from the White House, not HUD.

44. While the Obama-era AFFH regulation has been repealed, its framework and Assessment Tools are highly instructive as best practices. See Final Rule, Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,278 (July 16, 2015). Accompanying the final AFFH Rule were several notices, which contained the Assessment Tools customized to different types of jurisdictions. See also Abraham, *supra* note 23, at 33 & nn. 130–31.

45. See generally 80 Fed. Reg. 42,272.

Interagency MOUs present a particular opportunity. Few agencies explicitly coordinate with HUD or DOJ to monitor or enforce fair housing violations. Among them, few—if any—are taking proactive steps to analyze or change how their programs perpetuate segregation. A more clearly defined legal relationship between the agencies increases dialogue, generates new thinking, and normalizes legal obligations toward better enforcement. Thus, from a policy perspective, agencies would be directed to rethink and reform how they administer their programs, such as how they allocate their resources, monitor grantees, investigate complaints, and ultimately enforce violations.

Third is actual practice. This is unknown frontier. Beginning in 1969, HUD Secretary George Romney took decisive steps in the face of local defiance to carry out the AFFH mandate. But those efforts were quickly quashed by President Nixon. Subsequent attempts in the Clinton and Obama administrations did not take root or were repealed by the Trump administration in 2020. As such, we have yet to see the AFFH mandate in action.

In context, effective AFFH implementation begins with self-examination. An agency must look in the mirror and identify the flaws in its administration of housing programs and activities. This effort requires a searching inquiry that asks how each program or activity perpetuates segregation. Then, to address these flaws, the agency must have a full panoply of remedies. For instance, an agency must be able to do more than negotiate voluntary settlements. It must be able to suspend and terminate the spigot of federal funding to its grantees.⁴⁶

Finally, there is the matter of budget allocation. Practice does not make perfect without enforcement staff—literally the people to negotiate and enforce the MOUs. Historically, this has been a problem at HUD.⁴⁷ Successful interagency collaboration will require at least some budgetary commitment to enhanced enforcement.

In 2008, the bipartisan National Commission issued an extensive report assessing the future of the Fair Housing Act, replete with policy recommendations for more effective implementation.⁴⁸ With respect to the AFFH mandate, it underscored the federal government’s failure to fulfill its fundamental obligations, calling it a “requirement [that] has generally been honored in the breach.”⁴⁹ Among its recommendations, the National

46. See, e.g., Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 *YALE L.J.* 248 (2014).

47. See, e.g., Alec MacGillis, *Is Anybody Home at HUD?*, *PROPUBLICA* (Aug. 22, 2017), <https://www.propublica.org/article/is-anybody-home-at-hud-secretary-ben-carson> (observing that HUD has approximately one-half of the 16,000 employees it once had).

48. *THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY* 19 (Dec. 2008).

49. *Id.* at 51.

Commission endorsed the reinstatement of the President's Council.⁵⁰ As it emphasized, fair housing implicates a complex web of government policies and systems that perpetuate entrenched segregation patterns. Unknotting these complex relationships requires more than one agency: it requires something bolder.

Conclusion

In pivotal moments like today, we must boldly reimagine what is possible. It may be the only way that we can inch our way out of racism's shadow. This essay reimagines fair housing enforcement as a scaffolding of legal mechanisms established through cabinet-level leadership and directives, along with cross-agency coordination through tools like negotiated memoranda of understanding between agencies. A problem as enduring and far-reaching as housing segregation demands proactive cabinet-level federal leadership.

50. *Id.* at 52.