



**LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
U N D E R L A W**

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Lawyers' Committee for Civil Rights Under Law**

**U.S. House of Representatives
Subcommittee on Housing, Community Development, and Insurance of the
House Financial Services Committee**

**Hearing on "Zoned Out: Examining the Impact of Exclusionary Zoning on People,
Resources, and Opportunity"**

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Introduction

Chairman Cleaver, Ranking Member Hill, and members of the Subcommittee, thank you for the opportunity to testify today regarding the harmful impact of exclusionary zoning and strategies for mitigating its harms. My name is Thomas Silverstein, and I am the Associate Director of the Fair Housing & Community Development Project at the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee). The Lawyers' Committee is a national civil rights organization created at the request of President John F. Kennedy in 1963 to mobilize the private bar to confront issues of racial discrimination pro bono.

For decades, the Lawyers' Committee has advocated for fair housing through impact litigation, legislative and administrative advocacy, public education, and direct work advising states and localities on how to best meet their fair housing and community development requirements. While these issues have always been at the forefront of our work and are integral to achieving racial equality, they have become even more acute during the COVID-19 pandemic. The pandemic has underscored the need for all sectors of our society to address two pressing, interrelated crises: housing insecurity and structural racism. The problem of exclusionary zoning lies at the intersection of these two conditions because it is used to limit housing choices for low-income people of color. Although many think of zoning and land use regulation as inherently local issues, there is a great deal that the federal government can and should do to eliminate exclusionary zoning. Indeed, if the federal government does not act, the result will be the systematic undermining of our shared investments in affordable housing and combating climate change.

I. What Is Exclusionary Zoning?

In order to begin to address exclusionary zoning, it is critical that we understand the problem. Fundamentally, exclusionary zoning consists of land use regulations that have the *effect* of preventing low- and sometimes moderate-income people from living in either a municipality or a section of a municipality. Typically, due to persistent correlations between socioeconomic status and protected characteristics such as race under the federal Fair Housing Act, exclusionary zoning has the effect of disproportionately preventing Black and Latinx families from living in certain places. Exclusionary zoning can take the form of rules that make it impossible to build certain housing types that have higher density and therefore are more likely to be affordable than single-family houses. Additionally, exclusionary zoning can also take the form of permitting "market-rate" housing but not subsidized affordable housing. The rules that form the bedrock of exclusionary zoning can vary significantly, from prohibitions on multifamily housing to minimum lot or unit sizes to excessive setback requirements.

It is important to draw a distinction between exclusionary zoning as a practice and zoning as an overall concept. Although all zoning involves disallowing or "excluding" land uses that presumably could occur in the absence of regulation, not all zoning is exclusionary. Exclusionary zoning is about the exclusion of people through the exclusion of land uses, not the exclusion of land uses *per se*. At times, zoning can play a positive role and advance the general welfare, such as when heavy polluting industrial land uses are not allowed near peoples' homes. At times, its effect simply may not be exclusionary, such as when a low-income community of color is

primarily zoned for single-family homes and housing within that neighborhood is within reach for local residents.

II. *What Is the Federal Government Doing and What Else Could It Do with Existing Authority?*

The current federal response to exclusionary zoning consists of two main features: (1) the federal Fair Housing Act and the roles of both the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Justice (DOJ) in enforcing that law; and (2) HUD's oversight of its state and local government grantees' compliance with planning requirements that are conditions of receiving federal funds.

a. Fair Housing Act Enforcement

Congress passed the Fair Housing Act in 1968 against the backdrop of uprisings in cities across the country in the aftermath of the assassination of Dr. Martin Luther King, Jr.¹ In doing so, Congress was in part reacting to the assessment of the National Advisory Commission on Civil Disorders – commonly known as the Kerner Commission – that attributed uprisings over the preceding years to entrenched residential racial segregation that federal policies helped create.² Congress intended the Fair Housing Act to *both* ban housing discrimination on the basis of race and other protected characteristics *and* to ameliorate these patterns of segregation.³

Under the Fair Housing Act, it is clearly established that exclusionary zoning and land use policies may be illegal either under an intentional discrimination standard – where the desire to excluded people based on race was a motivating factor behind the challenged decision or policy – or under a discriminatory effects standard.⁴ The latter allows proof of a violation through evidence that a policy disproportionately harms a protected group or perpetuates residential segregation, combined with the absence of a substantial, legitimate, nondiscriminatory interest served by the policy that could *not* be served by an alternative policy with less discriminatory effect.⁵

Despite case law supporting these applications of the Fair Housing Act dating back to at least 1974 when the Eighth Circuit decided *U.S. v. City of Black Jack*, exclusionary zoning remains widespread and litigation challenges to exclusionary zoning are rare. This is the case

¹ 42 U.S.C. §§ 3601 *et seq.*; *see also History of Fair Housing*, U.S. Dep't of Hous. & Urb. Dev. (last visited Oct. 12, 2021), https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history.

² Report of the National Advisory Commission on Civil Disorders 1 (1968).

³ *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

⁴ *See, e.g., Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 615, 619-20 (2d Cir. 2016) (affirming trial court decision that zoning decision was intentionally discriminatory and holding that plaintiffs had established a *prima facie* case of disparate impact); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1294 (7th Cir. 1977) (holding that a municipality's zoning policy would violate the Fair Housing Act if it effectively foreclosed the possibility of developing affordable housing within the community's boundaries); *United States v. City of Black Jack*, 508 F.2d 1179, 1188 (8th Cir. 1974) (holding that a city's zoning policies had an unjustified disparate impact on the basis of race); *see also Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project*, 576 U.S. 519, 539-40 (2015) (stating that exclusionary zoning cases are at the "heartland" of Fair Housing Act jurisprudence).

⁵ 24 C.F.R. § 100.500 (2013).

because it is extremely difficult for private parties – other than affordable housing developers – to establish standing to challenge exclusionary zoning.⁶ Affordable housing developers are often reluctant to sue municipalities over exclusionary zoning or even to propose developments that may predictably run into zoning barriers and “not in my backyard” (NIMBY) opposition because their business is dependent upon municipal approval.

HUD and DOJ are ideally positioned to challenge exclusionary zoning. HUD has historically used its power to initiate complaints on behalf of the Secretary to attack exclusionary zoning,⁷ and the Department should continue to do so with more frequency. DOJ plays a critical, statutorily mandated role in investigating zoning cases referred by HUD and represents the interests of the United States in litigation.⁸ Unlike private parties whom the courts have held not to have a sufficiently concrete interest in seeing that federal laws such as Fair Housing Act are enforced, the United States has an unambiguous interest in rooting out any and all violations of the Fair Housing Act. Thus, DOJ is not meaningfully constrained by standing doctrine and can challenge exclusionary zoning in places where affordable housing developers are deterred from proposing projects as a result of extreme zoning barriers, often in combination with high land costs.

An illustrative example is the Village of East Hills in Nassau County, New York, approximately 20 miles east of Manhattan. Although there is no commuter rail station within the village’s boundaries, parts of the community are in close proximity to Long Island Railroad stations in neighboring Roslyn and Greenvale. Just 5.5% of the village’s population are Black and/or Latinx as opposed to 28.0% of the county’s population.⁹ The median household income in the Village is \$224,583, nearly double the countywide figure of \$116,100.¹⁰ The poverty rate is a microscopic 1.4%.¹¹ None of the Village’s zoning districts allow for multifamily housing, and nearly all of its northern half requires lot sizes of at least one acre.¹² In light of these zoning barriers, it is unsurprising that not one single Housing Choice Voucher family is able to live in

⁶ See, e.g., *Warth v. Seldin*, 422 U.S. 490, 504-07 (1975); *Fair Housing in Huntington Committee v. Town of Huntington*, 316 F.3d 357, 363 (2d Cir. 2003).

⁷ Conciliation Agreement between the United States of America, Department of Housing & Urban Development, Fair Housing & Equal Opportunity (Complainant) & the City of Ridgeland, Mississippi (Respondent), FHEO Case No. 04-16-4066-8 (Sep. 7, 2016), available at <https://www.hud.gov/sites/documents/FHEOCASE04-16-4066-8.PDF>.

⁸ See 42 U.S.C. § 3610(g)(1)(C).

⁹ 2015-2019 American Community Survey 5-Year Estimates, ACS Demographic & Housing Estimates (last visited Oct. 12, 2021), https://data.census.gov/cedsci/table?q=dp05&g=0500000US36059_1600000US3622260&tid=ACSDP5Y2019.DP05&hidePreview=true.

¹⁰ 2015-2019 American Community Survey 5-Year Estimates, Selected Economic Estimates (last visited Oct. 12, 2021), https://data.census.gov/cedsci/table?q=dp05&g=0500000US36059_1600000US3622260&tid=ACSDP5Y2019.DP03&hidePreview=true.

¹¹ *Id.*

¹² Village of East Hills Code of Ordinances, Chapter 271: Zoning (last visited Oct. 12, 2021), <https://ecode360.com/6304209>; Village of East Hills, Zoning Map (last visited Oct. 12, 2021), <https://villageofeasthills.org/wp-content/uploads/2016/03/VEHZoningMap.pdf>.

this suburban community of 7,147 residents,¹³ with sections within walking distance from a 50-minute commuter rail ride to Penn Station.

HUD and DOJ do not have the same constraints as an affordable housing developer who has to incur significant predevelopment costs in order to apply for a zoning change that would invariably be denied. Congress has already given HUD and DOJ the authority to act. They should do so and thereby send a strong message to so many exclusionary municipalities across the country like the Village of East Hills.

b. Grant Administration

HUD administers a variety of competitive and formula grant programs through local governments, which have zoning and land use regulatory authority, and states, from whose grants of power that local authority derives funding. The key formula grant programs are the Community Development Block Grant (CDBG)¹⁴ and HOME Investments Partnerships (HOME)¹⁵ programs. The Choice Neighborhoods Initiative (CNI), which facilitates public housing redevelopment, is the most significant current competitive grant program.¹⁶ For formula grant programs, states, as well as municipalities of a certain size, are entitled to receive funds if they so choose, and the amount of those funds is based on factors like population, poverty, and characteristics of the existing housing stock.¹⁷ As a condition of receiving these federal funds, grantees must submit a variety of plans, including a five-year Consolidated Plan, Annual Action Plan, and Consolidated Annual Performance and Evaluation Report (CAPER) on a regular basis, and these plans must contain certain required substantive information and certifications.¹⁸ The submission of these plans is relevant to the question of exclusionary zoning.

Substantively, HUD regulations for the Consolidated Plan, found in part at 24 C.F.R. § 91.210(e) for local governments, require an analysis of barriers to affordable housing. In whole, the provision states that:

“The plan must explain whether the cost of housing or the incentives to develop, maintain, or improve affordable housing in the jurisdiction are affected by public policies, particularly by policies of the jurisdiction, including tax policies affecting land and other property, land use controls, zoning ordinances, building codes, fees and charges, growth limits, and policies that affect the return on residential investment.”

Furthermore, 24 C.F.R. § 91.215(h), which sets forth the requirements for the Strategic Plan component of the Consolidated Plan, states that:

¹³ Picture of Subsidized Households, U.S. Department of Hous. & Urb. Dev. (last visited Oct. 12, 2021), <https://www.huduser.gov/portal/datasets/assthsq.html>.

¹⁴ 42 U.S.C. §§ 5301 *et seq.*

¹⁵ 42 U.S.C. §§ 12741 *et seq.*

¹⁶ Choice Neighborhoods, U.S. Dep’t of Hous. & Urb. Dev. (last visited Oct. 12, 2021), https://www.hud.gov/program_offices/public_indian_housing/programs/ph/cn.

¹⁷ 42 U.S.C. § 5306; 42 U.S.C. § 12747.

¹⁸ 42 U.S.C. §§ 5304, 5313.

“The consolidated plan must describe the jurisdiction's strategy to remove or ameliorate negative effects of public policies that serve as barriers to affordable housing, as identified in accordance with § 91.210(e), except that, if a State requires a unit of general local government to submit a regulatory barrier assessment that is substantially equivalent to the information required under this paragraph (h), as determined by HUD, the unit of general local government may submit its assessment submitted to the State to HUD and shall be considered to have complied with this requirement.”

Lastly, under 24 C.F.R. § 91.220(j), must include:

“Actions it plans to take during the next year to remove or ameliorate the negative effects of public policies that serve as barriers to affordable housing. Such policies, procedures and processes include, but are not limited to, land use controls, tax policies affecting land, zoning ordinances, building codes, fees and charges, growth limitations, and policies affecting the return on residential investment.”

Parallel provisions exist for state governments, who are also required to analyze and take action to ameliorate exclusionary zoning, among other barriers to affordable housing. HUD has the authority to reject a jurisdiction’s Consolidated Plan or Annual Action Plan and thereby hold up its funding if the Department finds these components of the Consolidated Plan to be wanting or, if adequate at the planning stage, unimplemented. Needless to say, this is not the authority that HUD has asserted.

With respect to the certifications required of HUD formula grantees, the most significant ones related to exclusionary zoning are the civil rights certifications, including one that requires jurisdictions to affirmatively further fair housing (AFFH). These certifications are grounded in statute, but Congress has not defined the duty to AFFH, leaving HUD to fill that void through the following definition:

“Affirmatively furthering fair housing means 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 access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant’s activities and programs relating to housing and urban development.”¹⁹

Historically, HUD has required states and local governments to engage in fair housing planning as part of the process of demonstrating compliance with their AFFH duty.²⁰ However, due to

¹⁹ 24 C.F.R. § 5.151.

²⁰ See, e.g., Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,271 (Jul. 16, 2015); Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1,878, 1,905 (Jan. 5, 1995).

regulatory changes during the Trump Administration, no explicit fair housing planning obligation is currently in place.²¹ Although this is likely to change in the near future, the more salient point for now is that state and local recipients of formula grants must promise that they will carry out their AFFH duty. Given the abundant research on the connection between exclusionary zoning and both patterns of segregation and disproportionate housing needs,²² it is clear that the reduction or elimination of exclusionary zoning barriers would comport with jurisdictions' current AFFH obligations as construed by HUD.

Additionally, the certification requirements for receipt of formula grant funds also include certifications that grantees will comply with the non-discrimination provisions of the Fair Housing Act.²³ Courts have interpreted Fair Housing Act compliance as being a prerequisite for compliance with the duty to AFFH.²⁴ Thus, to the extent that exclusionary zoning – as described above – violates the Fair Housing Act, the practice can also render states and local governments ineligible for formula grant funds.

There are limitations on HUD's ability to use its authority as a grant administrator to effectuate progress in the fight against exclusionary zoning. The first is statutory. Under 42 U.S.C. § 12711, HUD is prohibited from establishing “any criteria for allocating or denying funds made available under programs administered by the Secretary based on the adoption, continuation, or discontinuation by a jurisdiction of any public policy, regulation, or law that is (1) adopted, continued, or discontinued in accordance with the jurisdiction's duly established authority, and (2) not in violation of any Federal law.” If a zoning or land use regulation does not violate the Fair Housing Act, this provision appears to prevent HUD from using its grant administration authority to order a change. If there is a violation of the Fair Housing Act, HUD would not be so barred, but, in the absence of litigation adjudicating whether a zoning or land use regulation violates the Fair Housing Act, it is predictable that HUD would be reluctant to exercise the full scope of its power.

The second limitation is relational. HUD's Office of Community Planning and Development (CPD), which is responsible for the administration of these grants, is widely perceived in the fair housing and civil rights field as prioritizing collegial relationships with its grantees over meaningful civil rights enforcement. Thus, there are often internal struggles between the more enforcement-oriented Office of Fair Housing and Equal Opportunity and CPD, which is both more powerful and more focused on customer service.²⁵ CPD tends to win those fights.

²¹ *Compare* Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Aug. 7, 2020); *with* Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779 (June 10, 2021).

²² Solomon Greene & Ingrid Gould Ellen, *Breaking Barriers, Boosting Supply: How the Federal Government Can Help Eliminate Exclusionary Zoning*, Urban Institute (Sep. 2020), https://www.urban.org/sites/default/files/publication/102963/breaking-barriers-boosting-supply_0.pdf.

²³ 24 C.F.R. § 91.225(b)(6).

²⁴ *E.g.*, *N.A.A.C.P., Boston Chapter v. Sec'y of Hous. & Urb. Dev.*, 817 F.2d 149, 154 (1st Cir. 1987).

²⁵ *The Future of Fair Housing: Report of the National Commission on Fair Housing & Equal Opportunity 18-19* (2008), <https://lawyerscommittee.org/wp-content/uploads/2015/08/The-Future-of-Fair-Housing-National-Commission-on-Fair-Housing-and-Equal-Opportunity.pdf>.

Much less needs to be said about HUD's role in administering competitive grant programs. Typically, including with respect to the CNI program, HUD has broad discretion to establish application criteria for the notices of funding availability through which it awards funds.²⁶ HUD already incorporates requirements related to the duty to AFFH and broader civil rights compliance, but these criteria tend to lack specificity as to particular applications of the Fair Housing Act, such as in the context of exclusionary zoning.²⁷ Whether as threshold eligibility requirements or as competitive scoring points, HUD could use its leverage in awarding competitive grants to incentivize the amelioration of exclusionary zoning.

III. Context of Zoning Reform, the Limitations of Market-Based Solutions, and Urban Displacement

Low-income communities of color, civil rights lawyers, and affordable housing developers have long been on the frontlines of the fight against exclusionary zoning. In recent years, however, a more libertarian, market-oriented zoning reform movement has emerged and is now attracting attention to its proposals in state houses and city halls across the country. In particular, the elimination of single-family zoning²⁸ and proposals to increase density near public transit service²⁹ have garnered significant attention. This yes-in-my-backyard (YIMBY) movement is not a monolith, but its limitations reemphasize the need to ground efforts to eradicate exclusionary zoning in principles of racial and economic justice.

Fundamental to the YIMBY worldview is the notion that inadequate housing supply is a primary cause of the housing affordability crisis and that easing or eliminating regulatory constraints on residential development, such as zoning, would alleviate the crisis by increasing supply.³⁰ Although YIMBYs would acknowledge that newly constructed housing is unlikely to be affordable to lower income households without government subsidy, they posit that, via a process called "filtering," lower income households may still benefit from new construction because higher income household will move out of older homes and the cost of those older homes will fall as sellers and landlord compete for new occupants.

While YIMBY policies may sound good on paper, there are holes in the narrative that are hugely consequential for low-income communities of color. First, although filtering is a real phenomenon, it can take decades for filtered housing to become available - though not necessarily affordable - to very or extremely low-income households making below 50% of the area median income for their metropolitan region, if indeed it ever does.³¹ Thus filtering may

²⁶ FY 2021 Notice of Funding Availability (NOFA) Information, U.S. Dep't of Hous. & Urb. Dev. (last visited Oct. 12, 2021), https://www.hud.gov/program_offices/public_indian_housing/programs/ph/cn/fy20funding.

²⁷ FY 2020 Choice Neighborhoods Initiative Implement Grant Program Notice of Funding Availability, U.S. Dep't of Hous. & Urb. Dev. (last visited Oct. 12, 2021), <https://www.hud.gov/sites/dfiles/PIH/documents/Full%20Announcement%20FR-6400-N-34.pdf>.

²⁸ Miguel Otárola, *Minneapolis Moves Forward by Allowing Triplexes Citywide*, StarTribune (Nov. 8, 2019), <https://www.startribune.com/minneapolis-moves-forward-with-allowing-triplexes-citywide/564664232/>.

²⁹ S.B. 827, Cal. Leg., 2017-2018 Sess. (2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB827.

³⁰ Jay Caspian Kang, *Want to Solve the Housing Crisis? Build More, and Build Higher*, N.Y. TIMES (Sep. 2, 2021), <https://www.nytimes.com/2021/09/02/opinion/housing-crisis-pandemic.html>.

³¹ Miriam Zuk & Karen Chapple, *Housing Production, Filtering, and Displacement: Untangling the Relationships* 3-4 (May 2016),

ease the affordability crisis for middle-income (95-120% of area median income), moderate-income (80-95% of area median income), and sometimes even low-income (50-80% of area median income) households, but not for those currently experiencing the greatest need and highest risk of homelessness. Second, to the extent that filtering results in increased housing affordability for lower income households, the homes to which lower income households are afforded access are definitionally older and, in practice, likely to be less healthy, safe, and efficient. Third, although filtering typically reduces housing costs at the regional level, new development can increase housing costs in hyperlocal submarkets.³² When this takes place in the context of low-income communities of color in the urban core, the result can be increased gentrification and displacement.

The YIMBY narrative also frequently misses the important and harmful role that exclusionary zoning can play in regional housing markets that are not supply-constrained. Some regions, whether through population loss due to lack of jobs or significant housing construction, do not have significant housing shortages. But exclusionary zoning is often common in these areas. Sometimes, it is not only common; it is actually more severe than in high-cost coastal markets. The outer suburbs of many industrial cities in the Midwest attest to this fact. In these areas, exclusionary zoning clearly retrenches residential racial segregation and reduces the options available to affordable housing developers for new construction, even if it does not exacerbate an absolute housing shortage.

In addition to these holes in the YIMBY narrative, those who identify as “market urbanists” often pair their advocacy of less restrictive zoning with opposition to policies that increase the supply of affordable housing and protect tenants through regulation. Inclusionary zoning and rent control are perhaps the two most notable policies that increase affordable housing.³³ There is, consequently, a risk that a critique of exclusionary zoning that centers the “regulatory” nature of zoning as the source of the practice’s ills could undermine housing and land use policies that are essential for meeting the need for safe, stable, affordable housing.

IV. Principles for Equitable Zoning Reform

Against this backdrop of rampant exclusionary zoning and potentially counterproductive proposals for how to end the practice, coupled with the Biden Administration’s proposal to pair increased affordable housing funding with incentives for zoning reform, the Alliance for Housing Justice – a collaboration between the Lawyers’ Committee for Civil Rights Under Law, PolicyLink, the Poverty and Race Research Action Council, Public Advocates, and the Right to the City Alliance – brought together a broad coalition of civil rights, community organizing, and affordable housing organizations to articulate a set of eight principles for equitable zoning reform. This coalition sent a letter, which is attached to this written testimony, to President Biden, HUD Secretary Marcia Fudge, Chairwoman Maxine Waters, and other key members of

³² Anthony Damiano & Chris Frenier, *Build Baby Build?: Housing Submarkets and the Effects of New Construction on Existing Rents* (Oct. 16, 2020), <https://www.tonydamiano.com/project/new-con/bbb-wp.pdf>.

³³ Caleb Malik, *Rent Control Is Bad for Both Landlords and Tenants*, MARKET URBANISM (Apr. 2, 2016), <https://marketurbanism.com/2016/04/02/rent-control-bad-landlords-tenants/>.

Congress on June 23, 2021.³⁴ The letter recommends that federal action regarding zoning should (1) focus on areas that are actually “exclusionary,” (2) require an equity analysis to increase impact and avoid unintended consequences, (3) prioritize the development of deed-restricted affordable housing (including units for extremely low-income households), (4) evaluate municipalities’ zoning and land use actions holistically, (5) protect tenants from displacement, (6) ensure that historical disinvested low-income communities of color have equitable access to federal funds, (7) identify funding sources that will actually incentivize meaningful change; and (8) obligate municipalities to maintain data and report on their progress.

In light of the discussion of market-based approaches above, two principles in particular merit elaboration. First, the possibility that zoning reform might not focus on areas that are actually exclusionary is not an abstract risk. New York City is a prime example. The administration of current Mayor Bill de Blasio has made broad-based higher-density rezoning a focal point in its efforts to create more market-rate and affordable housing.³⁵ Although such upzoning can increase affordability and foster residential racial integration while posing minimal displacement risk when undertaken in disproportionately white higher income neighborhoods, the first several neighborhoods in which the de Blasio Administration implemented its policy were low-income communities of color such as East New York and East Harlem.³⁶ Rezoning of more affluent areas such as Gowanus and SoHo have only started to move forward this year as Mayor de Blasio prepares to leave office.³⁷ In low-income communities of color, rezoning has contributed to displacement, and the housing that it has produced – including many of the deed-restricted affordable units – has been beyond the means of many neighborhood residents.

Second, true to the historical roots of the movement to end exclusionary zoning, the development of deed-restricted affordable housing should be the primary focus of reform efforts. It is well-established that filtering will not result in housing affordability for very low- and extremely low-income households, and that government subsidies are required. Zoning reform efforts can prioritize the development of deed-restricted affordable housing through tools like overlay districts that entitle affordable housing developments to greater density than market-rate developments. Such policies can make it easier for affordable housing developers to compete for scarce buildable sites rather than compete with for-profit developers if these districts are upzoned for all multifamily development as-of-right. None of this is to suggest that there should not be unsubsidized units in developments that are facilitated by zoning reform. Any government that is designing a zoning reform proposal can establish acceptable proportions of affordable versus market-rate units in order for mixed-income developments to benefit from relaxed zoning. Additionally, government entities would be well-served by considering social housing models like those found in Vienna, Austria that are not means-tested and instead allow households at a

³⁴ *Principles for Equitable Zoning Reform*, ALLIANCE FOR HOUSING JUSTICE (June 23, 2021), <https://www.allianceforhousingjustice.org/post/zoning-equity>.

³⁵ *Zoning for Quality and Affordability*, NYC PLANNING (last visited Oct. 12, 2021), <https://www1.nyc.gov/site/planning/plans/zqa/zoning-for-quality-and-affordability.page>.

³⁶ Michelle de la Uz et al., *How the Gowanus Rezoning Could Push NYC Forward on Racial Equity*, CITY LIMITS (Sep. 21, 2021), <https://citylimits.org/2020/09/21/opinion-how-the-gowanus-rezoning-could-push-nyc-forward-on-racial-equity/>.

³⁷ *Id.*

wide range of income levels to pay a sustainable proportion of their income in rent.³⁸ An article discussing how to develop social housing in the United States without replicating some of the mistakes made in developing public housing is attached to this written testimony.

Many of the principles articulated in the letter are equally relevant to zoning reform proposals at the state and local levels, and some could apply whether the vehicle for zoning reform is an incentive grant program, as is currently under consideration in Congress, or a more prescriptive approach. It is worth noting that in reacting to proposals from the Biden Administration that were public at the time of the letter's drafting, the letter presupposes an incentive grant approach.

There are some benefits to a more prescriptive alternative approach. In order to ensure the efficacy of its investments in the supply of affordable housing and pursuant to its Commerce Clause powers, Congress clearly has the authority to regulate state and local zoning and land use regulation. Congress could, for example, pass a law stipulating that federally subsidized affordable housing developments are exempt from state and local land use regulation. Congress could do this either in a blanket manner or in a more narrowly tailored fashion whereby, for example, a development could include up to six stories and up to 100 units per acre without being subject to local zoning, but would not be entitled to unlimited density.

One benefit of the prescriptive approach is that it avoids some of the contradictions that the principles articulated in the coalition letter attempted to navigate. Namely, with a mandatory approach, it is not necessary to steer disproportionate resources for infrastructure, transportation, parks and recreation, and other public goods to the communities that need such federal funding the least in order to spur them to action.

V. *Catalyzing Private Enforcement*

In addition to comprehensive policy reform and the more robust exercise of the existing powers held by HUD and DOJ, another way in which the federal government could contribute to the fight against exclusionary zoning is by creating the conditions in which affordable housing developers would be more likely to propose projects in exclusionary areas. As discussed above, it is difficult for private plaintiffs to establish standing to challenge exclusionary zoning under the Fair Housing Act unless an affordable housing developer has proposed a zoning change and had their request rejected. Under current conditions, affordable housing developers have little incentive to incur substantial predevelopment costs for projects that they have good reason to believe will not be approved and for which litigation offers uncertain prospects of overturning any denial. But, as the example of the Low Income Housing Tax Credit (LIHTC) program illustrates, developers respond to incentives.³⁹ If affordable housing developers were more likely to receive government subsidy for proposals in exclusionary areas, they would, at a certain point, follow that money. Although many states do currently offer incentives for developments in

³⁸ See Saoirse Gowan & Ryan Cooper, *Social Housing in the United States*, PEOPLE'S POLICY PROJECT (2018), <https://www.peoplespolicyproject.org/wp-content/uploads/2018/04/SocialHousing.pdf>.

³⁹ See Jill Khadduri, *Creating Balance in the Locations of LIHTC Developments: The Role of Qualified Allocation Plans* (Feb. 2013), https://www.abtassociates.com/sites/default/files/migrated_files/0b6a09dc-9a26-480d-9066-bc98a18e6fac.pdf.

relatively low poverty areas, the amount of available resources and the magnitude of the incentives are insufficient to challenge zoning. Instead, developers search long and hard for sites that both entitle them to bonus points on their applications and that are already appropriately zoned. Many state housing finance agencies even undercut the efficacy of their incentives for developments in low poverty areas by requiring that LIHTC applicants have zoning approval prior to submitting their applications.

Operationalizing this approach could take many forms. State agencies that administer LIHTC could modify their incentives and requirements in order to push developers into exclusionary areas. Federally, the U.S. Department of the Treasury (Treasury) could publish guidance on the siting of LIHTC properties that, in turn, could push action at the state level. Congress, in providing additional financial resources for affordable housing, could create set-aside or separate pools of funding that would be dedicated to use in exclusionary areas.

In order to ensure that these types of shifts do not result in an imbalance in federal affordable housing resources such that lower income areas cannot compete, Congress should grow the total pie of affordable housing funding. As a society, we should not have to choose between building affordable housing in exclusionary areas, communities of color being threatened with gentrification, and disinvested areas that are not experiencing displacement pressure. We can and must be able to address all three at the same time. If federal policy changes the behavior of affordable housing developers such that they are more likely to apply for zoning changes in exclusionary areas, the resulting increase in Fair Housing Act litigation is likely to (1) result in more judgments and settlements requiring positive zoning changes in specific instances and (2) deter other local governments from denying zoning approval in the future due to the risk of significant financial liability.

VI. Conclusion

Exclusionary zoning is a significant barrier to our societal efforts to foster integrated communities and increase housing affordability. Ending exclusionary zoning presents complex but solvable problems. At the same time, some proposed “quick-fix” solutions to exclusionary zoning risk causing significant unintended harm due to lack of careful geographic targeting and lack of sufficient focus on deed-restricted affordable housing. Congress, HUD, DOJ, and Treasury all have constructive roles to play in designing and implementing an effective federal response to exclusionary zoning. Key components of the federal response should include increased public and private Fair Housing Act enforcement, facilitated by greater incentives for affordable housing development in exclusionary areas; more rigorous block grant administration by HUD; and comprehensive policy reform, whether through a new incentive grant program or, preferably, direct requirements. Taken together, these interventions would help forge a more just and equitable society.

June 21, 2021

President Joe Biden

1600 Pennsylvania Ave.,
Washington, DC 94801

The Honorable Marcia Fudge

Secretary of Housing & Urban Development
Washington, DC 20410

The Honorable Nancy Pelosi

Speaker of the House
U.S. House of Representatives
Washington, DC 20515

The Honorable Chuck Schumer

Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Maxine Waters

Chair, Financial Services Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Sherrod Brown

Chair, Banking Housing & Urban Affairs
Committee
U.S. Senate, Washington, D.C. 20510

The Honorable David Price

Chair, Subcommittee on Transportation,
Housing & Urban Development
House Appropriations Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Brian Schatz

Chair, Subcommittee on Transportation,
Housing & Urban Development
Appropriations Committee
U.S. Senate
Washington, DC 20510

To: President Biden, Secretary Fudge, Speaker Pelosi, Majority Leader Schumer, Chair Waters, Chair Brown, Chair Price and Chair Schatz:

We are writing on behalf of the undersigned civil rights, community organizing, and affordable housing advocacy organizations with regard to the American Jobs Plan's proposal to create a competitive grant program that would incentivize municipalities to change local zoning and land use policies. The undersigned organizations have been at the forefront of efforts to challenge exclusionary zoning through litigation, legislative reform, and advocacy for affordable housing. We are also committed to fighting the displacement of residents of low-income communities of color facing development pressures, which is an equally pressing racial and economic justice issue — but one that requires different tools.

There is a long history of local governments using restrictive zoning practices, from the explicit racial zoning outlawed by the U.S. Supreme Court in 1917 in *Buchanan v. Warley* to large minimum lot sizes and apartment bans, to exclude people of color and reinforce residential racial segregation. Accordingly, federal action to eliminate exclusionary zoning has the potential to significantly advance racial and economic justice. But, if improperly targeted, there is a risk that a new grant program could have unintended consequences, including increased displacement. This letter outlines the core principles that should inform the drafting of any federal legislation concerning exclusionary zoning. In brief, federal action should (1) focus on areas that are actually “exclusionary,” (2) require an equity analysis to increase impact and avoid unintended consequences, (3) prioritize the development of deed-restricted affordable housing (including units for extremely low-income households), (4) evaluate municipalities’ zoning and land use actions holistically, (5) protect tenants from displacement, (6) ensure that historical disinvested low-income communities of color have equitable access to federal funds, (7) identify funding sources that will actually incentivize meaningful change; and (8) obligate municipalities to maintain data and report on their progress.

I. Focus on Areas That Are Actually Exclusionary

The first key consideration for any legislative proposal is that it target zoning and land use regulations that actually exclude low-income people of color in practice. Exclusionary zoning is about the exclusion of people, not the exclusion of types of buildings or housing types. Answering whether single-family zoning in a particular neighborhood excludes low-income people of color requires knowing who lives in single-family homes in that neighborhood and how housing costs compare to costs regionally. In many predominantly Black and Latinx neighborhoods, there is no shortage of homes available for rents or monthly mortgage payments below subsidized rents under the Low-Income Housing Tax Credit program. In such neighborhoods, reducing barriers to higher density development is unlikely to increase access for low-income families and, instead, has the potential to fuel real estate speculation and displacement.

Zoning reforms that increase density must target higher-cost municipalities and neighborhoods, where the ability to build different housing types would make affordable housing feasible where it currently is not. In some places, entire municipalities may fit this bill—those that lack racially and socioeconomically diverse neighborhoods. In other areas, particularly in larger cities, there may be a mix of diverse neighborhoods where the effect of zoning changes will differ based on the make-up of the specific neighborhood; zoning reform could risk fueling profit-motivated development and displacement in some areas, while leading to meaningful inclusion in other, disproportionately white, neighborhoods. Areas targeted for higher density zoning should have high income levels, low poverty rates, and low levels of racial diversity.

II. Require Equity Analysis to Increase Impact and Avoid Unintended Consequences

Building off of core Fair Housing Act principles, any federal legislation should mandate that local governments undertaking zoning changes carefully analyze the anticipated effects of zoning changes on communities of color through a process informed by robust community input. Such a requirement would serve several important purposes. First, it is essential to surface a community's particular needs, such as for units that are affordable to extremely low- or very low-income households among communities of color or for units with three or more bedrooms to accommodate large families without overcrowding. Without such an analysis, zoning and land use reform might result in the production of units that do not actually address patterns of exclusion, such as only one-bedroom apartments, below-market units that are still too expensive for those in need, or units that are not accessible to persons with disabilities. Second, an equity analysis would document that zoning changes actually target genuinely exclusionary areas, while not destructively intervening in non-exclusionary areas. Third, it would reduce the risk that changes would be based on outdated assumptions or conditions. For example, a historically exclusionary community may be experiencing "white flight" and the early stages of disinvestment while still being perceived as the homogeneous place it once was. Fourth, an equity analysis may identify policies that would undermine the efficacy of zoning changes. These might include policies that tie rezoning to residency preferences for affordable housing in exclusionary areas, thereby limiting access for people of color from outside of those areas, or disingenuous inclusionary zoning requirements that serve to make all development infeasible. Lastly, robust community input can help avoid the adoption of policies that are based on incomplete or outdated data that lacks local context and can help ensure that adopted policies are consistent with the needs of low-income communities of color. All of these challenges can and should be averted through careful planning.

III. Prioritize the Development of Deed-Restricted Affordable Housing, Including Units for Extremely Low-Income Households

To combat exclusion, a central purpose of zoning reform must be to facilitate the development of deed-restricted affordable housing. Deed restrictions protect long-term affordability by imposing income eligibility requirements and restricting future rent levels or sale prices. In light of persistent correlations between race, ethnicity, and socioeconomic status, many people of color will benefit more from increased affordable housing development in exclusionary areas than from market-rate housing. This becomes even more evident when considering the housing needs of extremely low-income households (i.e., households whose income does not exceed the higher of the federal poverty guideline or 30% of the area median income). Moreover, in high-cost areas, new market-rate multi-family housing is generally still very expensive, even if it is slightly less expensive than single-family homes in the area. Therefore, zoning changes that broadly allow multifamily development without any requirements that they include a percentage of affordable units, even if appropriately targeted at exclusionary areas, will miss the mark.

Zoning reform will only be an effective tool for advancing racial and economic justice if reform focuses on affordable housing. Any efforts to increase the availability of “missing-middle” housing should be paired with homebuyer-assistance programs that are affirmatively marketed to moderate- and middle-income people of color who have been denied the wealth-building potential of homeownership, and “missing-middle” housing efforts must not be adopted at the expense of robust programs to increase the number of more deeply affordable homes.

There is a range of policy tools that can be used to pair zoning changes with affordable housing development. One option is the creation of affordable “overlay districts,” which apply across a broad geographic area and allow increased density only for development proposals that meet certain affordable or social housing requirements. Another option is well-designed inclusionary zoning requirements that mandate at least some of the housing in each new building is affordable. This approach is most effective in places where there is high demand and high prices for market-rate multifamily housing, a common feature of many exclusionary neighborhoods, which make it financially feasible to produce units for extremely low-income households without government subsidy. Lastly, zoning changes could target publicly-owned land that government agencies commit to lease or sell for free or at a below-market price to subsidize development of affordable housing. Local governments can also enact a policy of prioritizing lease or sale of public land to non-profit developers of affordable or social housing, including community land trusts and public housing authorities.

IV. Evaluate Municipalities’ Zoning and Land Use Policies Holistically, Rather Than in Isolation

Municipalities should be evaluated holistically to ensure that municipalities are not able to identify some beneficial actions to access a generous new funding source while simultaneously using their zoning powers to undermine the goals of the federal program in other ways. For example, a city that upzones ten acres of land in an exclusive neighborhood while downzoning 20 acres nearby is, on balance, exacerbating exclusion rather than combatting it. Likewise, if a large city that includes both exclusive and inclusive neighborhoods adopts zoning changes that fuel displacement in diverse neighborhoods, no amount of upzoning in exclusionary neighborhoods can right that wrong. It would radically undermine the intent of federal zoning reform to only focus on the positive steps that municipalities take in response while ignoring actions that may circumvent the underlying purpose of the new incentive program. Likewise, actions that may superficially appear to increase opportunities for the development of affordable housing but that would either be fruitless in practice – such as selectively upzoning parcels that are unlikely to be redeveloped due to existing land uses – or that would result in the siting of affordable housing in isolated or environmentally unhealthy areas should not qualify municipalities for funds. Lastly, zoning and land use policies should also be evaluated in tandem with other housing and community development policies,

such local funding streams (or the lack thereof) for affordable housing and barriers to affordable housing development like requirements for the approval of a city council member in whose district a development would be located. Equitable zoning and land use policies are unlikely to lead to meaningful affordable housing production unless other necessary policies are in place, as well.

V. Protect Tenants from Displacement, Even in Exclusive Areas

Targeting zoning reform at exclusionary areas is critical to reducing the likelihood that zoning changes will result in wholesale displacement of vulnerable communities, but it is also important to protect individual low-income households from displacement pressures that may result from zoning or land-use decisions. Even areas that are exclusionary overall may nonetheless have small pockets of racial and socioeconomic diversity, perhaps as a result of past fair housing litigation or because a small landlord has decided to keep rents low to maintain long-term tenants. A variety of policy tools may be helpful in preventing the displacement of low-income tenants living in exclusionary areas. Such tools may include prohibitions on demolition of existing, occupied multifamily properties; prohibition or strict limitations on land use conversions of manufactured home communities; anti-harassment and retaliation protections; just cause eviction requirements; rent stabilization; right to counsel; source of income protections; and a tenant's opportunity to purchase. In the event that displacement does occur, tenants should have access to generous relocation assistance benefits, both in the form of financial payments and help locating and securing a new home in the community.

VI. Ensure Equitable Access to Federal Funds in Historically Disinvested Low-Income Communities of Color

Pursuing federal zoning reform through the exercise of Congress's Spending Clause power would raise significant equity concerns if it directed new resources only towards communities that currently have exclusionary zoning, without a way for historically disinvested communities to access funding. Areas with exclusionary zoning are generally highly resourced communities, supported by high property values and a robust tax base. Because, as discussed above, zoning reform should target areas that are actually exclusionary in order to avoid contributing to displacement, lower income communities could be ineligible for a funding stream that is specifically targeted at ending exclusionary zoning. To avoid this potential inequity of increasing funding only in areas that are already well-funded, Congress should create parallel grant programs that support neighborhood investments in low-income communities of color to build or replace infrastructure and to counter displacement pressures.

As an alternative approach, federal preemption of genuinely exclusionary zoning would not exacerbate resource disparities between highly resourced communities and historically disinvested low-income communities of color. Moreover, federal preemption of local zoning and land use regulation falls squarely

within Congress's Commerce Clause powers, and Congress has a proprietary interest in stopping the application of certain local zoning regulations to federally programs like the Low-Income Housing Tax Credit program.

VII. Identify Funding Sources that Will Actually Incentivize Meaningful Change

For an incentive program to succeed, careful consideration must be given to the types of funding that are used to motivate local actions. At a basic level, local jurisdictions must be sufficiently interested in the incentive funding to take actions that may be politically difficult. One key lesson our organizations have learned through work on local and state programs is that attempts to use affordable housing dollars to incentivize breaking down of exclusionary zoning and land use practices have failed. Exclusive municipalities are generally not interested in such funding, and it is also important to ensure that affordable housing is developed in these communities, whether or not a local jurisdiction chooses to participate in an incentive-based program. On the other hand, funding for local road maintenance, other local infrastructure, or local discretionary funding have proven to be much more effective in motivating local actions. Conditioning funding for states on meaningful state law exclusionary zoning reform, consistent with the principles articulated in this letter, would also be an important avenue for Congress to consider.

VIII. Obligate Municipalities to Maintain Data and Report on Their Progress

In exchange for valuable federal funds, municipalities must be expected to maintain data and report on their progress in implementing reforms. Some municipalities that have adopted inclusionary zoning have neglected to incorporate oversight and compliance monitoring into their programs, leading to significant questions about whether those programs are delivering on their promise. In addition to demonstrating to the federal government that local governments are truly eligible for funding, good data collection and reporting requirements should better position municipalities to enforce regulatory agreements for inclusionary developments.

The federal government has historically played a significant role in promoting exclusionary zoning policies, and the federal government has an obligation to help end this practice. From supporting widespread adoption of the Standard Zoning Enabling Act by states in the early 1920s to the developing single-family zoning federal mortgage insurance underwriting guides that encouraged racially restrictive covenants, zoning has never been an exclusively local issue. The federal government has also played a significant role in past policies that have contributed to mass displacement of communities of color, most notably urban renewal under Title I of the Housing Act of 1949 and the construction of the interstate

highway system, which carved up many thriving urban neighborhoods. The federal government has an obligation to actively reverse this legacy.

By designing federal intervention around exclusionary zoning in adherence with the eight principles articulated in this letter, Congress can ensure that any reform efforts effectively address structural racism in federal housing policy. The undersigned groups would welcome the opportunity to engage with you regarding the development of legislation that embodies these principles.

If you have any questions or for additional information, please contact Liz Ryan Murray at Alliance for Housing Justice (LRyanMurray@PublicAdvocates.org)

Sincerely,

National Organizations

A Community Voice	NAACP Legal Defense and Educational Fund, Inc. (LDF)
Action Center on Race and the Economy	National Alliance for Safe Housing
Alliance for Housing Justice	National Coalition for Asian Pacific American Community Development
Americans for Financial Reform	National Fair Housing Alliance
Building Healthy Places Network	National Housing Law Project
Center for Popular Democracy	National Low Income Housing Coalition
Center for Responsible Lending	People's Action
Equal Rights Center	Planners Network
Housing Justice Center	PolicyLink
Housing Rights Initiative	Poverty and Race Research Action Council
Lawyers' Committee for Civil Rights Under Law	Public Advocates
Liberation in a Generation	RESULTS
Manufactured Housing Action (MHAction)	
Mi Familia Vota	
Right to the City Alliance	
Root and Rebound	

State & Local Organizations

Affordable Housing Network of Santa Clara County

Alabaster Box Collective

Alliance of Californians for Community Empowerment

American Constitution Society, ASU Student Chapter

Anthropocene Alliance

Beyond Inclusion Group

CAUSE

California Housing Partnership

Catholic Migration Services

Center for Fair Housing, Inc

Change on the Inside

Chicago Lawyers' Committee for Civil Rights

Chicago United for Equity

Chinatown Community Development Center

City Heights Community Development Corporation

Citizens Committee for Flood Relief

CNY Fair Housing

Collective Medicine

Community Health Councils

Congregations Organized for Prophetic Engagement

Cooper Square Committee

East Bay Housing Organizations

Eastside People's Intercultural Center

Eperanza Community Housing Corporation

Fair Housing Center of Central Indiana, Inc.

Fair Housing Partnership of Greater Pittsburgh

Fair Share Housing Center

FreshWater Accountability Project

Georgetown Open Space Committee

Hill District Consensus Group

HomeStart, Inc

Horizon Home Buyers, Inc..

Housing Action Illinois

Housing California

Housing Justice for All (New York State)

Housing Now! CA

Just Cities

Kheprw Institute

La Raza Community Resource Center

Law Foundation of Silicon Valley

Leadership Counsel for Justice and Accountability

Legal Aid Justice Center

Little Tokyo Service Center

Long Island Housing Services, Inc.

Louisiana Fair Housing Action Center

Make the Road Nevada

Malach Consulting
Massachusetts Fair Housing Center, Inc.
Massachusetts Law Reform Institute
Metropolitan St. Louis Equal Housing and Opportunity Council
Mississippi Center for Justice
Mississippi Communities United for Prosperity (MCUP)
MZ Strategies, LLC
National Lawyers Guild — ASU Chapter
Nobody Leaves Mid-Hudson
Northwest Bronx Community & Clergy Coalition
Oakland Tenants Union
Parable of the Sower Intentional Community Cooperative
Partnership for Working Families
Port Arthur Community Action Network (PACAN)
Portland Harbor Community Coalition
Pratt Institute, graduate program in City and Regional Planning
Public Counsel
Public Engagement Associates

Public Interest Law Center
Public Justice Center
RENA (Riverside Edgcombe Neighborhood Association)
Sacramento Housing Alliance
Save James Island
Schultz Family Foundation
South Bay Community Land Trust (SBCLT)
Southwest Fair Housing Council
Strategic Actions for a Just Economy (SAJE)
T.R.U.S.T. South LA
The Fair Housing Center of Southwest Michigan
The Public Interest Law Project
ThinkBox
Todco/Build Affordable Faster CA
United Way Bay Area
Utah Center for Civic Improvement
Venice Community Housing
Vermont Legal Aid
Virginia Housing Alliance
Washington Lawyers' Committee for Civil Rights and Urban Affairs
West Boulevard Neighborhood Coalition
Western Center on Law and Poverty

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Buffalo School of Law

Janevette Cole, Trustee,
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Victoria Washington, District 3 Representative,
Charlotte City Council

Decommodifying Housing Without Reproducing American Apartheid

Though the idea of social housing is gaining traction among advocates and policy experts, the path of least resistance for its production in the U.S. is also the path of the perpetuation of residential racial segregation.

By **Thomas Silverstein** - December 7, 2018



Chain Link Skyline. Photo by a. via flickr, CC BY-NC-ND 2.0

One of the ironies of housing justice work in 2018 is that, while a deeply hostile and incompetent federal administration plots the destruction of the housing safety net, the range of what is politically possible for policies to meet the United States' housing needs has moved sharply to the left.

After decades of focus on tax credits, vouchers, and inclusionary zoning, organizers and policy experts are shifting focus toward direct, public, or collective control of homes. The vehicles for this

sort of development include community land trusts and public housing, both of which fall under the broader umbrella of social housing. It turns out that aspirations for taking the market out of housing provision were not reduced to rubble with the Pruitt-Igoe Towers in St. Louis in 1972.

As it increasingly influences housing policy, **this turn** is apt to cause no small amount of agita among civil rights advocates who have long fought to remedy the continuing effects of deliberate residential racial segregation. After all, **federally sponsored racism permeated public housing** with regard to its occupancy, location, and maintenance. Although **residents managed to forge strong communities**, much of what public housing authorities across the country produced in the wake of the National Housing Act of 1949 isolated residents from decent jobs, quality education, and basic health and safety. Why then would this society want to recreate those conditions?

The answer should be that it would be different this time around—in producing social housing that honors the fundamental right of all to a decent home, we will also respect the fundamental rights to education, health and safety, a living wage, and freedom from discrimination. There is, however, a substantial risk of those being empty words as the path of least resistance for social housing production in the U.S. is also the path of the perpetuation of residential racial segregation. At the same time, by understanding the structural reasons why that is the case, the opportunities to exploit gaps and fissures in those structures, and how segregation would threaten the sustainability of social housing, it is possible to build a case for racially integrated housing as a public good.

The Path of Least Resistance: Land Availability, Land Costs, and Political Will

In the absence of concerted action, three principal factors are likely to steer decommodified housing to low-income communities of color where residents are disproportionately isolated from decent jobs, quality schools, and basic health and safety. First, it typically seems as if developable land where construction would not fuel sprawl is concentrated in or adjacent to low-income communities of color. Second, acquisition costs for privately owned land are likely to be lower in those very same places. Third, over the long haul, local governments in disproportionately black and Latino central cities and inner ring suburbs, rather than heavily white, affluent suburbs, are more likely to have the political will to invest significant resources in the production of social housing.

The Location of Developable Land

When selecting sites for the production of new housing, regardless of affordability, two categories of land tend to appear be the commonsense choice: land within the developed portion of a metropolitan region that has fallen into disuse, and undeveloped greenfields at the periphery of metropolitan regions. The former type of land, which can be industrial, residential, or commercial, tends to be located in or near low-income communities of color in central cities and declining inner-ring suburbs because of disinvestment and deindustrialization.

Formerly industrial land is often located in close proximity to logistical infrastructure such as rail hubs and ports and communities of color that often had no or lax zoning requirements. For residential land in particular, deliberate underinvestment in maintenance by absentee property owners and the discriminatory lending practices of financial institutions have played significant roles in increasing vacancy. By contrast, with some exceptions, greenfields are more likely to be located in predominantly white areas, but prioritizing development in those areas often has adverse environmental implications.

Areas with brownfields and housing that has deteriorated as a result of disinvestment offer some tradeoffs with respect to access to opportunity. On the one hand, access to high-performing schools and healthy environmental conditions is usually limited, while, on the other, proximity to

job centers is sometimes greater and transit access is usually better. The dimensions of opportunity that are most beneficial to individuals or families may vary based on each household's individual characteristics, with young children benefitting more from access to high-performing schools and young adults without children benefitting more from access to transportation and jobs.

The Cost of Land

Closely related to the availability of developable land is the cost of land. Controlling for current zoning regulations, land tends to be most expensive in affluent, predominantly white areas. There are partial exceptions to this norm in cities undergoing rapid gentrification, but any strategy to foster residential racial integration in decommodified housing will need to account for this obstacle. Patterns in ownership of land by public entities and public-spirited nonprofit organizations, such as religious congregations, exacerbate the problem.

In comparison to suburban municipalities, big city local governments are more likely to own land and to own it for a wider variety of purposes rather than just the more typical schools, parks, and emergency services. The greater the inventory a government holds, the more frequently a building will become obsolete, thus creating opportunities for adaptive reuse as social housing. Additionally, because of the pernicious effects of lending discrimination and broader economic insecurity as well as a lack of competition from private actors to purchase land, big city local governments are more likely to own individual small lots and structures through tax foreclosure.

The geographic distribution of land owned by nonprofit institutions that might have a mission-related motivation for contributing to social housing production is also skewed. Nonprofit service providers and advocacy organizations located in big cities may have surplus land. The location of religious institutions is more widely distributed, but land that is available for reuse is likely to be disproportionately located in big cities, both due to the relative age of physical structures and relocation by congregants. Accordingly, neither public land nor nonprofit institutional land is likely to offer a way out of the problem posed by higher land costs in affluent, predominantly white areas.

Racism and Political Will

It should also come as no surprise that affluent, predominantly white suburban communities are less likely to be supportive of the production of social housing within their boundaries than are big cities. **Opposition** occurring even within big cities tends to be concentrated in affluent, predominantly white neighborhoods rather than in low-income communities of color.

To the extent that it influences government actors, this predictable opposition has adverse implications for the donation of public land, zoning and land use approvals, and commitment of public funds to pay for acquisition and construction. Even if local politicians accept the case for social housing production, community opponents may have an effective veto over some bond financing necessary for development by way of the ballot box.

Identifying and Exploiting Gaps in Exclusionary Structures

The foregoing case for why building decommodified housing in low-income communities of color is the path of least resistance is a bit of a straw man and intentionally so. Closer scrutiny reveals that for each of the problems above—the availability of affordable, developable land and racially motivated community opposition—there are either exceptions to the rule or workarounds that diminish the significance of the problem. Understanding these problems can drive the field to engage in the creative, visionary thinking needed to avoid the reproduction of residential racial segregation.

The Land Is There When You Look For It

With respect to the availability of developable land, the overview above does not address how certain **extant land uses** that are concentrated in affluent, predominantly white suburbs are rapidly becoming obsolete. In 2017, Credit Suisse estimated that 20-25 percent of U.S. shopping malls would close by 2022. These shopping centers are spread across suburban areas, and, although it may be reasonable to expect closures to hit diverse inner-ring suburbs the hardest, the shuttering of some malls in historically exclusionary areas across many metropolitan areas is a near-inevitability.

Additionally, among malls that may be able to survive the proliferation of e-commerce, many are undergoing dramatic renovations along the "Town Center" model, which invites the inclusion of housing as part of a New Urbanist-inspired drive to create walkable mixed-use communities.



Along similar lines, the U.S. is likely to see **the closure of a significant number of golf courses** across metropolitan regions in upcoming years. According to a study by Pellucid Corp., an industry group, there was an over 30 percent reduction in the number of regular golfers in the U.S. between 2002 and 2016. To an even greater extent than with respect to shopping malls, golf courses are concentrated in affluent, predominantly white suburban areas. These broad swaths of land present an opportunity for decommodified housing production for which there arguably is no parallel in low-income communities of color.

A final and more controversial source of developable land in affluent, predominantly white suburbs consists of the ubiquitous subdivisions that line these communities. Nassau County, New York is one of the foundational proving grounds for residential racial segregation in the U.S. The Town of Oyster Bay includes the most exclusionary areas, where roughly two-thirds of the housing units were built prior to 1960, and only about one in thirteen have been built since 1990. Older housing units in Oyster Bay tend to be relatively poorly constructed post-World War II homes. Although homeowners in places like Oyster Bay may have greater access to affordable home equity and refinance loans, there is very little architectural significance or expectation of high future demand that would prevent the reuse of this land.

If Government Is an Active Partner, Cost Containment Is Feasible

The conventional wisdom that land costs are higher in affluent, predominantly white areas is belied by the ways in which existing zoning controls intersect with cost. It is certainly true that in most metropolitan regions, the cost of land per unit of allowable density is most affordable in low-income communities. At the same time, it is also often true that the per-acre cost of land is actually lower in exclusionary suburbs. Government has the power to increase allowable density.

Typically, this would increase the value of the land that is upzoned, partially undermining the power of upzoning to decrease disparities in land costs between affluent suburbs and low-income cities and inner-ring suburbs. However, if the government assumes ownership of the land prior to upzoning (whether through property tax foreclosure, eminent domain, or consensual sale), it should be able to do so at a price point that reflects the value of the property at the lower density.

Though municipalities could similarly acquire higher density land in low-income communities of color and facilitate social housing development that is yet more dense, that practice could not match the gains in value added from suburban areas because the gap between the original density and the density of what is built would be smaller.

If the community land trust model, which does not necessarily require government support, is the dominant model of social housing production, the difficulty in overcoming higher per-unit land costs in affluent, predominantly white areas is not so easily solved. Unlike a local government producing housing directly, a community land trust, which owns land subject to deed restrictions and leases individual homes to low-income households for an extended period, typically 99 years, does not have zoning authority, and, unlike many municipalities, it does not have the power to simply ignore land use regulations when acting as a land user. That does not, however, mean that community land trusts are without options for precipitating the upzoning of land in suburban areas.

The federal Fair Housing Act has long offered an underused tool for attacking exclusionary zoning through litigation. The Fair Housing Act prohibits policies and practices that have unjustified discriminatory effects in addition to intentional discrimination. Since exclusionary zoning tends to have a disparate impact on Black and Latino households, the practice is often a violation. The primary reason why the threat of Fair Housing Act enforcement has not had as much of a deterrent effect as would be ideal is that it is very difficult to bring such cases unless a developer makes a failed attempt to secure a zoning change. Developers in the commodified market, both for-profit and nonprofit, generally are not inclined to take on the pre-development costs, lengthy process, and uncertain outcome that accompany such efforts. These deterrents should not be as determinative for mission-driven community land trusts.

Additionally, proponents of social housing production can advocate for policies that return land use regulatory authority in affluent, predominantly white suburbs from the local level to the state, which may be a friendly forum for upzoning attempts. New Jersey's Fair Housing Act and Massachusetts' Chapter 40B law both provide examples of how to achieve this.

The extent to which this is a realistic prospect will vary by state. It is hard to imagine state legislatures that have purposefully preempted local inclusionary zoning, like Tennessee or Indiana, forwarding affirmative legislation to undercut exclusionary zoning. At the same time, in order to overcome preemptive tax and expenditure limits that would prevent municipalities from adequately funding social housing and to beat back attempts by the real estate industry to stymie social housing, advocates will inevitably have to build power that can be exercised in currently unfriendly state legislatures and governors' mansions.



Although it is difficult to imagine with the current administration and Congress, the federal government can also play a role through enforcement by the U.S. Department of Housing and Urban Development of its grantee local governments' duty to take proactive steps to foster residential integration or through legislation like that recently introduced by Senator Elizabeth Warren that would incentivize exclusionary local governments to adopt more inclusive zoning.

Confronting Racism with Hard and Soft Power

The litigation-based approach to lowering land costs for community land trusts in high opportunity areas discussed above also represents the most direct, albeit lengthy, way of reducing the role of racism in the siting of social housing. Smaller variations on the same theme of transferring power from local governments that are captive to the exclusionary interests of their constituents to institutions like state administrative agencies, state and federal courts, and regional or county governmental bodies also hold promise. Alliances between low-income communities of color and mostly white, middle-income suburbs that are straining under the weight of unsustainable costs because of municipal fragmentation could advance such policies.

Other state policies that could further common interests and cement the durability of an urban-suburban coalition include mechanisms for pooling property tax revenues regionally, laws that make annexation easier, and ones that make further incorporation of new municipalities and school districts more difficult.

Proponents of social housing can also make the affirmative case for why such development is in the best interests of nearly all segments of metropolitan society. In essence, advocates would seek to pit individuals and families up to the 90th percentile of household income (and perhaps the 98th) against economic elites. Although those in the top 10 percent (but not the 1 percent) have a different lived experience than the working class, there is a growing recognition that, in an era of intense and growing income inequality, their interests are increasingly more aligned with the working class.

While many upper-middle-class families saw their home equity and retirement savings wiped out by the Great Recession, they did not benefit from the golden parachutes provided to executives and institutional shareholders of financial services firms. Even if they rebounded more easily than working class people, their experience with the trauma that speculation-driven instability in the housing market predictably causes could lead them to view social housing as a bulwark of security.

The nationwide housing affordability crisis and generational shifts in preferences for denser housing also have the potential to play constructive roles. The shift toward deliberately socioeconomically integrated **social housing with quality amenities, like that in Vienna, Austria**, is a partial answer to the question of whether social housing can really be "for" the upper-middle class.

It is only a partial answer because there are other structural factors that might make the speculative housing market continue to seem like a better bet for those in the top 10 percent by household income. Though to a lesser extent than before passage of the 2017 tax bill, the federal tax code still incentivizes homeownership free from equity accumulation restrictions as a means for accumulating wealth and retirement security. Additionally, in the wake of a large-scale retreat from defined-benefit pensions and in light of Congress's continuing failure to increase Social Security benefits, there are ever-decreasing alternatives for achieving retirement security.

Although an upper-middle-class family may spend less of their income on housing costs if they reside in decommodified housing, the options of increasing their 401(k) contributions or independently playing the stock market may seem both less fruitful and more dangerous than continued participation in the speculative housing market. Thus, the indirect strategy of advancing retirement security by increasing Social Security benefits, requiring employers to offer defined benefit pensions, or both, would help push upper-middle-class families toward acceptance of decommodified housing as a good of value to them specifically.

The fundamental goal must be to engender the perception that social housing is a universal social good that, though it may provide disproportionate benefits to poor and working class people, helps all people regardless of income and wealth. This articulation of the goal illustrates why the adoption of certain established practices for diffusing opposition to affordable housing in affluent, predominantly white areas would be harmful. Chief among these are residency preferences or requirements, which may violate the Fair Housing Act and that limit (in part or in whole) occupancy to households that live or work in the community in which the housing is located. Although such policies may facilitate the broad spatial dispersion of social housing, that distribution would not signify residential racial integration if people of color cannot reside in housing in predominantly white areas in practice.

Additionally, whether through admissions preferences or targeted marketing to specific groups, a disproportionate focus on housing for seniors seeking to downsize and young people seeking to



establish themselves come at the expense of housing families with children and thus could neutralize the integrative effect of social housing in predominantly white areas. Although stressing the needs of elders and young people who are from affluent, predominantly white communities may be an important part of the narrative as to why such housing is in the interest of residents, that should not translate into the actual exclusion of low-income people of color moving to those areas.

Ensuring the Stability and Soundness of Decommodified Housing

Although the imperative to take strategic action to ensure racial integration in social housing on civil rights grounds is clear, the relation between integration and the long-term stability of social housing is nearly as significant. One of the principal reasons why public housing in the U.S. is widely perceived as a failure is that it was chronically underfunded, leading to a spiral of habitability issues, increasing vacancies, and reduced revenue from rents. The lack of broad public support underlying that underfunding was, in part, the product of the racially biased perception that public housing was “for” a specific marginalized population and that others had little or no interest in its effective operation. By expanding the base of people who believe that social housing is “for” them and people close to them, it may be possible to prevent the reproduction of that pattern.

Another closely connected reason for the deterioration of public housing was that, contrary to some initial aspirations, deep income targeting led to a preponderance of extremely low-income residents. In 1999, at the beginning of the years-long process of demolishing the Robert Taylor Homes, just 15 percent of Chicago Housing Authority residents were employed, and the average head of household had an income of \$10,000. The amount of rent that a housing provider can collect from extremely poor households is much less than can be obtained even by moving slightly up the income scale.

That lack of revenue played a complementary role to that of insufficient government appropriations for maintenance and operations. If upper-middle class households can be drawn into social housing, that occupancy could play a similar role to the one it plays in private market housing featuring inclusionary set-asides of affordable units, effectively cross-subsidizing the residency of low-income households.

A perhaps underappreciated benefit of efforts to avoid the concentration of social housing in low-income communities of color is that doing so would free up vacant and underutilized land to meet local needs that may actually be more pressing than the need for shelter.

Racial disparities in access to amenities like green space, recreational facilities, and retail options that meet community needs like grocery stores, pharmacies, and hardware stores are products of racial segregation and subsequent neighborhood disinvestment. Making use of available land to fill gaps and reduce disparities in access may prove to be of more benefit than producing social housing locally.

As illustrated by a recent [study](#) in the Journal of the American Medical Association, converting vacant [city lots into green space can improve the mental health](#) of neighborhood residents. In the best case scenario, reducing the pressures that would tend to undercut the accrual of these types of benefits can be the result of prioritizing racial integration as a goal in social housing programs.

Social housing should be the future of housing in the U.S. True racial and economic justice depend on it. At the same time, the past track record of public housing in the U.S. has been one of stark racial segregation that has far-reaching negative consequences. There is a substantial risk that contemporary social housing efforts will reproduce those outcomes, but there are several windows of opportunity for orienting production toward racial integration as a core value. Doing so should enhance the long-term sustainability of social housing efforts and maximize the benefits of housing and broader community development efforts for residents of low-income communities of color.

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