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Land use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation

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Myron Orfield

Abstract

This Article recommends that land use and housing policies be marshaled to reduce residential racial segregation and concentrated poverty. It argues secondly, that state legislatures must adopt a coordinated policy approach. This Article uses Oregon's comprehensive land use legislation as a paradigmatic example of policies that effectively promote affordable housing and decrease urban sprawl. Finally, the article discusses nine policies that the author believes are necessary to promote stable metropolitan living patterns.

KEYWORDS: race, racial, segregation, poverty, housing policy, land use, property, urban, poverty, isolation, ghetto

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LAND USE AND HOUSING POLICIES TO REDUCE CONCENTRATED POVERTY AND RACIAL SEGREGATION

*Myron Orfield**

INTRODUCTION

As metropolitan areas spread over huge stretches of land, residents living at the core, particularly poor Blacks and Latinos, become increasingly isolated from the jobs and other life opportunities that are rapidly dispersing among increasingly far-flung suburbs. The concentration of existing affordable housing in central cities[1] and older suburbs perpetuates the isolation of low-income residents and people of color from life opportunities available to suburban residents.[2] One result is to reinforce the racial segregration which is intimately related to the concentration of poverty at the urban core and in older, inner-ring suburbs.[3]

Urban sprawl tends to exacerbate residential racial segregation[4] because unchecked development at the fringe permits rapid abandonment of inner-suburban and central-city housing stocks as White residents move into expanding suburban developments. The resulting isolation of non-Whites

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1. MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY 46 (2002) [hereinafter ORFIELD, AMERICAN METROPOLITICS].

2. *Id.* at 122-23; John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 188, 193-94 (2003) [hereinafter Powell, *Opportunity-Based Housing*].

3. ORFIELD, AMERICAN METROPOLITICS, *supra* note 1, at 49-53; John A. Powell, *Achieving Racial Justice: What's Sprawl Got to Do With It?*, POVERTY & RACE RES. ACTION COUNCIL NEWSL. (Poverty & Race Research Action Council, Wash., D.C.), Sept./Oct. 1999, at 1.

4. *See, e.g.*, ORFIELD, AMERICAN METROPOLITICS, *supra* note 1, at 131 ("[M]any regions become even more fragmented with growth and expansion into new communities.").

in the increasingly segregated areas that Whites abandon effectively denies many of those residents access to the sites of opportunity in distant, developing areas of the region.[5] This isolation is perpetuated not only by the concentration of existing affordable housing in central cities and older suburbs, but by the barriers to developing affordable housing in most outlying suburbs. One of the most invidious barriers is exclusionary zoning.

Governmental fragmentation—the proliferation of separate political jurisdictions—facilitates structures such as exclusionary zoning laws.[6] By prohibiting the development of housing that only the better-off can afford, these local policies effectively exclude the poor and people of color from the places that erect those policy fences. Together with fragmented school districts that institutionalize the racial segregation of students, practices such as exclusionary zoning unnecessarily burden both the affected individuals and metropolitan regions.[7]

The harmful effects of sprawl and fragmentation on people of color have been well documented. Racial segregation concentrates poverty, with or without class segregation, which Douglas Massey and Nancy Denton have demonstrated with their extensive research.[8] Massey and Denton explain that "racial segregation—and its characteristic institutional form, the Black ghetto—are the key structural factors responsible for the perpetuation of Black poverty in the United States."[9]

Together with overt racial discrimination, as where realtors steer Blacks and Whites into segregated neighborhoods,[10] the structural racism that restricts affordable housing to ghettoized areas of the urban core intensifies racial segregation and perpetuates poverty. To address both overt and structural racism requires undoing segregation and making it possible for people to live in places where they can access opportunities for jobs, quality schools, and social networks. Making affordable housing available throughout a metro region, rather than in segregated places distant from opportunity, is a significant means to address segregation and concentrated poverty.

In recent years, scholarship about potential reform has been increasingly

5. For a comprehensive review of the dynamics and consequences of racial residential segregation, see Camille Z. Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167 (2003).

6. Powell, *Opportunity-Based Housing*, *supra* note 2, at 193-94.

7. *Id.* at 194-95.

8. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 118-25 (1993).

9. *Id.* at 9.

10. *See infra* note 14 and accompanying text.

pessimistic, citing enduring local sovereignty over land use as a barrier to regional cooperation, regional planning, regional housing, and regional tax-based sharing.[11] In response, this article reviews housing and land use policies that several states have enacted to increase the availability of affordable housing in metropolitan regions by countering sprawl and the effects of governmental fragmentation. It illustrates these approaches with case examples of the most promising approaches thus far attempted in the nation's metropolitan regions, and summarizes the empirical and analytic research evaluating the effectiveness of these policies. The success of such policies is measured largely by the extent to which they increase the stock of affordable housing available to non-White and poor residents, and by their potential to reduce residential racial segregation. The examples presented are the most hopeful illustrations of approaches that states and metropolitan regions can adopt to counter the inequitable effects of sprawl and fragmentation.

This article recommends that land use and housing policies be marshaled to reduce residential racial segregation and concentrated poverty. Such policies should be statewide, or at least regional, in scope. Isolated policies will encourage leap-frog development that in turn will promote both sprawl and racial segregation.[12]

Secondly, state legislatures must adopt a coordinated policy approach. This article uses Oregon's comprehensive land use legislation as a paradigmatic example of policies that effectively promote affordable housing and decrease urban sprawl. Other regional government policies that promote integration and reduce sprawl also serve as useful models. The nine policies that I believe are necessary to promote stable metropolitan living patterns are discussed in Part VI of this article.

With the adoption of a regional approach to governance of development and the nine policies laid out below, metropolitan regions can work to reduce sprawl and promote integrated communities. This Article addresses the seriousness of segregation and the dire consequences it has on both poor minorities and the middle-class Whites who are separated from people of color. It then analyzes Oregon's legislative scheme to promote

11. *See, e.g.*, HAL WOLMAN ET AL., BROOKINGS INST., THE CALCULUS OF COALITIONS: CITIES AND STATES AND THE METROPOLITAN AGENDA (2004), *available at* https://www.brook.edu/urban/pubs/20040422_coalitions.pdf; NAT'L RESEARCH COUNCIL, GOVERNANCE AND OPPORTUNITY IN METROPOLITAN AMERICA (Alan Altshuler et al. eds., 1999).

12. James A. Kushner, *Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations*, 21 UCLA J. ENVTL. L. & POL'Y 45, 53 (2003) (citing Loudoun County, Virginia as an example of an isolated effort that may propel leapfrogging).

affordable housing and manage urban growth. Part III discusses the necessity of inclusionary housing policies to promote mixed-income developments, while Part IV examines the benefit of dispersed subsidized housing in the context of the Twin Cities' progressive siting policies of the 1970s and the Area Wide Housing Program. Finally, Part V discusses positive integration measures, and Part VI sets forth the nine policy recommendations noted above in detail.

I. THE PROBLEM OF SEGREGATION

Housing discrimination contributes to the racial segregation of the poor.[13] Even today, real estate agents discriminate against middle- and low-income minorities by showing them a segregated subset of the market, while at the same time steering Whites away from communities with people of color.[14] Discrimination against minorities also abounds in mortgage lending.[15]

Discrimination and segregation are not confined to the inner-city; instead, they affect large parts of suburbia. For example, a recent study of metropolitan Boston showed that nearly half of Black homebuyers were concentrated in only seven of 126 communities.[16]

The way in which government agencies have located public housing projects is also a particularly important cause of segregation.[17] Since the

13. MASSEY & DENTON, *supra* note 8, at 102-09 (citing the Housing Discrimination Study conducted by the Department of Housing and Urban Development).

14. *See generally* MARGERY A. TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000 (2002), *available at* http://www.huduser.org/Publications/pdf/Phase1_Report.pdf; JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 51-61 (1995) [hereinafter YINGER, CLOSED DOORS, OPPORTUNITIES LOST]; George C. Galster, *Racial Steering in Urban Housing Markets: A Review of Audit Evidence*, 18 REV. BLACK POL. ECON. 105 *passim* (1990).

15. *See* YINGER, CLOSED DOORS, OPPORTUNITIES LOST, *supra* note 14, at 69-70 (analyzing HMDA data and finding stark racial differences in lending policy, even controlling for differences in lender policy and individual economic characteristics of the borrower); John Yinger, *Cash in Your Face: The Cost of Racial and Ethnic Discrimination in Housing*, 42 J. URB. ECON. 339, 351 (1997) ("[M]inority applicants are more likely than comparable white applicants to be turned down for a mortgage.").

16. GUY STUART, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., SEGREGATION IN THE BOSTON METROPOLITAN AREA AT THE END OF THE 20TH CENTURY 5 (2000), *available at* http://www.civilrightsproject.harvard.edu/research/metro/housing_boston.pdf.

17. *See* Robert Gray & Steven Tursky, *Location and Racial/Ethnic Occupancy for HUD-Subsidized Family Housing in Ten Metropolitan Areas*, *in* HOUSING DESEGREGATION AND FEDERAL POLICY 235, 249-50 (John M. Goering ed., 1986) (finding that HUD-subsidized rental housing was "concentrated in a relatively small number of minority-occupied census tracts"); Florence W. Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A*

1930s, housing authorities concentrated public housing sites in inner cities and, since 1969, filled them with poor tenants rather than encouraging mixed-income, racially-stable communities.[18] Some commentators have theorized that if the federal government had not segregated public housing or the tenants of public housing, mandatory busing to desegregate public schools in the 1960s and 1970s would not have been necessary.[19]

These forces of segregation and larger patterns of governmental fragmentation[20] limit most of the Black and Latino middle classes, along with poor minorities, to living in areas with increasing poverty and diminishing opportunity. In 2000, about half of both the Black and Latino middle classes had suburbanized in the one hundred largest regions.[21] Because of housing discrimination, however, Blacks and Latinos who left the city often ended up in at-risk, segregated communities characterized by older housing stock, slow growth, and low tax bases—the resources that support public services and schools.[22] Residents in these at-risk segregated communities have high poverty rates and high concentrations of minority students in the schools.[23] These realities decrease opportunities for middle class minorities as compared with their White counterparts in education, wealth acquisition in home equity, and employment.[24]

Response to Schill and Wachter, 143 U. PA. L. REV. 1351, 1367-69 (1995); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1290 (1995).

18. *See* Schill & Wachter, *supra* note 17, at 1293-95.

19. *See, e.g.*, Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 854 (1996).

20. The Northeast and Midwest developed highly fragmented governmental structures with hundreds of municipalities, and the structure that initially developed was largely dependent upon property taxes. ORFIELD, AMERICAN METROPOLITICS, *supra* note 1, at 130-33 (noting areas of fragmentation by numbers of local governments per 100,000 residents).

21. *See* MYRON ORFIELD & TOM LUCE, INST. ON RACE & POVERTY, MINORITY SUBURBANIZATION AND RACIAL CHANGE: STABLE INTEGRATION, NEIGHBORHOOD TRANSITION, AND THE NEED FOR REGIONAL APPROACHES 1 (2005), *available at* http://www.irpumn.org/uls/resources/projects/MinoritySubn_050605wMAPS.pdf ("In the nation's 102 largest metropolitan regions, nearly half of the nonwhite population now lives in suburbs.").

22. *See* ORFIELD, AMERICAN METROPOLITICS, *supra* note 1, at 37-38. Forty percent of metropolitan residents live in at-risk suburbs. *Id.* at 2.

23. *Id.* at 37.

24. In Chicago and Atlanta, for instance, the black middle class moved south to socially and fiscally limited suburbs, while jobs and economic opportunity moved north. *Id.* at 14. Additionally, the black middle class in Washington D.C. is moving southeast of the city to Prince George's County, one of the poorest suburban counties in the nation, while job opportunities move west toward Dulles Airport and beyond. SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 136 (2004); *see generally* MYRON ORFIELD, METRO. AREA RESEARCH CORP., WASHINGTON METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY

Because of their concentration in distressed, racially segregated cities and inner suburbs, the majority of poor Blacks and Latinos live in poor neighborhoods and attend poor schools; at the same time, poor Whites more often than not live in middle-income neighborhoods and attend middle-class schools.[25] Children who grow up in densely poor neighborhoods and attend low-income schools face many barriers to academic and occupational achievement. Studies show they are more likely than children in mixed-income schools and communities to drop out of high school or become pregnant as teenagers.[26] Long-term social isolation, caused by racial discrimination, also leads to the formation of gangs and other "oppositional social identit[ies]" in deprived communities that are held out of the mainstream of opportunity.[27] In addition, racial and social isolation leads to linguistic isolation, which limits employment opportunities for poor minorities.[28] Neighborhoods with concentrated poverty have very high crime rates, often many times higher than suburban violent crime rates, and huge health disparities resulting from the concentration of environmental hazards, stress, inadequate health care

(1999), *available at* http://www.brookings.edu/es/urban/myron.pdf.

25. While there are some very high-poverty White neighborhoods in Appalachia and in some older Rust Belt cities, more than seventy-five percent of poor Whites in the United States live outside of high-poverty neighborhoods. *See* PAUL A. JARGOWSKY, POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY 61-62 (1997). On the other hand, approximately eighty-two percent of poor Blacks and Latinos live in neighborhoods of high poverty. *Id.* at 62.

26. *See* Jonathan Crane, *Effects of Neighborhoods on Dropping Out of School and Teenage Childbearing*, *in* THE URBAN UNDERCLASS 299, 299-319 (Christopher Jenks & Paul E. Peterson eds., 1991). Dropout rates of fifty percent or greater are thirty times more common among majority-minority schools. *See* ROBERT BALFANZ & NETTIE LEGTERS, CTR. FOR SOC. ORG. OF SCHS., JOHNS HOPKINS UNIV., LOCATING THE DROPOUT CRISIS 5 (2004), *available at* http://www.csos.jhu.edu/tdhs/rsch/Locating_Dropouts.pdf ("29% of the nation's majority minority high schools . . . have senior classes with 50% fewer seniors than freshmen."); *see also* CHRISTOPHER B. SWANSON, URBAN INST., WHO GRADUATES? WHO DOESN'T? A STATISTICAL PORTRAIT OF PUBLIC HIGH SCHOOL GRADUATION, CLASS OF 2001 27-28 (2004), *available at* http://www.urban.org/UploadedPDF/410934_WhoGraduates.pdf (noting that graduation rates are lower in majority-minority districts, as compared to majority-White districts); GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 6 (2004), *available at* http://www.urban.org/UploadedPDF/410936_LosingOurFuture.pdf ("[W]hether a student attends a school district with a high concentration of minority students and has little exposure to white students in school is also a strong predictor of failing to graduate.").

27. Signithia Fordham, *Racelessness as a Factor in Black Students' School Success: Pragmatic Strategy or Pyrrhic Victory?*, 58 HARV. EDUC. REV. 54, 56 (1988).

28. *See* Joleen Kirschenman & Kathryn M. Neckerman, "*We'd Love to Hire Them, But . . .*" : *The Meaning of Race for Employers*, *in* THE URBAN UNDERCLASS 203, 216 (Christopher Jenks & Paul E. Peterson eds., 1991) (reporting that employers view job seekers negatively if they cannot communicate in standard English).

facilities, and poor quality food.[29] The increased need for services, the lack of role models and social connections to higher education and employment, oppositional cultures, and other problems of poverty make it even more difficult for teachers to do their jobs in public schools.[30]

All individuals—including poor people of color—benefit from living in affluent and opportunity-rich neighborhoods with large tax bases and abundant entry-level jobs. Integration has long-term benefits for people of all races. Blacks, Latinos, and Whites from desegregated elementary schools are more likely than their counterparts from segregated schools to attend a desegregated college, live in a desegregated neighborhood, work in a desegregated environment, and have high career aspirations.[31] The vast majority of law students attending some of the nation's most selective law schools report attending desegregated colleges.[32] Moreover, diverse educational settings contribute to students' ability to participate in a pluralistic society.[33]

II. COORDINATED LEGISLATION TO MANAGE URBAN GROWTH AND FOSTER AFFORDABLE HOUSING

Oregon provides an example of a coordinated, statewide legislative approach to restraining sprawl and providing affordable housing throughout a region. Among other things, Oregon's legislation requires local governments to create comprehensive plans; prohibits exclusionary zoning; requires growth boundaries in urban regions; and provides for

29. ORFIELD, AMERICAN METROPOLITICS, *supra* note 1, at 54.

30. *See* Gary Orfield, *Urban Schooling and the Perpetuation of Job Inequality in Metropolitan Chicago*, *in* URBAN LABOR MARKETS AND JOB OPPORTUNITY 161, 162-72 (George E. Peterson & Wayne Vroman eds., 1992).

31. *See* JOMILLS H. BRADDOCK II & JAMES M. MCPARTLAND, CTR. FOR SOC. ORG. OF SCHOOLS, MORE EVIDENCE ON SOCIAL-PSYCHOLOGICAL PROCESSES THAT PERPETUATE MINORITY SEGREGATION: THE RELATIONSHIP OF SCHOOL DESEGREGATION AND EMPLOYMENT DESEGREGATION 3 (1983) (describing the results of a retrospective study that found that blacks who attended desegregated schools had more confidence and more consideration for jobs not traditionally held by blacks, and that both blacks and whites who attended desegregated schools were, as adults, more likely to live in desegregated neighborhoods); *see also* Amy Stuart Wells & Robert Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. OF EDUC. RES. 531, 552 (1994) ("[D]esegregated black students are more likely to have desegregated social and professional networks . . . more likely to find themselves in desegregated employment, and . . . more likely to be working in white-collar and professional jobs.").

32. Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, *in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143, 152-53 (Gary Orfield ed., 2001).

33. *See, e.g.*, *id*. at 159-66 (discussing the perceived benefits of attending a desegregated law school).

oversight and prompt, effective enforcement of land-use actions.

A. Land Use Coordination and Oversight: Oregon's Comprehensive Legislation

For over thirty years, Oregon has had the most comprehensive and progressive land use management legislation in the country. Passed in 1973, the Land Conservation and Development Act (LCDA) provided for "the highest possible level of liveability in Oregon" by requiring "coordinated comprehensive plans for cities and counties, regional areas and the state as a whole."[34]

To implement the LCDA, the Oregon legislature created the Land Conservation and Development Commission (LCDC), a seven-member policy-making body appointed by the governor.[35] LCDC is empowered to adopt by rule or by goal "any statewide land use policies that it considers necessary" to carry out the LCDA, to review local government comprehensive plans for compliance with LCDC goals and rules, and to coordinate the planning efforts of state agencies to assure compliance with the goals.[36] The LCDC appoints the director of the Department of Land Conservation and Development, which serves as LCDC's staff.[37]

To provide for expeditious enforcement in matters involving land use, the LCDA created the Land Use Board of Appeals (LUBA), a three-member board appointed by the governor to hear appeals of land use decisions by local governments, special districts, and state agencies.[38] The enforcement powers given to LUBA and the Department are discussed in more detail below, following an overview of the LCDA's comprehensive planning requirement.

1. Comprehensive Planning

Each city and county in Oregon must prepare and adopt a comprehensive plan in compliance with the LCDC goals, and must enact land use regulations to implement its comprehensive plans.[39] Once LCDC has acknowledged a local government's plan and regulations, the local

34. OR. REV. STAT. § 197.010(1) (2005).

35. § 197.030(1).

36. § 197.040(1)(c)(A).

37. §§ 197.075-.090. The legislation also established a Joint Legislative Committee on Land Use pursuant to section 197.125, and an advisory committees of citizens and local officials, appointed by LCDC, pursuant to sections 197.160-.165.

38. §§ 197.810-.855.

39. Any amendments or revisions of comprehensive plans or regulations must also comply with the goals. § 197.175(2)(a).

government must make land use decisions in compliance with its plan and regulations.[40] State agencies also are required to carry out their land use planning and activities in compliance with the goals set by LCDC, and in a manner compatible with local governments' acknowledged comprehensive plans and regulations.[41]

In the Portland metropolitan region, there is, in addition, a "metropolitan service district." Metro, as it is known, is an elected regional government approved in 1978 by voters in Multnomah, Washington, and Clackamas counties.[42] As required by the 1992 Metro Charter, Metro created a Regional Framework Plan adopted in 1997[43] that, while not considered a comprehensive plan, is subject to review by LCDC.[44] In addition, it adopted an urban growth boundary in compliance with LCDC's Goal 14 (Urbanization)[45] as required of all districts.[46]

Proposed amendments to acknowledged comprehensive plans and land use regulations implicating the LCDC goals can be made only if local governments give notice to the Department of Land Conservation and Development. Participants in the local government proceeding may appeal an amendment, as may the Department, if it is not given notice.[47]

All "limited land use decisions" that a local government makes must be consistent with its comprehensive plan and regulations.[48] A "limited land use decision" is a decision pertaining to a site within an urban growth

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40. § 197.175(1). LCDC had acknowledged all local government comprehensive plans as of the end of 1986. *See* 1000 Friends of Oregon, An Overview of the History and Structure of Oregon's Land Use Planning Program, http://www.friends.org/resources/overview.html (last visited Feb. 12, 2006). Once acknowledged, comprehensive plans are subject to periodic review by LCDC every five to ten years (for counties with population of 50,000 or more or cities or metropolitan service districts with population of 25,000 or more), or every five to fifteen years (for smaller cities and counties). *See* §§ 197.628-.629.

41. §§ 197.180(1).

42. *See, e.g.*, Metro, Land Use Planning, About Metro, http://www.metro-region.org/pssp.cfm?ProgServID=62 (last visited Feb. 12, 2006) ("Metro is the directly elected regional government that serves more than 1.3 million residents in Clackamas, Multnomah and Washington counties, and the 25 cities in the Portland, Oregon, metropolitan area.").

43. *See* Metro, Regional Framework Plan, http://www.metro-region.org/article.cfm?articleid=432 (last visited Feb. 13, 2006) (describing the Regional Framework Plan).

44. § 197.015 (defining the Metro regional framework plan).

45. OR. ADMIN. R. 660-015-0000 (2005) (citing urbanization as the fourteenth statewide planning goal).

46. § 268.390. For a discussion of Goal 14 and the region's urban growth boundary, see *infra* Part II.C.

47. §§ 197.610-.620.

48. § 197.195(1).

boundary (UGB) that involves the approval or denial of a subdivision or partition, or the approval or denial of an application based on discretionary standards regulating the physical characteristics of a land use.[49] Limited land use decisions also may be appealed to LUBA.[50]

2. Dedicated Oversight and Enforcement

The appeal process is an important part of the LCDA's effectiveness, and two features are significant. First, LUBA has exclusive jurisdiction to review all land use decisions and limited land use decisions for which review authority has not been granted to LCDC or the Department of Land Conservation and Development.[51] Second, appeals to LUBA are handled in an expedited manner.

Any person who participated orally or in writing in the proceedings of the local government, special district, or state agency may petition LUBA for review of a land use decision by filing a notice of intent to appeal.[52] Such notice must be filed with LUBA within twenty-one days after the land use decision became final, or within twenty-one days after the person received notice of a decision made without a hearing.[53] Within twenty-one days of service of the notice of intent to appeal, the local government, special district, or agency must transmit to LUBA a copy of the entire record of the proceeding under review.[54] LUBA may receive briefs and hear oral argument according to deadlines it sets, but it must issue a final order within seventy-seven days of transmittal of the record. [55]

In addition to providing for appeals to LUBA, the LCDA sets out judicially reviewable enforcement order procedures. A person who believes that a local government's comprehensive plan, land use regulation, limited land use decision, or other land use decision is not in compliance with LCDC's goals, or with acknowledged comprehensive plan provisions or regulations, may request adoption of an enforcement order by the local government.[56] The local government must issue a written response to that request within sixty days of the postmark date.[57] If the requester is not satisfied with the local government's response, he or she may present a

49. § 197.015.
50. § 197.825.
51. *Id.*
52. § 197.830.
53. *Id.*
54. *Id.*
55. *Id.*
56. § 197.320(6).
57. § 197.319(2)(a).

petition for an enforcement order to LCDC.[58] LCDC may also initiate proceedings for an enforcement order on its own motion.[59]

Either LCDC itself or a hearing officer appointed by LCDC must hold a hearing within forty-five days of the petition or motion for an enforcement order; LCDC must adopt a final order no later than 120 days after the petition was filed.[60] If LCDC finds that the local government is not in compliance with either the goals or its own acknowledged plan or regulations, it will issue an order requiring the government to take action to bring itself into compliance.[61] As part of the enforcement order, LCDC may withhold state planning grant money from the local government until the government complies with the order.[62]

LCDC enforcement orders are subject to judicial review by the Oregon Court of Appeals.[63] The court may reverse, modify, or remand the order only if it finds the order to be unlawful in substance or procedure, unconstitutional, invalid because it exceeds LCDC's statutory authority, or not supported by substantial evidence in the record.[64] Oregon courts have recognized and deferred to the broad authority that the legislature gave LCDC.[65]

Lane County v. Land Conservation & Development Commission[66] presents an example of judicial deference to LCDC decisions.[67] In *Lane County*, the Oregon Supreme Court upheld an LCDC amendment to Goal 3 (Agricultural Lands)[68] and the Goal's implementing regulations.[69] Lane County argued that the amended goal conflicted with state statutes by imposing restrictions on statutorily permitted uses of high-value farmlands.[70] But the court held that LCDC did not exceed the scope of its authority in "promulgat[ing] regulations imposing additional restrictions on land classified as high value farmland, even if those regulations have the effect of prohibiting uses otherwise permissible under the applicable

58. § 197.319(2)(c).
59. § 197.324(1).
60. § 197.328.
61. § 197.320.
62. § 197.335(4).
63. § 197.335(2).
64. *Id.*
65. *See infra* notes 67-71 and accompanying text (providing an example of such deference).
66. 942 P.2d 278 (Or. 1997).
67. *Id.* at 285.
68. *Id.* at 284; *see also* OR. ADMIN. R. 660-015-0000 (2005).
69. *Lane County*, 942 P.2d at 284-85.
70. *Id.* at 282.

statute."[71]

The planning requirement and the prompt review mechanisms are significant foundations of Oregon's comprehensive approach. In addition, Oregon's coordinated approach includes three features that are significant policy tools for reducing sprawl, enhancing the availability of affordable housing throughout a region, and connecting all residents with a region's opportunities. These tools, discussed next, include prohibiting exclusionary zoning; requiring metropolitan areas to set urban growth boundaries; and linking development and public transportation.

B. Prohibit Exclusionary Zoning

The first step toward providing affordable housing throughout a region is to eliminate policies that preclude development of affordable housing. The most common legal impediment to affordable housing is exclusionary zoning. Exclusionary zoning limits residential development to detached single-family homes on large lots, and is common in suburbs.[72] When the only type of residential development permitted by zoning laws is detached houses on large lots, affordable housing siting and production becomes nearly impossible.

Zoning laws typically are generated by local governments, as most states have delegated their police power over zoning to local authorities. This system allows each municipality to promulgate zoning laws that serve only the perceived interest of that locality, without consideration of the effect of their laws on the larger region.[73] A result of exclusionary zoning is that many metropolitan areas have nearly no land outside the central city that is zoned for attached housing.[74]

Oregon's comprehensive legislation prohibits exclusionary zoning barriers to enable housing development throughout metro regions. This aspect of the law is discussed next, followed by an illustration of a less vigorous approach, the Massachusetts Low and Moderate Income Housing Act.

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71. *Id.* at 286.

72. Robert L. Liberty, *Abolishing Exclusionary Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates*, 30 B.C. ENVTL. AFF. L. REV. 581, 582-84 (2003).

73. Florence W. Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 94-95 (2001) [hereinafter Roisman, *Opening the Suburbs to Racial Integration*].

74. *Id.* at 65-67.

1. Oregon Prohibits Exclusionary Zoning

Because exclusionary zoning is an enormous barrier to the provision of affordable housing, the Oregon legislature has declared that "[t]he availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for farmworkers, is a matter of statewide concern."[75] Oregon's legislation includes provisions directed at ensuring sufficient residential development to meet the needs for housing in general, and affordable housing in particular.

The LCDA prohibits exclusionary zoning by enacting statewide standards to which all local zoning provisions must adhere. Under the LCDA, a local government may not prohibit, from all residential zones, housing types such as attached housing, multifamily housing, manufactured homes, or government-assisted housing.[76] With the exception of cities with populations under 2,500 and counties with populations less than 15,000, all local governments must zone to provide for all housing types determined to meet the need for housing within a UGB at particular price and rent levels.[77]

LCDC adopted nineteen statewide planning goals pursuant to its authority under the LCDA to adopt "goals and guidelines for use by state agencies, local governments, and special districts in preparing, adopting, amending and implementing" comprehensive land use plans.[78] Goal 10 (Housing)[79] requires that plans "encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."[80] The guidelines[81] for Goal 10 recommend that comprehensive plans include

75. OR. REV. STAT. § 197.307(1) (2005).

76. § 197.312.

77. §§ 197.303-.307.

78. § 197.225. The LCDC's statewide planning goals "express the state's policies on land use and on related topics, such as citizen involvement, housing, and natural resources." Oregon Department of Land Conservation and Development, Goals, http://www.lcd.state.or.us/LCD/goals.shtml (last visited Feb. 13, 2006).

79. OR. ADMIN. R. 660-015-0000 (2005).

80. Oregon's Statewide Planning Goals & Guidelines, GOAL 10: HOUSING, http://www.lcd.state.or.us/LCD/docs/goals/goal10.pdf (last visited Feb. 13, 2006) [hereinafter GOAL 10: HOUSING).

81. Many of Oregon's statewide planning goals include non-mandatory guidelines, which suggest how the given goal may be applied. Oregon Department of Land Conservation and Development, Goals, http://www.lcd.state.or.us/LCD/goals.shtml (last visited Feb. 13, 2006).

inventories of buildable land and, at a minimum:

> (1) a comparison of the distribution of the existing population by income with the distribution of available housing units by cost;
>
> (2) a determination of vacancy rates, both overall and at varying rent ranges and cost levels;
>
> (3) a determination of expected housing demand at varying rent ranges and cost levels;
>
> (4) allowance for a variety of densities and types of residences in each community; and
>
> (5) an inventory of sound housing in urban areas including units capable of being rehabilitated.[82]

In 1978, LCDC demonstrated[83] that Goal 10 would be enforced to reform exclusionary zoning practices by relying on it to invalidate a City of Durham ordinance that doubled the city's minimum residential lot size.[84] Goal 10 became the basis for statutes mandating planning and zoning for multiple family housing, government-assisted housing, farmworker housing and manufactured housing, and prohibiting local governments from using home rule charters as the basis for excluding such housing.[85]

The Land Conservation and Development Department also adopted administrative rules implementing Goal 10. One rule applies statewide,[86] and the other—the metropolitan housing rule—applies to land within the Portland metropolitan area UGB.[87] The metropolitan housing rule requires all but the smallest cities within the Portland UGB to "designate sufficient buildable land to provide the opportunity for at least 50 percent of new residential units to be attached single family housing or multiple family housing or justify an alternative percentage based on changing circumstances."[88]

The metropolitan housing rule also specifies overall residential density levels that most cities within the Portland UGB must maintain. These density levels range from six or more dwelling units per buildable acre for

82. GOAL 10: HOUSING, *supra* note 80.

83. Prior to the creation of the Land Use Board of Appeals in 1979, local government land use decisions and limited land use decisions were appealed to LCDC. Liberty, *supra* note 72, at 592 n.72.

84. *Id*. at 591-92 (describing the anti-exclusionary intent of Goal 10, in an effort to increase the diversity of housing types and prices).

85. OR. REV. STAT. §§ 197.303, 197.307, 197.312; Liberty, *supra* note 73, at 593-94.

86. OR. ADMIN. R. 660-008-0000 to 660-008-0040 (2005).

87. OR. ADMIN. R. 660-007-0000 to 660-007-0060.

88. OR. ADMIN. R. 660-007-0030.

smaller cities, to ten or more units per acre for the city of Portland and other larger cities within the UGB.[89] Although state legislation does not impose specific density requirements, the Oregon Court of Appeals upheld the metropolitan housing rule's density requirements, finding that, absent contrary statutory provisions, LCDC acted within its authority in mandating density levels.[90]

Implementation of Goal 10 quickly increased the availability of buildable lands for housing in the Portland metropolitan region. Between 1977 and 1982, although land zoned for residential use increased by only ten percent, the maximum number of buildable units more than doubled, from 129,000 to 301,000.[91] The cost of vacant residential lots also decreased, because the average size of vacant residential lots decreased.[92]

2. Massachusetts' Response to Exclusionary Zoning

The Massachusetts Low and Moderate Income Housing Act ("Massachusetts Act" or "the Act"), colloquially known as the Anti-Snob Zoning Law, illustrates a less comprehensive legislative approach to eliminating exclusionary zoning.[93] The Massachusetts Act streamlines the permit application process for subsidized housing by allowing developers to file a single application with the zoning board of appeals, rather than requiring separate applications to the applicable local boards.[94] Applications for subsidized housing are to be granted if they are "consistent with local needs" for low-income and moderate-income housing.[95]

The Massachusetts Act provides an incentive for jurisdictions to provide some affordable housing by creating a presumption that requirements or regulations detrimental to permit applications are "consistent with local needs" in jurisdictions in which more than ten percent of housing is affordable to low- and moderate-income households, or in which at least

89. OR. ADMIN. R. 660-007-0035.

90. City of Happy Valley v. Land Conservation & Dev. Comm'n, 677 P.2d 43, 46 (Or. Ct. App. 1984).

91. Robert L. Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 ENVTL. L. REP. 10367, 10379 (1992).

92. *Id.* (citing MARK GREENFIELD, 1000 FRIENDS OF OR., THE IMPACT OF OREGON'S LAND USE PLANNING PROGRAM ON HOUSING OPPORTUNITIES IN THE PORTLAND METROPOLITAN REGION 4, 17-18 (1982)).

93. MASS. GEN. LAWS ch. 40B, §§ 20-23 (2005).

94. § 21.

95. *See* § 23 ("If the Committee finds . . . that the decision of the Board of Appeals was unreasonable and not consistent with local needs, it shall . . . direct the board to issue a comprehensive permit . . . ."); § 20 (defining "consistent with local needs").

1.5 percent of all land zoned for residential, commercial, or industrial use contains such housing.[96] The Massachusetts Supreme Court has made it clear that this legislation gives the zoning board of appeals the authority to override local exclusionary zoning practices.[97] The Massachusetts Act is also supported by a number of state subsidy programs for affordable housing that promote mixed-income housing, rather than monolithic low-income "projects."[98]

The Massachusetts Act has spurred considerable construction of subsidized housing in suburban jurisdictions that were unlikely to have such housing but for the Act. Since 1969, when it was passed, "18,000 affordable units have been built in at least 173 Massachusetts cities and towns."[99]

But the little available evidence indicates that this new housing has largely benefited Whites, and has "exacerbated racial segregation."[100] According to Paul Stockman, "[t]he [Massachusetts] Act makes no distinction between family [housing] and elderly housing.[101] Most new affordable units for the elderly benefited White residents who already lived in the vicinity of the new housing.[102] Stockman further notes that "[o]nly one-third of the units constructed pursuant to the Act have been family housing."[103] Critics also question the passive approach of the Massachusetts Act, as it neither mandates affordable housing production nor creates subsidies to encourage its production.[104]

Stockman, however, suggests that the Act's passivity makes it less controversial, and thus more durable, than more activist measures.[105] According to Stockman, "[b]y making participation optional on the part of developers, the Act avoids creating some of the disincentives that plague other inclusionary schemes."[106] Stockman concludes that the Massachusetts Act's passive approach "essential to the program's

96. § 20.

97. Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 553 (1992) (citing Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d 393, 423 (Mass. 1973)).

98. *Id.* at 554.

99. Roisman, *Opening the Suburbs to Racial Integration*, *supra* note 73, at 73.

100. *Id.* at 74-75.

101. Stockman, *supra* note 97, at 557 n.147.

102. Roisman, *Opening the Suburbs to Racial Integration*, *supra* note 73, at 75.

103. Stockman, *supra* note 97, at 564 n.187.

104. *Id.* at 565-66.

105. *Id.* at 566.

106. *Id.*

continued existence and feasibility."[107]

C. Urban Growth Management to Reduce Sprawl and Promote Infill

Urban growth management limits the amount of land available for conversion to urban uses, which can reduce the harmful effects of unrestricted sprawl. Growth management policies, by requiring careful designation of lands available for development, also can lead to more infill development in central cities and older inner-ring suburbs. Infill with higher-end housing and commercial space has the potential to spark renewal in financially depressed and resource-poor urban areas.

As part of its comprehensive land use legislation, Oregon requires any metropolitan service district to adopt a UGB,[108] which Portland region's district, "Metro," has done.[109] While some metropolitan areas in other states have adopted some type of UGB, it has not been in the context of a comprehensive legislative approach such as Oregon's LCDA. This comprehensive policy context is important to the effectiveness of a UGB and is why the Portland region's UGB is the model discussed in this article.

1. The Portland Metropolitan Region UGB

Goal 14 (Urbanization)[110] most directly implements urban growth management by mandating UGBs. Goal 14 requires local governments "to identify and separate urban and urbanizable land from rural land."[111] To guide local governments in setting and modifying their UGBs, Goal 14 sets out seven relevant factors:

> (1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;
>
> (2) Need for housing, employment opportunities, and livability;
>
> (3) Orderly and economic provision for public facilities and services;
>
> (4) Maximum efficiency of land uses within and on the fringe of the existing urban area;
>
> (5) Environmental, energy, economic and social consequences;

107. *Id.*

108. OR. REV. STAT § 268.390(3) (2005).

109. Metro, Regional Framework Plan, http://www.metro-region.org/article.cfm?articleid=432 (last visited Feb. 8, 2006). See also *supra* notes 42-43 and accompanying text for an explanation of Metro.

110. OR. ADMIN. R. 660-015-0000 (2005).

111. Oregon's Statewide Planning Goals & Guidelines, GOAL 14: URBANIZATION, http://www.oregon.gov/LCD/docs/goals/goal14.pdf (last visited Feb. 8, 2006).

> (6) Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and
>
> (7) Compatibility of the proposed urban uses with nearby agricultural activities.[112]

Land within UGBs is considered "urbanizable," meaning that it is available over time for urban uses.[113] Decisions whether to convert urbanizable land to urban uses require a local government to consider the following four factors: "(1) Efficient accommodation of identified land needs; (2) Orderly and economic provision of public facilities and services; (3) Comparative environmental, energy, economic, and social consequences; and (4) Compatibility of the proposed urban uses with the agricultural and forest activities occurring on farm and forest land outside the UGB."[114]

As the following subsections discuss, the effects of the Portland region's UGB on affordable housing availability and residential integration appear encouraging.

2. Effect of the UBG on Affordable Housing in Oregon

To determine whether the Portland region's UGB expands affordable housing options throughout the metropolitan area requires inquiry into the UGB's effects on the supply of housing and the price of housing. There has been considerable research about price but nearly none about supply. This section reviews these studies and then discusses the UGB's role in countering racial segregation. It also cautions against pairing UBG policies with strategies to foster racial and economic diversity by preventing displacement.

a. Effect on Housing Supply

There has been little empirical investigation of the effect of UGBs on the supply of housing. A literature review published by the Brookings Institution attributes the paucity of studies linking growth management and housing supply to a lack of data on housing stocks, and to methodological difficulties in distinguishing the impact of growth management policies from other factors affecting housing supplies.[115]

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112. *Id.*
113. *Id.*
114. *Id.*
115. ARTHUR C. NELSON ET AL., BROOKINGS INST., THE LINK BETWEEN GROWTH MANAGEMENT AND HOUSING AFFORDABILITY: THE ACADEMIC EVIDENCE 27 (2002), *available at* http://www.brookings.edu/es/urban/publications/growthmang.pdf.

The Brookings review cites one study by Rolf Pendall that found that zoning exclusively for low-density detached homes reduces housing supplies.[116] The restrictions in housing supply, particularly of rental housing, reduced the growth of Black and Hispanic households from these areas.[117] In contrast, Pendall found that UGBs were associated with shifts toward multifamily housing, which may lead to increased racial integration.[118]

b. Effect on Housing Prices

There is vigorous debate over the effect of UGBs on housing prices. This debate has focused on the Portland metropolitan area, Oregon's largest UGB. Critics of growth management attribute Portland's rising housing costs to its UGB.[119] Proponents cite other reasons for the housing price increases, and argue that Oregon's provisions facilitating production of affordable housing mitigate the effect that UGBs alone would have on housing costs.[120]

Arguments that UGBs and other growth management policies will increase housing prices focus on the cost of detached single-family homes.[121] This type of housing development consumes the most land, and thus is likely to be most affected by increased land costs resulting from land-supply restrictions. What critics generally do not acknowledge is that the higher density development encouraged by growth management uses less land per unit and thus tends to produce housing that is less expensive than detached single family homes.[122]

The National Low Income Housing Coalition (NLIHC) calculates the affordability of rental housing in every state, county, and metropolitan statistical area in the country.[123] NLIHC's 2003 statistics show that

116. *Id.* at 36 (noting that low-density zoning shifted housing stock from multifamily and rental units, thus reducing the affordability of rental housing).

117. Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS'N 125, 138-39 (2000).

118. *Id.* at 129 (noting that UGBs may encourage high-density, multifamily development by raising land prices).

119. Liberty, *supra* note 72, at 598-99 (citing NAT'L ASS'N OF HOME BUILDERS, HOUSING OPPORTUNITY INDEX: FIRST QUARTER 2002 (2002)).

120. *Id.*

121. Nelson, *supra* note 115, at 17.

122. Oliver A. Pollard III, *Smart Growth: The Promise, Politics and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 284 (2000) ("Promoting more compact development and increasing residential densities can lower housing prices by reducing the cost of land per unit of housing.").

123. National Low Income Housing Coalition, Out of Reach 2003: America's Housing Wage Climbs, http://www.nlihc.org/oor2003/ (last visited Feb. 8, 2006) (providing 2003

Oregon's affordable rental housing situation was less dire than in most other states.

NLIHC calculates each jurisdiction's "housing wage," which is the hourly wage a full-time worker would have to earn to afford a two-bedroom apartment at the area's fair market rent.[124] In 2003, the fair market rent for a two-bedroom apartment in Oregon was $707 per month, and the housing wage was $13.59 per hour.[125] Oregon's housing wage ranked twenty-second highest out of fifty-two jurisdictions that included the fifty states, the District of Columbia, and Puerto Rico.[126] These numbers do not present the full picture of housing affordability unless the area's average wages also are taken into consideration. In 2003, Oregon was one of thirteen states with a minimum wage higher than the federal minimum wage of $5.15.[127] The result is that Oregon was one of only ten states in which the housing wage was less than twice the minimum wage.[128] This is not to suggest that access to affordable housing was not a problem in Oregon in 2003, only that the problem was less severe than in most other states.[129]

A 2002 National Center for Public Policy Research (NCPPR) paper takes the position that UGBs necessarily increase the cost of housing by restricting the supply of land.[130] The NCPPR concludes that "[p]oor and minority families pay a disproportionate amount of the social and economic

results).

124. National Low Income Housing Coalition, Out of Reach 2003, Introduction, http://www.nlihc.org/oor2003/introduction.htm (last visited Feb. 8, 2006).

125. National Low Income Housing Coalition, Out of Reach 2003: America's Housing Wage Climbs, Oregon, http://www.nlihc.org/oor2003/data.php?getstate=on&state%5B%5D=OR (last visited Feb. 8, 2006) [hereinafter America's Housing Wage Climbs, Oregon].

126. National Low Income Housing Coalition, Out of Reach 2003, State Ranks Based on Two Bedroom Housing Wage, http://www.nlihc.org/oor2003/table9.htm (last visited Feb. 8, 2006)

127. See JEFF CHAPMAN, ECON. POLICY INST., EPI ISSUE BRIEF: STATES MOVE ON MINIMUM WAGE 4 (2003), *available at* http://www.epinet.org/issuebriefs/ib195/ib195.pdf. Oregon's statewide minimum wage was $6.90 in 2003. *Id.*

128. *See* National Low Income Housing Coalition, Out of Reach 2003: America's Housing Wage Climbs, http://www.nlihc.org/oor2003/ (last visited Feb. 8, 2006) (providing the data necessary to draw this conclusion). Only Alaska and Washington had minimum wages higher than Oregon's $6.90 in 2003. CHAPMAN, *supra* note 127, at 4.

129. In 2003, forty-four percent of Oregon renters were unable to afford a two-bedroom apartment at fair market rent, and the housing wage was only slightly less than twice the minimum wage. America's Housing Wage Climbs, Oregon, *supra* note 125.

130. CTR. FOR ENVTL. JUSTICE, NAT'L CTR. FOR PUB. POLICY RESEARCH, SMART GROWTH AND ITS EFFECTS ON HOUSING MARKETS: THE NEW SEGREGATION iii-iv (2002), *available at* http://www.nationalcenter.org/NewSegregation.pdf.

costs of growth restrictions," particularly increased home prices.[131] NCPPR concedes however, that the cause and effect relationship between site restrictions and rising home prices is "only a potential one," because growth management policies "tend to incorporate mechanisms for loosening the restrictions gradually in the face of growth."[132]

Indeed, many studies suggest that the UGB's effect on housing prices has been small, and that other factors may account for the changes. Robert Liberty cites data from the National Association of Homebuilders showing that while Portland is among the least affordable cities in the country, the median price of single-family homes is comparable to or lower than prices in similar western cities, and its ratio of median family income to median home price is more favorable.[133] Michael Lewyn reaches a similar conclusion after comparing Portland's housing prices to those of other western cities.[134]

Similarly, Justin Phillips and Eban Goodstein found that Portland's UGB "has created upward pressure on housing prices, but the effect is relatively small in magnitude."[135] After comparing Portland housing prices to those in other western metropolitan areas and conducting regression analyses to measure the effects of various factors on housing prices, Phillips and Goodstein attribute most of the increase in Portland housing prices to the area's economic growth, and to the alignment of Portland prices with those of other western metropolitan areas.[136]

Anthony Downs offers a more nuanced analysis. He refutes the claim that UGBs inevitably cause home prices to rise faster.[137] Downs found that home prices in Portland rose faster than in other communities in the region only during the period from 1990-94, but not during the rest of the 1990s.[138] He also tentatively concluded that the UGB had a significant impact on rising prices only from 1990-94, but not in the late 1990s.[139] He attributes the 1990-94 increases to a combination of job growth and the

131. *Id.* at v.

132. *Id.* at 10.

133. Liberty, *supra* note 72, at 598-99 (citing NAT'L ASS'N OF HOME BUILDERS, HOUSING OPPORTUNITY INDEX: FIRST QUARTER 2002 (2002)).

134. *See* Michael Lewyn, *Oregon's Growth Boundaries: Myth and Reality*, 32 ENVTL. L. REP. 10160, 10162 (2002).

135. Justin Phillips & Eban Goodstein, *Growth Management and Housing Prices: The Case of Portland, Oregon*, 18 CONTEMP. ECON. POL'Y 334, 334 (2000).

136. *Id.* at 342.

137. Anthony Downs, *Have Housing Prices Risen Faster in Portland than Elsewhere?*, 13 HOUSING POL'Y DEBATE 7, 7 (2002).

138. *Id.* at 12.

139. *Id.* at 25.

resulting buoyant consumer attitudes, relatively low housing production during the early 1990s,[140] and Metro's 1992 decision not to expand significantly the UGB boundary.[141]

Downs reasoned that the UGB did not influence home prices in the Portland region during the 1980s because the impact of the UGB's twenty-year supply of land was not yet felt, and because job and wage growth was not rapid in the 1980s.[142] He found no simple relationship between UGBs and housing prices, but suggested that Metro might need to expand strict UGBs in times of rapid job and income growth to ensure housing affordability.[143] Commenting on Downs's paper, William Fischel argues that Downs understates the propensity of UGBs to cause housing price increases.[144] Fischel contends that, by comparing Portland's housing price increases only to those of other western cities, Downs downplays the effect of UGBs because most western cities have growth controls.[145]

While a UGB as a stand-alone policy may increase housing costs by limiting the land supply available for development, other measures can mitigate this effect and make housing more affordable. For example, Robert Stacey credits the efficiency and certainty of Oregon's development permitting process—in particular the 120-day time limit for local governments to review and make final decisions on permit applications—with reducing development costs.[146] According to Stacey, zoning and policy changes leading to a "dramatic reduction in [the] average minimum lot size in the Portland metro area" have also had a moderating effect on housing costs.[147]

Robert Nelson also favors this comprehensive approach to Portland-style urban containment.[148] He argues that urban containment policies are the wave of the future, making the relevant question not whether, but how urban containment policies will be implemented.[149] In a 2002 review of the literature on growth management and housing affordability, Nelson and his colleagues determined that growth management policies that simply

140. William A. Fischel, *Comment on Anthony Downs's Have Housing Prices Risen Faster in Portland than Elsewhere?*, 13 HOUSING POL'Y DEBATE 43, 45 (2002).

141. Downs, *supra* note 137 at 27-28.

142. *Id.* at 27.

143. *Id.* at 29.

144. Fischel, *supra* note 140, at 44.

145. *Id.* at 47.

146. Robert Stacey, *Urban Growth Boundaries: Saying Yes to Strengthening Communities*, 34 CONN. L. REV. 597, 601-02 (2002).

147. *Id.*

148. *See* Nelson et al., *supra* note 115, at 36-37.

149. *Id.* at 35-36.

restrict available land should cause housing prices to rise, but policies that restrict land supplies while also facilitating housing production need not.[150] In that review, Nelson concluded that (1) "[m]arket demand, not land constraints, is the primary determinant of housing prices";[151] (2) "[b]oth traditional land use regulations and growth management policies can raise the price of housing";[152] and (3) if housing prices may rise under any type of land use management, then the decision to be made is which policies will mitigate both the adverse effects of urban growth and the adverse price effects on lower-income households.[153]

Significantly, Nelson recommends that UGBs in other regions be combined with measures to facilitate development, as they are in Oregon.[154] These coordinated measures include periodic review of the assessment of land necessary for anticipated development, zoning for higher density development, and expedited permit processes.[155] Carl Abbott agrees, suggesting that UGBs work best when combined, as they are in Oregon, with other planning measures such as "public transit investment, infill development, and affordable housing strategies."[156]

Similarly, while Nelson and Susan Wachter concede that growth management programs like Oregon's tend to increase housing costs,[157] they contend that such programs can be implemented in ways that do not preclude affordable housing.[158] They argue that inclusionary zoning might be more likely to succeed as part of a statewide land-use planning scheme than as a local policy because, without a statewide mandate, local communities tend to zone out affordable housing as a strategy to maintain a high local tax base.[159]

UGBs may frustrate the operation of the "trickle-down" approach to

150. *Id.* at 34.

151. *Id.* at 33.

152. *Id.* at 34.

153. *Id.* at 35-36 ("Growth management programs can mitigate adverse effects, however, by lowering the costs of providing public infrastructure, minimizing regulatory delays, and prohibiting exclusionary zoning practices.").

154. *Id.* at 34 (noting that Oregon's growth policies "include both urban growth boundaries (UGBs) to protect rural resource land and a host of strong measures to reduce regulatory barriers in developing areas").

155. Arthur C. Nelson, *Comment on Anthony Downs's Have Housing Prices Risen Faster in Portland Than Elsewhere?*, 13 HOUSING POL'Y DEBATE 33, 37 (2002).

156. Carl Abbott, *The Portland Region: Where City and Suburbs Talk to Each Other – And Often Agree*, 8 HOUSING POL'Y DEBATE 11, 41 (1997).

157. Arthur C. Nelson & Susan M. Wachter, G*rowth Management and Affordable Housing Policy*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 173, 173-74 (2003).

158. *Id.* at 174.

159. *Id.* at 181.

affordable housing, a process by which the flight of the affluent to outlying suburbs decreases home prices in the neighborhoods they abandon, making them more affordable to those lower down the economic ladder.[160] Yet, while this process can make housing less costly, it undercuts the value of homeownership as a wealth-generating mechanism in the increasingly devalued neighborhoods.[161]

c. Effect on Residential Racial Segregation

Black-White racial segregation has decreased in the Portland region. The region is one of the nation's least class-segregated metropolitan areas, and it became even more economically integrated during the 1990s.[162] These pro-opportunity trends may flow in part from the region's growth management policies. Limiting sprawl can help increase access to opportunity by reducing residential racial segregation.

While sprawl may depress real housing prices, making home purchases more accessible to Black residents, the same process that lead to this outcome can also lead to greater racial segregation. Moreover, studies have shown that Black homeowners, more than any others, are steered toward real estate that actually loses equity value.[163] These properties generally are located in highly stressed inner-ring suburbs.[164]

Matthew Kahn investigated the relationship between sprawl and Black home ownership.[165] He found that sprawl reduces the Black/White housing consumption gap by increasing the supply of land for development, which in turn increases affordability.[166] Using regression analysis, he found that Black households in highly sprawled metropolitan areas occupied larger housing units and were more likely to own their

160. *See, e.g.*, Tessa Melvin, *Legislators Face Their Critics on Housing*, N.Y. TIMES, May 17, 1992.

161. Abbott, *supra* note 156, at 36.

162. TODD SWANSTROM ET AL., BROOKINGS INST., PULLING APART: ECONOMIC SEGREGATION AMONG SUBURBS AND CENTRAL CITIES IN MAJOR METROPOLITAN AREAS 8-9 (2004), *available at* http://www.brookings.edu/metro/pubs/20041018_econsegregation.pdf.

163. *See, e.g.*, Myron Orfield, *Racial Segregation and Community Revitalization*, 58 VAND. L. REV. (forthcoming 2006) [hereinafter Orfield, *Racial Segregation and Community Revitalization*]; Joe T. Darden & Sameh M. Kamel, *Black Residential Segregation in the City and Suburbs of Detroit: Does Socioeconomic Status Matter?*, 22 J. URB. AFFAIRS 1, 10-11 (2000).

164. Orfield, AMERICAN METROPOLITICS, *supra* note 1, at 34-38.

165. *See generally* Matthew E. Kahn, *Does Sprawl Reduce the Black/White Housing Consumption Gap?*, 12 HOUSING POL'Y DEBATE 77 (2001) (using 1997 American Housing Survey data to show that black families are more likely to own homes in areas of sprawl).

166. *Id.* at 84.

homes than were Black households in regions without as much sprawl.[167]

Kahn's analysis contains its own counter-argument, however. He posits two explanations for his findings. First, greater land supply in sprawled areas lowers housing prices.[168] Second, "as jobs move to the fringe in sprawling metro areas, inner-city housing stock that is far from employment opportunities becomes cheaper."[169] Kahn thus concedes, "[w]hile housing opportunities for Blacks may improve with sprawl, the quality of life for minorities could decline in sprawling areas if suburban growth leads to less access to jobs and increases income segregation."[170]

If sprawl leads to increased racial segregation, then urban growth boundaries could stem further segregation and perhaps promote racial integration. Indeed, a recent study found that urban containment policies decrease racial segregation.[171] Arthur Nelson, Casey Dawkins, and Thomas Sanchez compared the 1990-2000 changes in the index of dissimilarity—a common measure of segregation—for the Black population relative to the White population among selected metropolitan areas, both those with and those without urban containment policies.[172] They found that, although Black-White segregation declined in nearly all metropolitan areas in the United States, segregation declined faster, on average, among regions with growth containment policies.[173]

More specific to the Portland region, Nelson and Wachter found that Black-White residential segregation declined in Portland at twice the average national rate between 1990 and 2000.[174] The region's Black-White dissimilarity value fell fifteen points—from sixty-four in 1990 to forty-eight in 2000.[175] Across all metropolitan areas, Black-White dissimilarity

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 84-85; *see also* Arthur C. Nelson et al., *Urban Containment and Residential Segregation: A Preliminary Investigation*, 41 URB. STUDIES 423, 435 (2004) ("[A]lthough planning efforts to improve the supply of affordable housing may result in an increase in the total number of affordable units per renter, these programs may also be perversely fostering segregation . . . .").

171. *See* Nelson et al., *supra* note 170, at 435 ("Generally speaking, metropolitan areas with urban containment policies have seen average declines in segregation of approximately two points over the period.").

172. *Id.* at 429-31.

173. *Id.* at 431.

174. Nelson & Wachter, *supra* note 157, at 173.

175. Metropolitan Racial and Ethnic Change – Census 2000, Portland-Vancouver, OR-WA PMSA, Data for the Metropolitan Statistical Area, http://mumford1.dyndns.org/cen2000/WholePop/WPSegdata/6440msa.htm (last visited Feb. 11, 2005) [hereinafter Portland-Vancouver Census Data].

decreased nearly as much during the 1990s—twelve percentage points, to fifty-two.[176] (Dissimilarity values of sixty or above are very high, while values of forty to fifty reflect moderate residential segregation.[177] Changes in dissimilarity values exceeding ten points during a decade are considered very significant.)[178]

Black-White segregation, however, declined fastest in metropolitan areas where the Black population shares were under five percent.[179] Nevertheless, although the Portland metropolitan area had a small Black population share in 2000—roughly three percent[180]—it is desegregating even faster than other areas with small Black population shares. The region's twenty-one point decline in its Black-White dissimilarity value not only is more than twice the pace of the national average decline between 1980 and 2000 (nine points),[181] but it also exceeds the twelve-point average decline for metro areas with Black population shares of less than five percent.[182]

In the Portland region, Hispanics comprised approximately seven percent of the population in 2000[183] and were far less segregated from Whites than Blacks.[184] Even so, Hispanic-White segregation is increasing in Portland.[185] The Hispanic-White dissimilarity index for the Portland region increased from twenty-two in 1980 to thirty-five in 2000.[186] Yet, Portland's Hispanic-White dissimilarity index remains well below the average value of forty-nine (a four-point increase across twenty years) for regions with Hispanic population shares of five to ten percent.[187]

In addition to having relatively less racial segregation, for decades Portland has been "one of the most class-integrated metropolitan areas in the country."[188] *The Oregonian*, Portland's major newspaper, reported that

176. Nelson & Wachter, *supra* note 157, at 173.

177. JOHN LOGAN ET AL., LEWIS MUMFORD CTR., UNIV. AT ALBANY, ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND 2 (2001), *available at* http://mumford1.dyndns.org/cen2000/WholePop/WPreport/MumfordReport.pdf.

178. *Id.*

179. *Id.* at 4.

180. *See* Portland-Vancouver Census Data, *supra* note 175.

181. *Id.* (noting that the Portland metropolitan region's Black-White dissimilarity value fell from sixty-nine in 1980 to forty-eight in 2000).

182. LOGAN ET AL., *supra* note 177, at 4.

183. Portland-Vancouver Census Data, *supra* note 175.

184. *Id.* (showing the Hispanic-white dissimilarity indexes at thirty-five, and the black-white dissimilarity index at forty-eight).

185. LOGAN ET AL., *supra* note 177, at 17.

186. Portland-Vancouver Census Data, *supra* note 175.

187. LOGAN ET AL., *supra* note 177, at 14.

188. Abbott, *supra* note 156, at 24.

"Portland and its suburbs became more economically integrated during the 1990s," unlike most metropolitan areas.[189] As of 2000, households earning less than the region's median income constituted at least one-third of the population in all but one Portland suburb.[190] David Bell, a partner at Portland-based GSL Properties, attributes this economic integration in the Portland region to the metropolitan housing rule's requirement[191] that cities within the Portland UGB zone enable construction of a substantial number of multiple-family units. [192]

3. Can an Oregon-Style UGB Approach Work Elsewhere?

Analysts disagree over whether Portland's success can be replicated in other metropolitan regions. Those who think not tend to focus on the unique characteristics of the Portland region.[193] Some, however, suggest that there may be limited replicability in somewhat similar places. For example, William Fischel believes that Portland's growth containment policies probably cause higher housing prices, [194] which "look a bit out of line."[195]

Believing Portland to be a rather unique case, Carl Abbott contends that several unusual regional features made policies such as urban growth restrictions and affordable housing development more palatable in the Portland region than they would be in most other metropolitan areas.[196] He observes that Portland's small non-White population, and its dispersal throughout the metropolitan area—White flight to the suburbs—is less of an issue there than in cities that have larger populations of color.[197] Abbott also believes Portlanders were more amenable to urban growth restrictions to preserve the unique value of the nearby Willamette Valley agricultural lands, a finite resource geographically limited to a small area by the surrounding mountains.[198]

In contrast, Henry Richmond is more optimistic about the replicability of

189. Betsy Hammond, *Income Groups Intermingle*, OREGONIAN, May 15, 2002, at A1.

190. *Id.* ("The Oregon figures show that households earning less than $50,000—roughly the median income for the metro area—constitute at least a third of every city except Happy Valley.").

191. OR. ADMIN. R. 660-007-0000 to –0060 (2005).

192. Hammond, *supra* note 189, at A1.

193. *See infra* notes 196-198 and accompanying text.

194. Fischel, *supra* note 140, at 44.

195. *Id.* at 48.

196. Abbott, *supra* note 156, at 26 ("[C]ity-suburban politics have not revolved around race and racial avoidance.").

197. *Id.*

198. *Id.* at 28 n.8.

Oregon's land use reforms. He characterizes the Oregon land use scheme as "prodevelopment,"[199] because development is encouraged within UGBs,[200] and both the higher-density zoning[201] and the expedited permitting process facilitate development.[202] Richmond views Portland's success as the result of tough policy choices that have garnered wide support because they are in the region's economic self-interest.[203] Thus, any region interested in changing its land use policies to better support the region's economic well-being could choose to accept the benefits of a comprehensive approach to urban growth management.

D. Development Linked to Transportation

Transit-oriented development is a complementary means to link low-income residents and residents of color with job centers. It is included in the plan for the Portland metropolitan area. Metro, the region's elected regional governing body, has a "Region 2040" development plan that calls for growth over the next forty years to be concentrated in mixed-use development in "regional centers" along transit corridors.[204] Rail transit eventually will connect each of these centers to downtown Portland.[205]

Some commentators believe that transit-oriented development better meets community needs and is a more realistic goal than inclusionary zoning.[206] Either way, given that non-White residents and the poor are least likely to have access to an automobile,[207] transit-oriented development is an additional approach for connecting people with opportunities.[208] This type of development is well-suited to be part of a comprehensive approach, as the Portland case illustrates. Thus, the

199. Henry R. Richmond, *Comment on Carl Abbott's "The Portland Region: Where City and Suburbs Talk to Each Other – And Often Agree,"* 8 HOUSING POL'Y DEBATE 53, 56 (1997).

200. *Id.*

201. *Id.* at 62.

202. *Id.* at 59.

203. *Id.* at 54.

204. Stacey, *supra* note 146, at 603-04.

205. *Id.* at 606-07; *see also* Abbott, *supra* note 156, at 30.

206. *See* Daniel R. Mandelker, *The Affordable Housing Element in Comprehensive Plans*, 30 B.C. ENVTL. AFF. L. REV. 555, 565 (2003); *see also infra* Part III.

207. "In 1995, 24 percent of black households had no car, compared to 5 percent of white households and 12 percent of Latino households." STEVEN RAPHAEL & MICHAEL A. STOLL, BROOKINGS INST., MODEST PROGRESS: THE NARROWING SPATIAL MISMATCH BETWEEN BLACKS AND JOBS IN THE 1990S 14 n.4 (2002), *available at* http://www.brookings.edu/es/urban/publications/Raphael_Stoll_spatial_mismatch.pdf.

208. Kushner, *supra* note 12, at 58-60.

Recommendations section[209] includes James Kushner's transit-oriented development proposals.[210]

III. INCLUSIONARY HOUSING POLICIES

Inclusionary housing policies are designed to ensure that affordable units are included in new residential developments. They accomplish this either by mandating that a percentage of units be affordable, or by offering incentives for developers to include affordable units. Inclusionary housing laws—also known as inclusionary zoning laws—can increase the stock of affordable housing, and can alleviate the economic segregation common to large, fragmented metropolitan areas.

In addition, the mixed-income housing developments produced through inclusionary zoning can be more acceptable to neighboring residents than traditional subsidized low-income housing developments, thus reducing NIMBY (Not In My Back Yard) resistance. Inclusionary zoning laws, whether mandatory or incentive-based, permit these goals to be advanced with little or no direct financial cost to governments and taxpayers.

A mandatory inclusionary zoning ordinance requires that all new residential developments[211] include a certain percentage of units that are affordable to households of a particular income level (generally defined as a percentage of the area's median income).[212] The share of units that must be made affordable is the "mandatory set-aside."[213] The laws generally will require that the set-aside units be maintained as affordable units for a period of at least ten years.[214] Because developers may be deterred by the reduced profitability of housing projects including affordable units, these laws usually include incentives to encourage development.[215]

A common incentive provision is a waiver of the zoning laws' limit on density levels, which allows developers to increase their profits by building additional units on their property by permitting greater densities.[216] Other statutory development incentives include local tax abatements, waivers of permit fees, reductions in the amenities required to be provided by

209. *See infra* Part VI.

210. Kushner, *supra* note 12, at 58-60.

211. Exceptions are generally made for very small development projects containing only a small number of units.

212. Robert W. Burchell & Catherine C. Galley, *Inclusionary Zoning: Pros and Cons*, NEW CENTURY HOUSING, Oct. 2000, at 3.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

developers, and government provision or subsidization of infrastructure in support of development.[217]

New Jersey is the first of the following two case examples. Its "fair share" doctrine[218] did not begin with an inclusionary zoning ordinance, yet it has evolved to require that municipalities plan to meet their "fair share" of their region's low- and moderate-income housing. The second case is Montgomery County, Maryland, which for three decades has used a mandatory inclusionary zoning ordinance and density bonuses to expand the availability of affordable housing throughout its metropolitan areas.[219]

A. New Jersey

1. Mount Laurel and the New Jersey Fair Housing Act of 1985

New Jersey's policies are the product of two New Jersey Supreme Court cases—*Mount Laurel I*[220] and *Mount Laurel II*[221]—and the New Jersey Fair Housing Act (NJFHA).[222] While these policies do not explicitly require inclusionary zoning, they have nudged widespread implementation of inclusionary housing policies in New Jersey.

In 1975, the New Jersey Supreme Court struck down the exclusionary zoning ordinance of the small, but developing, township of Mount Laurel in *Mount Laurel I*.[223] It concluded that Mount Laurel's zoning ordinance was contrary to the general public welfare clause of the New Jersey State Constitution, and outside the municipality's zoning power.[224] It also approved an affirmative order requiring that every "municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing."[225]

The court announced, for the first time, the "fair share" principle.[226] It ruled that a municipality "cannot foreclose the opportunity of the classes of

217. *Id.*; Marc T. Smith et al., *Inclusionary Housing Programs: Issues and Outcomes*, 25 REAL EST. L. J. 155, 155-56 (1996).

218. *See infra* notes 226-228 and accompanying text.

219. *See infra* notes 287-292 and accompanying text.

220. S. Burlington County N.A.A.C.P. v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel I*].

221. S. Burlington County N.A.A.C.P. v. Twp. of Mount Laurel, 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*].

222. N.J. STAT. ANN. § 52:27D-301 to -329 (2005).

223. 336 A.2d at 730.

224. *Id.*

225. *Id.* at 724.

226. *Id.* at 733 ("[E]very municipality therein must bear its fair share of the regional burden.").

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 therefore."[227] The court decreed that "[t]hese obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do."[228]

In reaching this result, the court reviewed the Township's justifications for exclusionary zoning, and found that they did not meet the heavy burden of showing "peculiar circumstances" that would exempt it from the fair share standard.[229] Significantly, the court required that municipalities consider the impact of their actions beyond their borders. It announced "that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality."[230]

Eight years later, in *Mount Laurel II*,[231] the court "established guidelines and procedures that would ensure active and detailed judicial supervision of local compliance" with the original fair share doctrine.[232] To promote consistency, and to centralize *Mount Laurel* litigation, the court also designated a panel of three judges to determine "fair share" and to ensure that municipalities were complying.[233] The judges could declare zoning ordinances invalid in whole or in part, or could mandate that municipalities change specific sections of their ordinances.[234]

The most significant change, however, was that a municipality no longer complied with *Mount Laurel* simply by eliminating exclusionary zoning. Instead, *Mount Laurel II* required each township to act affirmatively to provide a "realistic" opportunity, a "likelihood—to the extent economic conditions allow—that the lower income housing will actually be constructed."[235]

Expressing dissatisfaction at the lack of progress in the creation of fair

227. *Id.* at 724.

228. *Id.*

229. *Id.* at 727-28.

230. *Id.*

231. 456 A.2d 390 (N.J. 1983).

232. G. Alan Tarr & Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513, 515 (1984).

233. *Mount Laurel II*, 456 A.2d at 438-39.

234. CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 65 (1996).

235. 456 A2d. at 422.

share housing, the court also implemented a "builder's remedy" applicable to places that had not met their fair share of the region's affordable housing needs.[236] The builder's remedy authorized judges to grant developers the right to build high-density housing otherwise prohibited by local zoning laws, as long as at least twenty percent of the development would be affordable units.[237]

The New Jersey Legislature responded to these *Mount Laurel* decisions by enacting the NJFHA in 1985.[238] The NJFHA requires every municipality in the state to adopt and implement a housing plan that addresses its "fair share of the unmet regional need for housing affordable to low- and moderate-income households."[239]

To remove the courts from what many saw as a legislative process, the NJFHA created the New Jersey Council on Affordable Housing (COAH).[240] Its role is "to determine municipal fair share housing obligations, establish policies as to what types of municipal actions are necessary to create realistic opportunities for the provision of housing affordable to low- and moderate-income households, and, upon request, to review housing plans submitted to it by municipalities."[241] Although municipalities are not required to submit their local housing plans to COAH, the NJFHA encourages them to do so. "COAH approval of a local plan gives the local ordinance a presumption of validity that may be overcome in a court challenge only by clear and convincing evidence that the plan will not meet the fair-share obligation."[242]

2. Effectiveness of the New Jersey Laws

A number of researchers and commentators have evaluated the impact of New Jersey's policies. These analyses find that its policies have increased the amount of affordable housing.[243] The housing has, however, disproportionately benefited Whites and moderate-income persons rather than low-income persons, large families, and people of color. This section

236. *Id.* at 452.

237. *Id.* at 452 n.37; Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1130 (1995).

238. N.J. STAT. ANN. § 52:27D-301 to -329 (2005).

239. Naomi B. Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1271 (1997).

240. *Id.*

241. *Id.*

242. *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, *supra* note 237, at 1135.

243. *See infra* notes 244-267 and accompanying text.

reviews those studies and presents the resulting recommendations for improving the New Jersey model.

Most studies of New Jersey's fair share program focus on whether affordable housing has in fact been produced in suburban New Jersey. For example, a 1995 statewide survey showed that 15,733 suburban units were completed or under construction; 1,982 vacated units had been or were being rehabilitated; and 4,679 owner occupied units had been or were being rehabilitated.[244] These numbers fail to account for the affordable housing built in communities that moved proactively to forestall *Mount Laurel* litigation, nor do they include housing built as a result of cases settled outside the court's jurisdiction, according to Charles Haar.[245] Haar points out that tangible benefits, including changed behavior in suburban localities and passage of the NJFHA, bear out the impact of the *Mount Laurel* judicial intervention.[246]

In contrast, "[r]elatively little research has been done on the characteristics of the households who have applied for or occupy this housing."[247] One such study, examining the years 1983-88, found that benefits flowed neither to the lowest-income households nor to people of color living in the central city.[248] The study made the following findings:

- Approximately 5,087 low- and moderate-income units were built or under construction.[249]
- Approximately seventy-five percent of these units were in inclusionary developments, where a fixed percentage of units are sold or rented at controlled prices, and the remaining twenty-five percent were in publicly-subsidized developments or created by rehabilitating existing structures.[250]
- "The Mount Laurel units in inclusionary (market-provided) developments were almost always offered for sale rather than rental, were usually available without age restrictions, and were skewed slightly in favor of being affordable to moderate-income rather than low-income unit households."[251] The publicly-subsidized units were more balanced and had fewer age

244. Wish & Eisdorfer, *supra* note 239, at 1273 (citing J. LAGOS, N.J. DEP'T OF CMTY. AFFAIRS, 1995 SURVEY OF MOUNT LAUREL HOUSING (1995)).

245. HAAR, *supra* note 234, at 131.

246. *Id.*

247. Wish & Eisdorfer, *supra* note 239, at 1274.

248. John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 669-70 (1996).

249. *Id.* at 669.

250. *Id.*

251. *Id.*

restrictions.[252]

- Based on then-completed inclusionary developments, the typical residents were young married couples with children, drawn from households that formerly rented or doubled up.[253] Minorities, especially Blacks, were under-represented.[254]

Wish and Eisdorfer's 1997 study also reports disappointing results, finding that African Americans and Latinos in New Jersey "are disproportionately concentrated in a small number of urban areas and are dramatically under-represented in the suburbs."[255] Meanwhile, employment opportunities over the past thirty years have increased greatly in the suburbs and declined in the cities.[256] Wish and Eisdorfer conclude that the New Jersey program "has not enabled previously urban residents to move to suburban municipalities and has not enabled Blacks and Latinos to move from heavily minority urban areas to the suburbs."[257]

Wish and Eisdorfer's research examined the impact of Mount Laurel initiatives (the court decisions, the NJFHA, and the COAH) in meeting three judicial objectives:

- To increase housing opportunities for low- and moderate-income households.
- To provide housing opportunities in the suburbs for poor urban residents who had been excluded by past suburban zoning practices.
- To ameliorate racial and ethnic residential segregation by enabling blacks and Latinos to move from the heavily minority urban areas to white suburbs.[258]

They reviewed New Jersey Affordable Housing Management Service (AHMS) data on occupants of, and applicants for, recently constructed low-and moderate-income housing, and concluded that initiatives to date have at least partially served the first, but not the second or third objectives.[259] As to the first objective, however, it appeared that large

252. *Id.* at 669-70.
253. *Id.* at 670.
254. *Id.*
255. Wish & Eisdorfer, *supra* note 239, at 1276.
256. *Id.* at 1277.
257. *Id.* at 1305.
258. *Id.* at 1276.
259. *Id.* at 1302. AHMS is a state agency that helps municipalities and developers "administer occupant eligibility standards and affordability controls for low- and moderate-income housing." *Id.* at 1281.

households and very low-income households are under-served.[260] Specifically, the data showed that the Mount Laurel program had:

- Failed to produce housing for very low-income households. More housing for moderate income households than for low income households was produced, some in suburbs that used to hold only expensive housing.[261]
- Failed to facilitate moves from city to suburb.[262] A higher percentage of African-American households moved from suburbs to cities than vice-versa.[263] Many of the moves were lateral, with Whites tending to move from suburb to suburb and racial minorities from urban setting to urban setting or into predominantly minority suburbs.[264]
- Failed to achieve racial or ethnic integration.[265] New Jersey's suburbs remain predominantly White and there is no sign of residential integration along racial and economic lines.[266]

The study also revealed that there is a great demand for affordable housing among racial-ethnic minorities; that racial-ethnic minorities were still being shut out from New Jersey's suburbs; and that they obtained suburban housing less than half as often as Whites.[267] Overall, while opportunities for affordable housing have been created, the opportunities are flowing not to racial minorities, but to White homebuyers.

Others agree that the New Jersey policies have produced disappointing results and suggest ways to improve their effectiveness. Yet many also point to what has worked. For example, Bernard Ham, discussing Wish and Eisendorfer's study, concludes that "the *Mount Laurel* mandate of producing realistic opportunities for the production of affordable housing has largely been a failure."[268] Ham concedes, however, that *Mount Laurel* made "tremendous contributions" in reshaping the role of "local autonomy" and home rule in race relations by emphasizing regionalism and fair share concepts that, if enforced vigorously, could achieve the doctrine's full

260. *Id.* at 1301.

261. *Id.* at 1302; *see also* Bernard K. Ham, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L.J. 577, 609 (1997).

262. Wish & Eisdorfer, *supra* note 239, at 1302.

263. *Id.* at 1303.

264. *See* Ham, *supra* note 261, at 608.

265. Wish & Eisdorfer, *supra* note 239, at 1302-04.

266. *See* Ham, *supra* note 261, at 609.

267. *Id.* at 608.

268. *Id.* at 610.

potential.[269]

In addition to recommendations for vigorous enforcement, commentators have encouraged the New Jersey program to take race-specific measures.[270] John Powell contends that without such measures, New Jersey "cannot adequately address the housing needs of *all* poor communities."[271] He explains that, in the *Mount Laurel* cases, the New Jersey court shifted emphasis away from protecting the rights of minorities.[272] The legislature, with the NJFHA, applied "the false premise that race issues can be reduced to poverty issues"; failed to acknowledge the relationship between race and poverty; and thereby left the issue of residential segregation wholly to the local authorities' discretion.[273]

Powell argues that race-conscious fair share housing strategies for racial minorities require policymakers to recognize "the interrelationship between poverty and race in housing."[274] Like "adequacy" suits in the education realm, *Mount Laurel* "general welfare" suits call for inter-district remedies that go beyond municipal boundaries to remedy inequalities and embrace system-wide approaches.[275] While the New Jersey courts and legislature recognize affordable housing as part of the "general welfare" that must be provided for, it is necessary that racially integrated housing be implicit in this understanding of "general welfare."[276] According to Powell, "[a]n improved *Mount Laurel* approach "would go beyond requirements of low-income housing and would mandate pro-integrative measures."[277] It also should attend to the needs of very low-income households.[278]

Others agree that the *Mount Laurel* approach has not alleviated the problems of New Jersey's cities. Peter Buchsbaum contends that the units generated have mainly "helped lower-income suburbanites retain residency in their areas rather than open up new opportunities for urban people of

269. *Id.* at 611.

270. *See, e.g.*, John A. Powell, *Injecting a Race Component into Mount Laurel-Style Litigation*, 27 SETON HALL L. REV. 1369 *passim* (1997).

271. *Id.* at 1369.

272. *Id.* at 1371 ("Making explicit reference to other characteristically middle-income or temporarily low-income groups——the elderly, young single persons, and large families——the court reasoned that minorities were not the sole category of persons excluded by the zoning scheme.").

273. *Id.* at 1372.

274. *Id.* at 1373.

275. *Id.* at 1383.

276. *Id.* ("[I]n Mount Laurel, the general welfare clause imposed a duty to provide the basic needs for housing opportunity. Implicit in this basic need for housing opportunity ought to be the requirement of racial integration.").

277. *Id.*

278. *Id.* at 1383-84.

color."[279] He argues that production figures could be higher under a truly comprehensive federally-subsidized program.[280] Like Powell, Florence Roisman contends that the New Jersey program could be improved if it directly acknowledged racial and ethnic integration as a goal.[281] Other improvements would be to provide subsidies for low-income households and to assure the accurate collection and reporting of data.[282]

Finally, John Boger recommends the implementation of meaningful enforcement mechanisms such as gradual reduction of income tax deductions for property tax and mortgage interest payments for all taxpayers remaining in municipalities that decline to fulfill their fair share obligations.[283] Boger surmises that a ten percent reduction in tax deductions would prompt residents to press their local governments to comply with their fair share obligations.[284] This mechanism could be extended to cover federal tax deductions if the federal government adopted a national "fair share" policy.[285]

Boger does credit the *Mount Laurel* cases with exposing the power of local laws to shape the economic and social characteristics of particular communities and thereby state and regional populations.[286] Indeed, they have had an impact by requiring a regional focus, and by introducing "fair share" concepts applicable at a regional scale. With suggested reforms, the New Jersey model could better meet the needs of communities of color and low-income persons. The next case example illustrates a highly effective inclusionary zoning law.

B. Montgomery County, Maryland

1. The Moderately Priced Dwelling Unit Ordinance

In 1973, Montgomery County, Maryland, a wealthy suburb northwest of Washington, D.C., adopted its Moderately Priced Dwelling Unit (MPDU)

279. Peter Buchsbaum, *Mount Laurel II: A Ten Year Retrospective*, N.J. LAW., Oct. 1993, at 13, 17.

280. *Id.*

281. Florence W. Roisman, *The Role of the State, The Necessity of Race-Conscious Remedies, and Other Lessons from the Mount Laurel Study*, 27 SETON HALL L. REV. 1386, 1388 (1997).

282. *Id.*

283. John C. Boger, *Mount Laurel at 21 Years: Reflections on the Power of Courts and Legislatures to Shape Social Change*, 27 SETON HALL L. REV. 1450, 1462 (1997).

284. *Id.*

285. *Id.*

286. *Id.* at 1453.

program—the nation's first inclusionary zoning law.[287] The MPDU program requires that any new housing development of fifty or more units set aside 12.5 to fifteen percent of the units for households earning sixty-five percent or less of the area's median income.[288] As compensation for building the mandated MPDUs, developers can receive a density bonus of up to twenty-two percent.[289]

Rental units must be maintained as affordable units for twenty years, and owner-occupied units have price restrictions for ten years.[290] After ten years, owners of MPDUs can sell their units without price limitations, but half of their profits go to the county's Housing Initiative Fund, which uses the revenue to help developers purchase, build and rehabilitate affordable housing.[291]

From a racial equity perspective, a key feature of the Montgomery County ordinance is the provision that a substantial portion of the MPDUs go to the county's public housing authority, to be made available to very low-income households. One-third of the MPDUs are offered to the public housing authority—the Housing Opportunities Commission (HOC)—and qualified nonprofit organizations may purchase additional units, up to a total of forty percent of all MPDUs.[292] Most of the units purchased by the HOC and the nonprofits are maintained as rental units for low- and very low-income households. As of 1999, there were 1,441 such units in the hands of the HOC and nonprofits.[293] Unlike other MPDUs, which revert to market rate after ten to twenty years, these will be maintained as affordable units indefinitely.[294]

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287. *See, e.g.*, KAREN DESTOREL BROWN, BROOKINGS INST., EXPANDING AFFORDABLE HOUSING THROUGH EXCLUSIONARY ZONING: LESSONS FROM THE WASHINGTON METROPOLITAN AREA 5 (2001), *available at* http://www.brookings.edu/es/urban/publications/inclusionary.pdf; DAVID RUSK, INSIDE GAME/OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA 184 (1999) [hereinafter RUSK, INSIDE GAME/OUTSIDE GAME]; David Rusk, *Inside Game/Outside Game: The Emerging Anti-Sprawl Coalition*, NEW CENTURY HOUSING, Oct. 2000, at 13, 13, *available at* http://planningcommunications.com/nhc_inclusionary_zoning_viable_solution.pdf [hereinafter Rusk, *The Emerging Anti-Sprawl Coalition*].

288. *See* BROWN, *supra* note 287, at 5.

289. *Id.*; Roisman, *Opening the Suburbs to Racial Integration*, *supra* note 73, at 78-79.

290. *See* BROWN, *supra* note 287, at 5.

291. *Id.* at 6-7.

292. *Id.* at 7.

293. *Id.*

294. *See id*. ("Once purchased, these units are set aside as rental for very low- to low-income households, and will always be in the County's affordable housing stock.").

2. Effectiveness of Montgomery County's MPDU

In contrast to the results in New Jersey, people of color have been the primary beneficiaries of the Montgomery County program. During its first twenty-five years of inclusionary housing, Montgomery County produced more than 10,500 affordable housing units, all integrated with market-rate housing.[295] Nearly fourteen percent of these are public housing rental units for low- to very low-income households.[296]

In addition, people of color occupy eighty percent of the new public housing rental units, and from 1991 to 1998 people of color accounted for approximately fifty-five percent of the purchasers of moderately priced dwelling units.[297] Moreover, Montgomery County's more than 10,500 MPDUs are scattered in almost 400 different subdivisions.[298] The local housing authority purchased more than 500 MDPUs, located in more than 200 middle-class subdivisions.[299] David Rusk has described the county as "one of the nation's more racially and economically integrated communities."[300]

Florence Roisman attributes Montgomery County's success at racial integration in large part to two factors. One is that public housing authority purchases a large portion of the MPDUs, and its waiting list of very low-income households includes many people of color.[301] The other factor is that purchasers of owner-occupied MPDUs are chosen by a lottery.[302] Information about the lottery is widely distributed throughout the county, with the support of fair housing groups and internal networking among minority communities.[303]

One weakness of the Montgomery County ordinance is that it only applies to developments with lots smaller than one acre per unit, making large-lot developers exempt from its inclusionary requirements.[304] The ordinance's fifty-unit threshold size for developments is also generous.

295. *See* Roisman, *Opening the Suburbs to Racial Integration*, *supra* note 73, at 79 ("This 'outstanding' program has produced 'more than 10,110 affordable housing units' in 25 years, all well integrated with market-rate housing.") (quoting Nico Calavita et al., *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 HOUSING POL'Y DEBATE 109, 111 (1997)).

296. BROWN, *supra* note 287, at 7.

297. Roisman, *Opening the Suburbs to Racial Integration*, *supra* note 73, at 78-79.

298. RUSK, INSIDE GAME/OUTSIDE GAME, *supra* note 287, at 194.

299. *Id.*

300. *Id.*

301. Roisman, *Opening the Suburbs to Racial Integration*, *supra* note 73, at 107.

302. *Id.* at 108.

303. *Id.*

304. BROWN, *supra* note 287, at 5.

Other inclusionary zoning laws, including an ordinance in Cambridge, Massachusetts, apply to developments as small as ten units.[305]

After reviewing the inclusionary housing ordinances of Montgomery County and three other counties in the Washington, D.C. metropolitan area, Karen Brown made several recommendations for improving their effectiveness.[306] She advocates replication in other jurisdictions of Montgomery County's practice of putting a substantial proportion of the new affordable units into the hands of public housing authorities.[307] These should be maintained indefinitely as rental units for low- and very low-income households.

Brown also recommends that Montgomery County broaden the scope of its law by applying it to developments smaller than the current threshold of fifty units.[308] In addition, she would require large-lot developers, currently exempt from the law on the theory that production of affordable housing is impossible in such developments, to participate in other ways, such as contributing money or land for the construction of affordable housing elsewhere.[309] Finally, Brown suggests measures to make affordable housing more attractive both politically and aesthetically, including support for coalitions of business, development, and housing organizations aimed at educating the public about the benefits of inclusionary housing.[310]

C. How Policies that use Economic Proxies Can Promote Integration

Among the prominent statutory programs aimed at producing affordable housing, only Montgomery County's policies have made significant progress in ameliorating racial segregation.[311] Other states with comparable policies include Oregon, New Jersey, California and Florida, with their statutes that require municipalities to adopt plans for affordable housing, and Massachusetts, with its Comprehensive Permit Law.[312] These policies may have decreased economic segregation, but they have had little impact on racial segregation.[313] Some of these programs may even have

305. *Id.* at 24 ("In Cambridge, MA, for instance, any residential development with ten or more units (new or converted) must make 15 percent of those units affordable to households whose incomes do not exceed 80 percent of the area median.").

306. *Id.* at 23-26.

307. *Id.* at 23.

308. *Id.* at 24.

309. *Id.*

310. *Id.* at 25-26.

311. Roisman, *Opening the Suburbs to Racial Integration*, *supra* note 73, at 71-72.

312. *Id.* at 69-70.

313. *Id.* at 71-72.

exacerbated racial segregation by increasing opportunities for poor Whites to relocate from integrated areas to predominantly White suburbs.[314]

Roisman argues that "economics cannot be used as a proxy for race, that economic remedies cannot be used to solve racial problems, and that steps in addition to the economic remedies are required to promote racial integration in the suburbs."[315] She does credit the New Jersey and Massachusetts laws with bringing some low-and moderate-income housing to suburbs that would not otherwise have below-market rate housing.[316] But racial integration and mobility have not been significantly advanced in either place.[317]

Roisman contrasts these programs with Montgomery County's inclusionary housing ordinance, which has furthered racial integration in the county.[318] She attributes Montgomery County's success at racial integration in large part to two factors, the first being the public housing authority's control over a large number of the new affordable units.[319] The second factor is the use of a lottery to identify purchasers of affordable housing, instead of simply placing the units on the market where purchasers might be subject to racial steering, preferences for local residents, and other factors that disadvantage persons of color.[320]

One lesson to be learned from Montgomery County is that policies that are not explicitly race-based can advance racial integration if they are carefully administered in ways that frustrate the typical operation of White privilege. Thus, Montgomery County's lottery for MPDU purchasers has resulted in greater opportunities than the unregulated system in New Jersey, which has delivered most of the suburban affordable units to Whites who were already living in the suburbs.

Roisman also notes that, although economic remedies are an imprecise tool to address racial equity, remedies that focus on very low-income households, such as Montgomery County directing forty percent of MPDUs to the public housing authority, are more likely than other economic remedies to help people of color.[321]

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314. *Id.* at 84-85 (describing the Massachusetts Comprehensive Plan in particular).

315. *Id*. at 72.

316. *Id.* at 77-78.

317. *Id.*

318. *Id*. at 77-79.

319. *Id*. at 107 ("One of the reasons for Montgomery County's relative success is the requirement that 40% of the MPDU units be offered to the local public housing authority.").

320. *Id*.

321. *Id*. at 107-08.

IV. DISPERSAL OF SUBSIDIZED HOUSING

Because subsidized housing specifically addresses the housing needs of certain low-income urban residents, it is important that the units be located throughout a metropolitan region. Policies to increase the number and proportion of units available in a region's suburbs help connect people of limited means with opportunities dispersed throughout an urban region.

A successful illustration is the Twin Cities metropolitan region, which adopted progressive policies in the 1970s that quadrupled the proportion of the region's subsidized housing located in the suburbs, and increased over seven-fold the number of subsidized housing units in the suburbs in less than a decade.[322] Between July 1971 and December 1979, the Twin Cities suburbs' share of the region's subsidized housing stock jumped from ten percent to thirty-nine percent.[323] The number of subsidized housing units in the suburbs increased from 1,878 to 14,712.[324]

A. The Twin Cities' Progressive Siting Policies during the 1970s

The twin cities of Minneapolis and St. Paul are part of a seven-county metropolitan region that has an appointed governing body, the Metropolitan Council.[325] Among its responsibilities are comprehensive infrastructure and land use planning for the region; planning, construction and management of major metropolitan sewer infrastructure; and planning and operating a seven-county metropolitan transit system.[326] The Minnesota Legislature, through The Metropolitan Land Planning Act of 1976,[327] empowered the Council to serve as a housing authority,[328] and to operate federally-assisted housing programs in any suburban community requesting such assistance.[329]

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322. METRO. COUNCIL, 1979 SUBSIDIZED HOUSING ACTIVITY IN THE TWIN CITIES METROPOLITAN AREA 6 (1980) (on file with author) [hereinafter METRO. COUNCIL, 1979 SUBSIDIZED HOUSING].

323. *Id.*

324. *Id.*

325. *See* Carrie Daniel, Note, *Land Use Planning—The Twin Cities Metropolitan Council: Novel Initiative, Futile Effort*, 27 WM. MITCHELL L. REV. 1941, 1950, 1958 (2001). Created by the Minnesota State Legislature in 1967, the Metropolitan Council's "main purpose is to set regional policies as directed by the legislature and then to mandate that other organizations implement the policies." *Id.* at 1950-51.

326. *See id.* at 1951; *see also* Metropolitan Council, About the Metropolitan Council, http://metrocouncil.org/about/about.htm (last visited Feb. 17, 2006).

327. MINN. STAT. § 473.851-.871 (2005).

328. *See, e.g.*, Daniel, *supra* note 325, at 1952-53 (describing the Metropolitan Council's land planning role).

329. *See, e.g.*, METRO. COUNCIL, 1979 SUBSIDIZED HOUSING, *supra* note 322, at 33

A number of factors, including the availability of federal monies for subsidized housing construction and conversion,[330] contributed to the dramatic increase in the number and proportion of subsidized housing units in the Twin Cities suburbs during the 1970s. Yet, the proactive housing policies adopted by the Metropolitan Council in 1971[331] made it possible for the Twin Cities region to leverage effectively those federal funds when they became available beginning in 1974. The Metropolitan Council's policies, which were part of an effort to expand the stock of subsidized housing in the suburbs, contributed to a substantial increase in the number and share of units available in the suburbs between 1971 and 1974.[332]

Under Policy 13 (now Policy 39), the Metropolitan Council used its A-95 authority to review applications for federal grants and implement a housing policy encouraging subsidized housing development in the suburbs.[333] When reviewing local governments' applications for federal funds, the Council recommended priority in funding based on how well a local jurisdiction had previously done in providing low- and moderate-income housing opportunities.[334]

The other 1971 Council policy that hastened suburbanization of affordable housing was a regional subsidized housing allocation plan that gave priority in federal housing funds to cities that had already had provided low- and moderate-income housing opportunities.[335] This allocation plan and the Council's Policy 13 deserve most, if not all, of the credit for progress toward the suburbanization of low- and moderate-income housing in the Twin Cities from 1971 until the advent of Section 8

(describing Section 8, the federal government's program for "assisting lower-income families to secure decent, safe and sanitary housing").

330. *Id.*

331. *See infra* notes 333-337 and accompanying text (describing the policies adopted by the Metropolitan Council).

332. *See* METRO. COUNCIL, 1979 SUBSIDIZED HOUSING, *supra* note 322, at 6 (noting an increase of 2,721 units from 1,878 to 4,599, which represented an eight percent jump in the share of subsidized housing units located in the suburbs).

333. BERKELEY POLICY ASSOCS., ASSESSMENT OF THE IMPACT OF THE HOUSING OPPORTUNITY PLAN (AHOP) PROGRAM, FINAL REPORT, VOLUME TWO: CASE STUDY NARRATIVES III-2, III-3 (1979) (on file with author) [hereinafter BERKELEY POLICY ASSOCS., VOLUME TWO]; METRO. COUNCIL, AN OVERVIEW OF REGIONAL HOUSING POLICY AND IMPLEMENTATION: 1967-2002 1 (2003) (on file with author) [hereinafter METRO. COUNCIL, AN OVERVIEW OF REGIONAL HOUSING POLICY]. The term "A-95 authority" comes from the authority granted by the Office of Management and Budget in its Circular A-95. METRO. COUNCIL, AN OVERVIEW OF REGIONAL HOUSING POLICY, *supra*, at 1.

334. METRO. COUNCIL, AN OVERVIEW OF REGIONAL HOUSING POLICY, *supra* note 333, at 1.

335. *See id.* at 2; *see also* BERKELEY POLICY ASSOCS., VOLUME TWO, *supra* note 333, at III-3.

in 1974.[336] During those three years, forty-one percent of new subsidized housing was located in the suburbs, and the cumulative suburban share of the region's subsidized housing increased from ten to eighteen percent.[337]

In the wake of a 1973 federal moratorium on public housing construction,[338] virtually all of the new subsidized housing units from 1973 through 1979 were funded through the Section 8 program.[339] Section 8, established by the 1974 Housing and Community Development Act, facilitated the transfer of subsidized housing to the suburbs by providing renters with the expanded residential choice and mobility of rent certificates and vouchers.[340] It also funded small developments and mixed-income developments that would better fit into the suburban landscape than did large housing projects. Under the existing Section 8 program, eligible families received certificates or vouchers for rent subsidies in existing rental units.[341] Under the Section 8 New Construction program (which was repealed by the Housing and Urban-Rural Recovery Act of 1983), private owners received Section 8 funding to build and own new rental units.[342]

The Twin Cities regions' experienced a net gain of 12,255 subsidized housing units between 1974 to 1979, due almost entirely to Section 8 units.[343] Fifty-four percent were new construction, and forty-six percent were existing units subsidized through Section 8 certificates and vouchers.[344] From 1974 to 1979, the Twin Cities metropolitan area gained 7,300 Section 8 New Construction units and 6,334 Section 8 Existing units, for a total of 13,634 new Section 8 units.[345]

During 1975 and 1976, with the Section 8 programs in place, the suburbanization of Twin Cities subsidized housing accelerated. Over these two years, sixty-two percent of new subsidized housing activity was in the suburbs; the suburbs' share of the region's subsidized housing jumped ten

336. See *infra* notes 339-342 for a description of the Section 8 program.

337. BERKELEY POLICY ASSOCS., VOLUME TWO, *supra* note 333, at III-15 to III-16.

338. Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy, 1949 to 1999*, 11 HOUSING POL'Y DEBATE 489, 490 (2000) (noting that in January 1973, President Nixon "abruptly imposed a moratorium on all new subsidy commitments").

339. METRO. COUNCIL, 1979 SUBSIDIZED HOUSING, *supra* note 322, at 4 tbl.2.

340. *Id.* at 33.

341. *Id.* (noting that eligible families pay no more than twenty-five percent of their income toward rent—a housing authority pays the difference); Janet L. Pershing, METRO. COUNCIL, CHANGES IN THE SUBSIDIZED HOUSING MARKET IN THE TWIN CITIES METROPOLITAN AREA 1980-1989 8 (1990) (describing the use of certificates and vouchers in the Twin Cities area).

342. METRO. COUNCIL, 1979 SUBSIDIZED HOUSING, *supra* note 322, at 33.

343. *Id.* at 6 tbl.4.

344. *Id.* at 14.

345. *Id.* at 3 tbl.1, 14.

percentage points to twenty-eight percent.[346] During the 1970s, the annual distribution of new subsidized units to the suburbs increased from thirty-six percent in 1971 to sixty-nine percent in 1979, with a high of seventy-three percent in 1977.[347]

The Council's progressive policies also contributed to the region's success in the late 1970s. In 1976, HUD initiated the Areawide Housing Opportunity Plan (AHOP) to recognize and build upon the fair-share housing plans implemented by several area-wide planning agencies around the country.[348] The Metropolitan Council was one of the several visionary agencies that already had a regional fair-share plan in place.[349] As a result, the Twin Cities was one of the first regions to get HUD approval of its AHOP, and therefore to receive additional HUD funding.

The AHOP program provided incentives for fair-share development through bonus Section 8 funding.[350] In the first few years of the AHOP program, the Metropolitan Council received more than $7 million in Section 8 bonus funding, all of which the Council distributed in the suburbs.[351] The program accelerated subsidized housing development in the suburbs. In 1977, the Twin Cities suburbs got seventy-three percent of the region's new subsidized housing, and the suburbs' cumulative share of the subsidized housing increased from twenty-eight to thirty-four percent.[352] In 1978 and 1979, the suburban share of new subsidized housing was sixty and sixty-nine percent, respectively, increasing the suburbs' cumulative share to thirty-nine percent by 1979.[353]

B. Results of the Area-Wide Housing Opportunity Plan

Even among the most progressive metropolitan regions, the Twin Cities stands out for its success in shifting subsidized housing from central cities to suburbs. This conclusion is based in part on a 1979 report in which Berkeley Policy Associates attributes the Twin Cities' success in implementing the AHOP program in part to the Metropolitan Council's leadership in developing and enforcing its regional housing allocation

346. *Id.* at 6 tbl.3; BERKELEY POLICY ASSOCS., VOLUME TWO, *supra* note 333, at III-15 to III-16.

347. METRO. COUNCIL, 1979 SUBSIDIZED HOUSING, *supra* note 322, at 6 tbl.3.

348. BERKELEY POLICY ASSOCS., VOLUME TWO, *supra* note 333, at v.

349. *Id.* at III-2 to III-3.

350. *Id*. at III-20, III-31.

351. *Id*. at III-14, III-20.

352. METRO. COUNCIL, 1979 SUBSIDIZED HOUSING, *supra* note 322, at 6 tbls.3 & 4.

353. *Id.*

plan.[354] Other factors include the region's progressive tradition, its small population of people of color, and local market conditions that made subsidized housing attractive to developers.[355]

The Berkeley report analyzes the success of the AHOP program in the first five regions to qualify for AHOP bonus funding in the first two years of the program.[356] The Berkeley report examines the following regions: the Twin Cities, Los Angeles, Puget Sound (Seattle), Miami Valley (Dayton), and Washington, D.C. (which includes Alexandria, four Virginia counties, and two Maryland counties).[357] The data for the Los Angeles region are not tabulated in a way that allows meaningful comparison to the Twin Cities numbers, but comparisons with the other regions are possible.

Between January 1975 to February 1979, the Puget Sound suburbs' share of the region's subsidized housing increased four percentage points, to twenty-five percent.[358] In the Twin Cities, the suburban share of subsidized housing increased nineteen percentage points, to thirty-seven percent, during approximately the same period (July 1974 through December 1978).[359] The Puget Sound suburbs added 3,026 new units,[360] contrasted with 8,160 in the Twin Cities.[361] In the Washington, D.C. region, the suburban share of the region's subsidized housing increased eight percentage points, to forty-eight percent, between October 1971 and April 1979.[362] During the comparable period (July 1971 through December 1978), the suburbs' share in the Twin Cities increased twenty-seven percentage points, to thirty-seven percent.[363] The Washington, D.C. region added 8,508 new subsidized units in the suburbs,[364] contrasted with 10,881 in the Twin Cities suburbs.[365]

In the Miami Valley region, the suburban share of the region's subsidized housing increased eleven percentage points, to thirty-seven percent between 1975 and 1979.[366] During the same period, the suburban share in the Twin Cities also increased eleven percentage points, to thirty-

354. BERKELEY POLICY ASSOCS., VOLUME TWO, *supra* note 333, at III-1, III-20.
355. *Id.*
356. *See generally id.*
357. *Id.* at v.
358. *Id.* at I-15 tbl.6.
359. METRO. COUNCIL, 1979 SUBSIDIZED HOUSING, *supra* note 322, at 6 tbl.4.
360. BERKELEY POLICY ASSOCS., VOLUME TWO, *supra* note 333, at I-15 tbl.6.
361. METRO. COUNCIL, 1979 SUBSIDIZED HOUSING, *supra* note 322, at 6 tbl.4.
362. BERKELEY POLICY ASSOCS., VOLUME TWO, *supra* note 333, at II-26 tbl.6.
363. METRO. COUNCIL, 1979 SUBSIDIZED HOUSING, *supra* note 322, at 6 tbl.4.
364. BERKELEY POLICY ASSOCS., VOLUME TWO, *supra* note 333, at II-26 tbl.6.
365. METRO. COUNCIL, 1979 SUBSIDIZED HOUSING, *supra* note 322, at 6 tbl.4.
366. BERKELEY POLICY ASSOCS., VOLUME TWO, *supra* note 333, at IV-23.

nine percent.[367] The number of new suburban units reported in the Miami Valley region was much lower than the number in the Twin Cities,[368] but this comparison is not helpful. Not only did the Miami Valley region have less than half the population of the Twin Cities, but the report includes Section 8 Existing units in the total for the Twin Cities, but not for Miami Valley.[369]

As the Twin Cities example illustrates, progressive policies at the regional scale can increase both the number and suburban share of affordable housing units by focusing their development in suburban locations. Such policies, when enacted at a regional scale, can position a metropolitan region to leverage additional resources for expanding the stock of housing for its residents, better connecting them with opportunities throughout the region. In the context of contemporary programs, this can be done by siting units developed under the Low Income Housing Tax Credit[370] in locations away from areas of concentrated poverty and racial segregation.

V. POSITIVE INTEGRATION MEASURES

In many metropolitan areas, residential racial segregation is deeply entrenched. Even when people of color relocate from central cities to suburbs, the same White flight that isolated central city residents is often replicated in the suburbs. When the population of color in a suburb, typically an older, inner-ring suburb, reaches a "tipping point," White flight quickly can resegregate the area as the White population plummets. Proactive integrative measures are necessary to accomplish desegregation, as well as to prevent resegregation.

Recognizing the value of neighborhood stability, and the importance of racial integration, some communities have taken proactive steps to promote and preserve diversity. Two successful examples are discussed next.

A. Shaker Heights, Ohio

Shaker Heights is a suburb on the southeast border of Cleveland. Since the 1960s, it has made extraordinary efforts to address racial segregation in its community, and to promote integration of its neighborhoods and its schools. One commentator observed in the early 1990s that, "Shaker

367. METRO. COUNCIL, 1979 SUBSIDIZED HOUSING, *supra* note 322, at 6 tbl.4.

368. BERKELEY POLICY ASSOCS., VOLUME TWO, *supra* note 333, at IV-23 tbl.10.

369. *Id.*

370. 26 U.S.C. § 42 (2005); *see also* Orfield, *Racial Segregation and Community Revitalization*, *supra* note 163.

Heights is one of the few examples of sustained suburban racial integration in the United States."[371]

According to a report by the Institute on Race and Poverty,

> Shaker Heights officials have taken a systemic approach to the integration of their community, recognizing, for example, that housing patterns and school segregation are interrelated and should be addressed together. The school board and the school system administration have long been involved in the city's efforts to integrate its neighborhoods.[372]

In 1964, the mayor, the city council, and the board of education created the Shaker Citizens' Advisory Commission, to address community issues like housing segregation.[373] That same year, the Commission banned "the display of for-sale signs on front lawns to stave off the 'blockbusting' that had contributed to resegregation elsewhere."[374] According to the aforementioned Institute on Race and Poverty report, "the board of education also funded and sent representatives to the governing board of the Shaker Housing Office . . . to promote housing integration."[375] Moreover, in 1968, the school board employed a community worker "to recruit White residents to buy and rent homes in the Moreland elementary school district, which was on the way to becoming an all-Black neighborhood."[376]

In 1985, the city government and the school system also joined together to form the Fund for the Future of Shaker Heights, "an innovative incentive program encouraging residential integration."[377] The Fund uses private donations to "provide[] low-cost mortgage loans of $3000 and $6000 to Whites who move into a neighborhood that is more than 50% Black, and to Blacks moving to a neighborhood that is more than 90% White.[378] According to Donald L. DeMarco, director of community services for the city, "[i]f you look at [the Fund] as a housing program, you say yes, maybe this is something that a board of education should not be involved with, [but] it actually is an integrative organization more than a housing

371. W. DENNIS KEATING, THE SUBURBAN RACIAL DILEMMA: HOUSING AND NEIGHBORHOODS 112 (1994).

372. SUSAN HARTIGAN ET AL., INST. ON RACE & POVERTY, RACISM AND THE OPPORTUNITY DIVIDE ON LONG ISLAND 26 (2002), *available at* http://www.eraseracismny.org/downloads/reports/IRP_Full_Report_with_Maps.pdf.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* (citing INST. ON RACE & POVERTY, STUDENT VOICES ACROSS THE SEPECTRUM: THE EDUCATIONAL INTEGRATION INITIATIVES PROJECT 78-79 (2000)).

377. *Id.* at 27.

378. *Id.*

organization."[379]

Having city governments and school systems work together to promote integrated communities is one important technique for developing and maintaining stably integrated communities.

B. South Orange – Maplewood, New Jersey

The Fund for an Open Society ("Open Society"), an organization dedicated to producing racially and ethnically integrated communities, helps several communities implement policies similar to those employed in Shaker Heights.[380] Open Society has worked with South Orange and Maplewood, New Jersey since 1996 to create an inclusive community.[381]

"South Orange and Maplewood are two middle-class suburbs which share a school district."[382] In the mid-1990s, a drop in property values, combined with increased racial diversity in the local housing market, led some community leaders to consider that White homebuyers avoided South Orange and Maplewood in the fear that the communities would resegregate.[383] These community leaders decided to take "a race-conscious approach to community-building."[384] With help from Open Society, these leaders undertook "a comprehensive, multi-pronged intentional integration initiative" with two central objectives: (i) "[b]alance the demand for housing among whites and people of color;" and (ii) "[b]alance the participation of people of color and whites in the power structure and civic life of the community."[385]

With funding from the two municipal governments, community leaders formed a nonprofit organization, the South Orange/Maplewood Community Coalition on Race (the "Coalition"), "to implement the

379. *Id.* (citing Peter Schmidt, *Courts, School Boards Testing Strategies To Integrate Neighborhoods, Schools*, EDUC. WK., Feb. 26, 1992).

380. *See* FUND FOR AN OPEN SOC'Y, RACIAL AND ETHNIC INTEGRATION: BUILDING EQUITY AT THE COMMUNITY LEVEL 2 (2003) (on file with author) [hereinafter FUND FOR AN OPEN SOC'Y, RACIAL AND ETHNIC INTEGRATION] (describing Open Society as "the nation's only organization whose mission is to promote racially and ethnically integrated communities"); Fund for an Open Society, How We Work, http://www.opensoc.org/aboutus/work.html (last visited Feb. 20, 2006) (describing the Open Society's desire to create a "unitary housing market, where people of more than one race are competing together for available housing").

381. *See, e.g.*, Fund for an Open Society, Demonstrable Results: A Case Study, http://www.opensoc.org/aboutus/work2.html (last visited Feb. 20, 2006).

382. *See* FUND FOR AN OPEN SOC'Y, RACIAL AND ETHNIC INTEGRATION, *supra* note 380, at 2.

383. *Id.*

384. *Id.*

385. *Id.*

intentional integration program."[386] The Coalition markets the community to "people who were underrepresented in the housing market, which in this case was whites.[387] The Coalition ran advertisements in local newspapers "positioning South Orange and Maplewood as attractive communities for families seeking a suburban lifestyle and strong public schools, but wishing to live in a cosmopolitan neighborhood."[388] The Coalition also offers potential homebuyers tours designed "to subvert potential steering by real estate agents."[389] Moreover, the Coalition communicates with real estate agents to make them "aware of all the positive aspects of the communities."[390] Furthermore, the Coalition created a fair housing organization (the Morris, Union, Sussex, and Essex Fair Housing Council) that conducts paired testing[391] "to identify whether discrimination and steering exist in the housing market."[392]

The Coalition also offers financial incentives to homebuyers participating in the integration initiative: "Whites and people of color . . . [who] purchase[d] homes in parts of the community where their race is under-represented . . . [could obtain] a second mortgage of $10,000 at a significantly reduced interest rate."[393]

In the broader community, the Coalition pursues an "integration culture" by "encouraging residents' comfort level with talking openly about race, by building inter-racial trust and relationships, and by working to address potential problems."[394] It has sponsored a variety of cultural, social and educational events.[395]

Since its inception in 1996, the Coalition has made significant progress toward "creating and sustaining intentional integration."[396] Positive results include:

- South Orange and Maplewood housing values are "increasing at a proportionately higher rate" than those of surrounding segregated suburbs;[397]
- Home Mortgage Disclosure Act data "shows that whites and

386. *Id.*
387. *Id.* at 3.
388. *Id.*
389. *Id.*
390. *Id.*
391. *See infra* notes 424-427 and accompanying text for a description of paired testing.
392. FUND FOR AN OPEN SOC'Y, RACIAL AND ETHNIC INTEGRATION, *supra* note 380, at 3.
393. *Id.*
394. *Id.*
395. *Id.* at 3-4.
396. *Id.* at 4.
397. *Id.*

people of color are now buying homes in every census tract in the community";[398]

- *Money Magazine* named Maplewood "one of the Top Ten communities in the nation, specifically citing its diversity";[399] and
- Increased representation by people of color in both town councils.[400]

Thus, as in Shaker Heights, coordinated pro-integration efforts have benefited Maplewood and South Orange. Yet, these types of coordinated pro-integration measures are, unfortunately, rare. The absence of regional-scale policy approaches in most metropolitan areas impedes pro-integration efforts.

Recognizing the value and successes of these integration efforts, W. Dennis Keating nevertheless observes that, for significant progress to be made, it is necessary to have "metropolitan strategies that would apply to all suburbs, not just those few that voluntarily have tried to deal with racial issues in housing."[401] Because dynamics within cities in a metropolitan region play out at the regional scale, Keating concludes that "[t]he lack of a viable metropolitan fair housing strategy or, in the alternative, countywide incentives for pro-integrative policies has resulted in piecemeal progress at best."[402]

C. Fostering Stable Racial-Ethnic Diversity

The two case studies (Shaker Heights, Ohio and South Orange and Maplewood, New Jersey)[403] illustrate the value of proactive, multifaceted efforts to promote stable integration. Researchers have observed that communities characterized by "self-conscious diversity" are more stable than communities that do not actively work to develop and sustain diversity.[404] For example, Philip Nyden, Michael Maly, and John Lukehart reached that conclusion after examining the characteristics of fourteen stable racially and ethnically diverse urban communities.[405] Based on their

398. *Id.*
399. *Id.*
400. *Id.*
401. KEATING, *supra* note 371, at 72.
402. *Id.*
403. *See supra* Parts V.A and V.B respectively.
404. Philip Nyden et al., *The Emergence of Stable Racially and Ethnically Diverse Communities: A Case Study of Nine U.S. Cities*, 8 HOUSING POL'Y DEBATE 491, 512-13 (1997).
405. *Id.* at 497.

research, Nyden, Maly, and Lukehart recommended the following policies and community-based strategies to encourage and maintain stably integrated communities:

- Expect government leaders and agencies proactively to promote diverse neighborhoods.[406]
- Encourage consciousness on the part of urban planners "to examine the consequences of their actions . . . that may either destabilize existing neighborhoods or thwart the development of new diverse neighborhoods."[407]
- Maintain and strengthen fair housing laws.[408]
- Encourage public and private funding and programs that promote mixed-income, racially diverse communities.[409]
- Develop and disseminate information on strategies to strengthen community-based organizations.[410]
- Establish citywide and regional networks of diverse community organizations.[411]
- Develop "[l]eadership training institutes for residents of diverse communities."[412]
- Maintain quality schools and community safety programs in diverse neighborhoods.
- Encourage the creation of programs that support mixed-income development.
- Encourage local chambers of commerce and other business associations to view diverse communities "as potentially strong markets."[413]
- Encourage the media to tell "the positive stories of diverse community successes."[414]
- Encourage ""[l]ocal community organizations, existing institutions, and local governments . . . to be receptive to new groups and be willing to work with them on common community issues."[415]

406. *Id.* at 523.
407. *Id.*
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.* at 524.
412. *Id.*
413. *Id.* at 525.
414. *Id.*
415. *Id.*

- Develop programs to create jobs and improve access to jobs in surrounding communities.[416]
- Conduct public discussions about whether "maintaining ethnic- and race-based political constituencies undermines efforts to develop and sustain diverse communities."[417]

Legislation should include provisions supporting positive integration measures like those that have contributed to maintaining stable racially integrated communities in places like Shaker Heights, Ohio, and South Orange and Maplewood, New Jersey. These measures must recognize that housing patterns and school integration are interrelated and thus require joint efforts by local government and school officials. Positive integration measures also can include funding and other support for policies such as the creation of local committees or agencies dedicated to residential integration, and the provision of low-interest mortgage loans to homebuyers in areas where the homebuyers' race is under-represented. Government funding as well as private foundation funding should be tapped to support these initiatives.

VI. RECOMMENDATIONS

Land use and housing policies should be marshaled to reduce residential racial segregation and concentrated poverty. Two recommendations are foundational for policy development. The first is to ensure that policies address an effective geographic scale: policies must apply to a statewide or, at least, regional area. If adopted only in isolated municipalities or counties, land-use policies can increase urban sprawl and the resulting segregation by encouraging leapfrog development. Developers and home buyers unwilling to abide by land use or housing policies in one place will take their development elsewhere.[418]

The second foundational recommendation is to adopt a coordinated policy approach. Oregon's comprehensive land use legislation is a solid starting point for crafting a system of laws to facilitate residential integration by providing access to affordable housing throughout a metro region. To that suite of policies can be added inclusionary housing approaches, effectively sited subsidized housing, and positive integration measures.

This Article has focused on policies to remedy structural discrimination that restricts access to affordable housing and to opportunities in vibrant

416. *Id.*
417. *Id.*
418. Kushner, *supra* note 12, at 53.

and developing portions of metro areas. The first eight recommendations that follow are strategies for addressing structural discrimination. To ensure access to opportunity and foster integration, however, we also must confront overt housing discrimination, which is the focus of the concluding recommendation.

1. Prohibit Exclusionary Zoning

The logical first step toward providing affordable housing throughout a region is to eliminate laws and policies that prohibit its development. The most effective approach is that taken by Oregon to standardize local governments' zoning authority by enacting statewide criteria to which all local zoning provisions must adhere. An aggressive prohibition on exclusionary zoning should require local planning units to project their affordable housing needs and to zone in a manner that permits development of housing types to meet those needs. No jurisdiction should be permitted blanket prohibitions on attached housing, multifamily housing, manufactured homes, or government-assisted housing.

A more passive approach, seen in Massachusetts, is to streamline the permit process for affordable housing developments and to provide state subsidy programs to promote mixed-income development. If a legislature chooses a passive approach for discouraging exclusionary zoning, it must modify the Massachusetts model by distinguishing between family housing and housing for the elderly. Legislation must provide that all, or at least a substantial portion, of the new housing created be available to families with children.

2. Require Comprehensive Planning and Provide for Dedicated Enforcement

Oregon's legislation is the best example of a coordinated system of land use regulation. It manages growth and ensures that localities attend to the anticipated housing needs of all residents, including those needing affordable housing. One is the comprehensive planning requirement, which requires each jurisdiction to predict and provide for the range of housing needs. The other is the enforcement system, which includes review entities dedicated to reviewing only land use issues, and prompt review procedures.

3. Use Urban Growth Boundaries to Reduce Sprawl and Promote Infill

UGBs that contain sprawl can alleviate the spatial isolation of central

city residents from jobs and other opportunities in outlying suburbs. UGBs should be part of a coordinated land use system at a regional scale to avoid "leapfrogging" and extreme impacts on the land and housing markets. In addition, policies to facilitate development and ensure adequate housing supplies should be part of any UGB policy. These include expedited review of proposed developments that include affordable housing, density bonuses, higher-density zoning, and periodic review of the supply of land available for development.

4. Adopt Proactive Policies to Prevent Displacement

Policies like UGBs that promote infill development must be accompanied by policies to prevent such development from displacing low-income persons and residents of color. Besides prohibiting exclusionary zoning, displacement-mitigating strategies should include "fair share" inclusionary housing policies. These can require any infill development to include affordable housing units, and can provide for subsidies, such as housing trust funds, to help finance affordable housing construction.[419]

5. Link Affordable Housing Development with Public Transportation

If affordable housing is developed at sites where public transit is available, residents without personal vehicles will have greater access to employment and other opportunities. James Kushner has proposed the following transit-related and equity-oriented initiatives that can help guide policy development:

1. Make the infrastructure investment to create efficient, high-speed inter-city trains and convenient local transit in urban areas.
2. Increase funding for urban transit and "Transit-oriented development" (TOD): mixed-use, high-density walkable pedestrian neighborhoods around stops.
3. Condition transit subsidies on land use conversion to TOD around stations and stops.
4. Condition transit funding on cities establishing a transit corridor plan with identified routes implemented through the use of TODs around stops.
5. Condition transit funding on the establishment of "urban growth boundaries" that accommodate reasonably anticipated regional growth.

419. *Id.* at 68.

6. Establish incentives for in-fill development. Empowerment and enterprise zones should be available to encourage TOD development along transit corridors in lower-income communities in need of revitalization.
7. Establish a tax credit program offering incentives for urban infill development.
8. Require inclusion of a minimum percentage of low-income housing tax-credit financed units and offer reservation priority for developers of TODs.
9. Establish a housing program generating a mixture of incomes linked by transportation and employment access, targeting infill development along transit corridors.
10. Make necessary modifications to the federal Community Development Block Grant Program to authorize the use of block grant funds for development of TODs in low-income communities.
11. Condition federal highway and transit funding on the states' requiring a transit corridor plan element in local comprehensive plans that designate TOD development at transit stops.
12. Modify state redevelopment laws to allow their use as an alternative to traditional blight determination in executing infill TOD plans, albeit with stringent restrictions favoring rehabilitation and reuse over clearance or demolition.
13. Eliminate sprawl-generating subsidies such as funds for suburban highway and road construction or the provision of subsidized water, or sewer facilities and service, on the urban fringe. Structure compensating subsidies that favor urban infill and TOD development.
14. Plan for the use of parks and green space throughout the community to make attractive pedestrian corridors.
15. Establish regional government authority to plan transit and corridor development rather than allowing traditional local autonomy.
16. Establish a regional tax-sharing scheme that will encourage affordable housing inclusion and discourage destructive sales tax competition.[420]

420. *Id.* at 58-60.

6. Adopt Inclusionary Housing Policies

Policies that encourage or, better yet, require each jurisdiction to provide its "fair share" of affordable housing can help reduced segregation and concentrated poverty if designed to include sufficient low-income housing and to ensure a race-conscious fair share for non-White residents. Subsidies can assist production of very low-income units. Lotteries and assignment of a substantial share of the units to public housing authorities can help ensure that people of color have access to these housing opportunities.

To be effective, inclusionary housing policies should apply to developments as small as ten units, or there should be provisions for developers to "buy-out" the requirement, with the funds going to support low-income housing development. If most units are maintained as rentals, and if the units are not permitted to revert to market rates after a short period, these policies should better serve poor and non-White residents within a metro region.

7. Promote Positive Integration Measures

Legislation should include provisions supporting positive integration measures like those that have contributed to maintaining stable racially integrated communities in places like Shaker Heights, Ohio, and South Orange and Maplewood, New Jersey. Among the important features of these measures is recognition that housing patterns and school integration are interrelated, leading to joint efforts by local government and school officials to work together to preserve and create diverse communities. Positive integration measures also can include funding and other support for policies such as the creation of local committees or agencies dedicated to residential integration, and the provision of low-interest mortgage loans to purchasers of homes in areas where their race is under-represented. Government funding as well as private foundation funding should be tapped to support these initiatives.

Based on their empirical research of stable diverse communities, Nyden, Maly, and Lukehart recommended a suite of policies and community-based strategies to encourage and maintain stably integrated communities.[421] These pro-integration measures can be added to the other approaches that this article recommends.

421. *See supra* notes 406-417 and accompanying text (describing the various policies that the authors recommend).

8. Effectively Site Subsidized Housing

Strategies for siting subsidized housing should disperse units throughout a metro region rather than concentrate them. In most regions, that means increasing the number and proportion of units available in suburban locations, especially newer, fast-growing suburbs. Any policies should provide that housing developed under the Low Income Housing Tax Credit[422] be dispersed throughout a metro region and not be sited either in areas of concentrated poverty or areas that are racially segregated or resegregating.

9. Enforce and Strengthen Laws Prohibiting Discrimination in Housing Markets

Unlike the preceding recommendations, this one addresses overt discrimination. While not the topic of this article, overt discrimination in housing remains a barrier to accessing opportunity. While it may be lessening, discrimination against Black and Hispanic renters and homebuyers persists in major metropolitan areas.[423] Thus, rigorous enforcement of existing federal, state, and local laws prohibiting discrimination in the housing market is essential, and these laws must be strengthened where necessary.

One can use paired testing to detect discrimination in the housing market.[424] Paired testing "control[s] for differences between white and minority homeseekers, and directly measure[s] patterns of adverse treatment based on a homeseeker's race or ethnicity."[425] Pairs of testers—one White and one Black or Hispanic—are provided with identical credentials and trained to present themselves to real estate agents or landlords, posing as potential renters or homebuyers.[426] Although the mortgage lending process is more complex, making paired testing more difficult, a recent HUD publication reports that paired testing also can be an effective tool for research and enforcement of anti-discrimination laws in mortgage lending.[427] To reduce overt discrimination, state and local

422. 26 U.S.C. § 42 (2005); *see also* Orfield, *Racial Segregation and Community Revitalization*, *supra* note 163.

423. TURNER ET AL., *supra* note 14, at 8-1 to 8-5; YINGER, CLOSED DOORS, OPPORTUNITIES LOST, *supra* note 14, at 49.

424. TURNER ET AL., *supra* note 14, at i.

425. *Id.*

426. *Id.*

427. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., ALL OTHER THINGS BEING EQUAL: A PAIRED TESTING STUDY OF MORTGAGE LENDING INSTITUTIONS ii (2002), *available at* http://www.huduser.org/Publications/PDF/aotbe.pdf.

governments must be pushed to fund ongoing paired testing, either by government agencies or by nonprofit fair housing organizations.

CONCLUSION

Existing examples of housing and land use policies that promote a racially and economically integrated society are valuable. While imperfect, they are heartening and instructive illustrations. By adopting and refining the best of the policies and practices already in use, the harmful effects of sprawl and concentrated poverty on non-White and poor residents can be reduced.

The racial segregation and concentrated poverty resulting from structural barriers such as sprawl and exclusionary zoning operate to isolate non-White and poor residents far from places of opportunity. Each day they engrave inequality into the landscapes of our metropolitan regions. In response, communities can promote development that removes barriers to opportunity by making affordable housing available throughout a metropolitan region. One way to ensure that access to opportunity is available in a metropolitan region, irrespective of race or ethnicity, is to adopt proactive housing and land use policies.