

## Embracing the Excluded: Using Mandatory Inclusionary Zoning to Affirmatively Further Fair Housing in St. Louis

Victor J. Pinedo

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# NOTE

## EMBRACING THE EXCLUDED: USING MANDATORY INCLUSIONARY ZONING TO AFFIRMATIVELY FURTHER FAIR HOUSING IN ST. LOUIS

*Victor J. Pinedo\**

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\* Washington University in St. Louis, B.S.B.A. Marketing & Psychology, 2013; Cornell Law School, J.D. Candidate 2017. I would like to extend a sincere thank you to Dean Eduardo Peñalver for his invaluable feedback and thoughtful suggestions for this Note. Many thanks as well to talented editors at the *Cornell Journal of Law and Public Policy* for their sharp editing and comments—your work has definitely made this piece better. I would also like to express my never-ending gratitude to Christina Lee for inspiring me to be the best I can be every single day. Finally, thank you to my parents, Victor and Magaly Pinedo, for all they have done for me and all their support in my life.

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## INTRODUCTION

You decide to take a walk, heading north out the door. As you begin your journey, you walk through large, gated neighborhoods with multi-story brick homes, green, luscious lawns, and streets shaded by tall white oaks and maple sugar trees. Continuing on, you notice a drastic change. Facing you are dilapidated houses, a plethora of vacant lots, and deteriorating, minimally maintained streets and infrastructure. The contrast is striking and you cannot help but wonder how long these conditions have existed and whether they will persist. No, this is not a scene from *A Tale of Two Cities*. Welcome to St. Louis, Missouri.<sup>1</sup>

This scene is nothing unique for St. Louis.<sup>2</sup> The city, one with a rich history and vibrant culture, has been plagued by a troubling history of segregation and racial inequality.<sup>3</sup> At the heart of this inequality is an

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<sup>1</sup> See Chico Harlan, *In St. Louis, Delmar Boulevard is the Line That Divides a City by Race and Perspective*, WASH. POST (Aug. 22, 2014), [https://www.washingtonpost.com/national/in-st-louis-delmar-boulevard-is-the-line-that-divides-a-city-by-race-and-perspective/2014/08/22/de692962-a2ba-4f53-8bc3-54f88f848fdb\\_story.html](https://www.washingtonpost.com/national/in-st-louis-delmar-boulevard-is-the-line-that-divides-a-city-by-race-and-perspective/2014/08/22/de692962-a2ba-4f53-8bc3-54f88f848fdb_story.html).

<sup>2</sup> See Kevin McDermott, *St. Louis Region Still Among Worst In Nation for Black-White Economic Disparity, Says Report*, ST. LOUIS POST-DISPATCH (July 29, 2015), [http://www.stltoday.com/news/local/crime-and-courts/st-louis-region-still-among-worst-in-nation-for-black/article\\_815c05d5-38bc-5271-ad45-79ef9b0c96e5.html](http://www.stltoday.com/news/local/crime-and-courts/st-louis-region-still-among-worst-in-nation-for-black/article_815c05d5-38bc-5271-ad45-79ef9b0c96e5.html).

<sup>3</sup> Cultural Resources Office, *A Preservation Plan for St. Louis Part I: Historic Contexts 8—The African-American Experience*, STLOUIS-MO.GOV, <https://www.stlouis-mo.gov/government/departments/planning/cultural-resources/preservation-plan/Part-I-African-American-Experience.cfm> (last visited Mar. 12, 2016) [hereinafter Preservation Plan for STL].

overall trend of segregative housing patterns and zoning policies in the St. Louis metropolitan area—a trend that has bred significant outrage amongst the St. Louisan minority population.<sup>4</sup> This disparity—particularly between the North and South—is evident in the makeup of the city and counties, and Delmar Boulevard serves as a symbol of this jarring inequality in St. Louis.<sup>5</sup> According to a recent joint study by Washington University and St. Louis University, to the south of Delmar, home values average \$330,000, median incomes are at \$47,000, and the population is 70% white, while to the north, home values average \$78,000, median incomes are at \$22,000, and the population is 99% African American.<sup>6</sup> The city and counties of St. Louis have attempted to mitigate these racial disparities, but even with the implementation of Fair Housing initiatives, the disparities endure.<sup>7</sup> As tensions have risen over the decades, so too has the exodus of citizens from the region.<sup>8</sup>

Given the issues of segregation in St. Louis, city and county officials must effectuate changes to zoning practices that will overcome the city's long history of segregation. The U.S. Department of Housing and Urban Development's ("HUD") recent "Final Rule on Affirmatively Furthering Fair Housing" makes the need for implementing new zoning practices in St. Louis even more imperative.<sup>9</sup> By mandating affordable housing production as a prerequisite for development, mandatory inclusionary zoning may be the answer to "affirmatively further" fair housing and facilitate integration in St. Louis.<sup>10</sup>

This Note will consider both St. Louis's history of segregation and the policies underlying the Fair Housing Act ("FHA"). The Note will then explain how the facilitation of mixed-income communities through mandatory inclusionary zoning will establish "meaningful actions" to end segregation and foster the inclusive communities envisioned by

<sup>4</sup> Richard Rothstein, *The Making of Ferguson*, AM. PROSPECT (Oct. 15, 2014), <http://prospect.org/article/making-ferguson-how-decades-hostile-policy-created-powder-keg>.

<sup>5</sup> See WASHINGTON UNIV. IN ST. LOUIS & SAINT LOUIS UNIV., FOR THE SAKE OF ALL: A REPORT ON THE HEALTH AND WELL-BEING OF AFRICAN AMERICANS IN ST. LOUIS AND WHY IT MATTERS FOR EVERYONE 29–30 (2014) [hereinafter FOR THE SAKE OF ALL].

<sup>6</sup> *Id.* at 29 (noting that Delmar Boulevard is the "example of modern-day segregation in St. Louis").

<sup>7</sup> See Rebecca Rivas, *Housing Conference Focuses on Needed Policy Changes*, ST. LOUIS AM.: LOC. BUS. (Feb. 11, 2016), [http://www.stlamerican.com/business/local\\_business/article\\_372ea42a-d041-11e5-8667-7f3fa1ed79ef.html](http://www.stlamerican.com/business/local_business/article_372ea42a-d041-11e5-8667-7f3fa1ed79ef.html) (noting that current affordable housing programs in St. Louis create gentrification and segregation and that the Affirmatively Furthering Fair Housing final rule would help to breakdown segregation that is "maintained . . . by design").

<sup>8</sup> Colin Gordon, *St. Louis Blues: The Urban Crisis in the Gateway City*, 33 ST. LOUIS U. PUB. L. REV. 81, 82 (2013) (discussing how St. Louis has fallen from the eighth largest city in the United States to the fifty-third largest).

<sup>9</sup> 80 Fed. Reg. 42,272 (Aug. 17, 2015) (to be codified at 24 C.F.R. pt. 5).

<sup>10</sup> Tim Iglesias, *Maximizing Inclusionary Zoning's Contributions to Both Affordable Housing and Residential Integration*, 54 WASHBURN L.J. 585, 587 (2015).

HUD's Final Rule.<sup>11</sup> Using this policy framework, this Note will argue that mandatory inclusionary zoning is a more compelling solution to reverse the detrimental effects of St. Louis's past zoning practices.<sup>12</sup> Accordingly, this Note will proceed in three parts. Part I will set forth the history of St. Louis's zoning practices and the FHA's "Affirmatively Furthering Fair Housing" mandate. Part II will explore the different forms of inclusionary zoning and will make the argument that mandatory inclusionary zoning is the more compelling choice. Part III will discuss how region-wide mandatory inclusionary zoning will best facilitate integration and establish compliance with HUD's Final Rule.

## I. BACKGROUND

### A. *History of Segregation in St. Louis*

#### 1. Early Roots

The racial and economic disparities of St. Louis are a product of land-use policies conducive to regional segregation and suburban "White Flight."<sup>13</sup> The earliest discriminatory zoning practices emerged in 1916 in the form of racial-segregation ordinances that prevented homebuyers from purchasing housing in neighborhoods that were composed of a population made up of 75% of another race.<sup>14</sup> Although the Supreme Court's ruling in *Buchanan v. Warley* outlawed this form of segregation,<sup>15</sup> the trend of segregationist policies continued.<sup>16</sup> Undeterred by *Warley*, local communities and neighborhood associations created restrictive covenants blocking ownership and occupation of houses by African Americans,<sup>17</sup> subsidized exclusionary suburban developments, and passed spot zoning policies to prevent African Americans from living and integrating within white neighborhoods.<sup>18</sup>

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<sup>11</sup> 24 C.F.R. § 5.150 (2015).

<sup>12</sup> See, e.g., Rigel C. Oliveri, *Fair Housing and Ferguson: How the Stage Was Set*, 80 Mo. L. REV. 1053, 1067–69 (2015) (discussing the implications of discriminatory housing practices on the Michael Brown shooting and subsequent Ferguson riots).

<sup>13</sup> See, e.g., RICHARD ROTHSTEIN, ECON. POLICY INST., *THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES* 5 (2014) (describing the intents of federal, state, and local governments to segregate cities).

<sup>14</sup> Preservation Plan for STL, *supra* note 3; ROTHSTEIN, *supra* note 13 at 7 (describing details of the St. Louis Real Estate Exchange's referendum which lead to the passing of the 1916 ordinance).

<sup>15</sup> 245 U.S. 60 (1917).

<sup>16</sup> Preservation Plan for STL, *supra* note 3. Indeed, city officials relied on "race-neutral" initiatives to create segregation in residential areas. See ROTHSTEIN, *supra* note 13, at 7.

<sup>17</sup> The Supreme Court would eventually outlaw the use of racial covenants in its landmark case, *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>18</sup> See ROTHSTEIN, *supra* note 13, at 6 (listing the various federal, state, and local policies used to segregate the St. Louis metropolitan area).

As time progressed, the City continued to implement zoning practices that maintained the segregationist policies.<sup>19</sup> For example, the 1942 City Plan Commission reclassified many African American residential areas to allow for industrial activities.<sup>20</sup> These zoning practices permitted the building of taverns, liquor stores, nightclubs, and prostitution houses in predominantly African American neighborhoods, all of which ultimately deteriorated these residential areas.<sup>21</sup> While conditions in these neighborhoods worsened, the suburbs began to pass facially neutral exclusionary zoning policies, such as zoning for large lot, single-family homes, that made suburban housing unaffordable to all but upper-middle and high class families, thereby aggravating the segregation.<sup>22</sup> To complicate matters, the City introduced segregated public-housing projects that transitioned many African Americans to the City's north and further segregated the metropolitan area.<sup>23</sup> Remarkably, even the federal government played a role in this segregation by earmarking certain funds for these public housing projects.<sup>24</sup> Most significantly, the Federal Housing Administration enacted redlining policies that allowed neighborhoods to approve, deny, or limit financial services based on racial or ethnic considerations alone.<sup>25</sup> These discriminatory policies would ultimately pave the way for modern-day segregation in St. Louis.<sup>26</sup>

## 2. Modern Practices and Further Entrenchment

Even as overt racial segregation in St. Louis declined, opposition to integration initiatives persisted. Indeed, officials continued to use the

<sup>19</sup> *Id.* at 7–9.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.* at 9.

<sup>22</sup> *Id.* at 9.

<sup>23</sup> Preservation Plan for STL, *supra* note 3. For an in-depth discussion of the Pruitt-Igoe Projects and their subsequent failures, see Michael Koh, *The St. Louis Problem: Pruitt-Igoe And the Social Factors That Led to Its Eventual Destruction*, THOUGHT CATALOG (May 8, 2014), <http://thoughtcatalog.com/michael-koh/2014/05/the-st-louis-problem-pruitt-igoe-and-the-social-factors-that-led-to-its-eventual-destruction/>.

<sup>24</sup> Camille Phillips, *Researcher: St. Louis Segregation is a Legacy of Deliberate Federal Policy*, ST. LOUIS PUB. RADIO (Mar. 5, 2016), <http://news.stpublicradio.org/post/researcher-st-louis-segregation-legacy-deliberate-federal-policy#stream/0>.

<sup>25</sup> See FAIR HOUS. CTR. OF GREATER BOS., *Historical Shift from Explicit to Implicit Policies Affecting Housing Segregation in Eastern Massachusetts: 1934–1968: FHA Mortgage Insurance Requirements Utilize Redlining*, <http://www.bostonfairhousing.org/timeline/1934-1968-FHA-Redlining.html> (last visited Oct. 15, 2016). These redlining policies ultimately led to overt personal and agency bias that affected loan guarantees in favor of white neighborhoods. *Id.*

<sup>26</sup> See Carla Murphy, *How Residential Segregation Still Divides St. Louis*, COLORLINES (Oct. 16, 2014), <http://www.colorlines.com/articles/how-residential-segregation-still-divides-st-louis> (“As any St. Louisan will tell you, you can’t talk about what’s wrong . . . without first understanding the region’s patchwork of municipal boundaries—holdovers from the Jim Crow Era . . .”).

exclusionary zoning policies to ensure that the region's residential segregation would continue.<sup>27</sup> These zoning policies effectively maintained the blockage of low- to moderate-income families from residing in the suburbs—a policy that would sustain African-Americans' entrenchment in the North County section of St. Louis.<sup>28</sup> As time passed, efforts to facilitate urban renewal emerged, but many of these initiatives fell short of their intended goals.

This history of segregation came with significant consequences. City investment declined, which led to decreased home values.<sup>29</sup> Moreover, tax bases shrunk in size, which led to lowered education funding, reduced job opportunities, and diminished community development.<sup>30</sup> As a result, areas like North County boast some of the highest poverty rates.<sup>31</sup> Taken together, these factors both cultivated St. Louis's current dilapidated state and deprived residents of advancement and growth opportunities.<sup>32</sup> Expectedly, despite a decreasing trend over time, St. Louis continues to boast one of the highest rates of segregation in the United States.<sup>33</sup>

### 3. Government Fragmentation—A Compounding Factor

To fully understand St. Louis's segregation, we must discuss the region's government fragmentation. Beginning in 1876 with the "Great Divorce,"<sup>34</sup> when St. Louis City separated from St. Louis County, this fragmentation has undoubtedly impacted the area's racial and economic

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<sup>27</sup> See *id.*

<sup>28</sup> *Id.*

<sup>29</sup> FOR THE SAKE OF ALL, *supra* note 5, at 28.

<sup>30</sup> *Id.*

<sup>31</sup> See *id.* at 30 (indicating that the northern portions of St. Louis have some of the highest rates of poverty, falling between 19% to 54% of all residents in these areas). These studies have also noted that areas with higher concentrations of African American residents often have higher rates of poverty and higher rates of death from chronic disease. *Id.*

<sup>32</sup> See *id.* at 17–18.

<sup>33</sup> EAST-WEST GATEWAY COUNCIL OF GOV'TS, WHERE WE STAND, RACIAL SEGREGATION AND DISPARITY 4 (2014); JOHN R. LOGAN & BRIAN J. STULTS, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 5 (Mar. 24, 2011); see also Leland Ware, *The Demographics of Desegregation: Residential Segregation Remains High 40 Years After the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1155, 1165 (2005); .

<sup>34</sup> Peter W. Salsich, Jr. & Samantha Caluori, *Can St. Louis City and County Get Back Together? (Do Municipal Boundaries Matter Today?)*, 34 ST. LOUIS U. PUB. L. REV. 13, 18–19 (2014). The "Great Divorce" was part of a broader proposal by Missouri to establish "home rule" in St. Louis City, essentially granting the city a substantial amount of governing power. *Id.* at 15. One of the primary reasons driving the City's split from the County was due to City residents feeling deprived of their fair share of tax revenue between the city and county residents. *Id.* at 20. However, as a result of the separation and the newly created boundaries of the city, St. Louis City became a landlocked county and assumed St. Louis County's existing debt, while St. Louis County continued to grow by annexing existing municipalities, incorporating new municipalities, and establishing urban services in unincorporated areas. *Id.* at 16.

composition.<sup>35</sup> While repeated attempts to re-merge the city and county have failed,<sup>36</sup> to date a total of 17 counties and 309 municipalities have emerged throughout the St. Louis metropolitan region.<sup>37</sup>

A major consequence of this fragmentation was the emergence of home-rule policies amongst the various municipalities in the region. These policies further divided county and city residents and allowed the now-fragmented set of municipalities in the county to strengthen their own wealth and prosperity.<sup>38</sup> What materialized was a “patchwork of insular corporate units” that created a “small subset of affluent localities.”<sup>39</sup> Meanwhile, the city fell into despair. The County grew wealthier while the City continued to lose a significant tax base as flight from the City to the suburbs increased.<sup>40</sup>

There is no doubt that this fragmentation promoted the outpour of segregative housing practices that haunt the region today.<sup>41</sup> Indeed, as fair housing advocates explain, the government fragmentation was one of the most significant factors driving segregation.<sup>42</sup> In particular, the current entrenchment of minorities and poverty in Northern St. Louis is a product of the suburban municipalities’ pervasive and exclusionary home-rule policies.<sup>43</sup> To find a solution that will reinvigorate St. Louis and break down the long-entrenched segregation that plagues the city, officials must account for—and potentially dispose of—this fragmentation.<sup>44</sup>

### B. *The Fair Housing Act and HUD’s Final Rule*

Congress passed the FHA in 1968 in a concerted effort to prohibit and eliminate discrimination based on race, color, religion, sex, and national origin.<sup>45</sup> The FHA was the first of its kind, setting forth compre-

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<sup>35</sup> See Colin Gordon, *Patchwork Metropolis: Fragmented Governance and Urban Decline in Greater St. Louis*, 34 ST. LOUIS U. PUB. L. REV. 51, 62–65 (2014).

<sup>36</sup> See Salsich & Caluori, *supra* note 34, at 20.

<sup>37</sup> Gordon, *supra* note 35, at 62.

<sup>38</sup> *Id.* at 61.

<sup>39</sup> *Id.* at 63.

<sup>40</sup> *Id.* at 55, 65.

<sup>41</sup> *Id.* at 64.

<sup>42</sup> *Id.* at 67. As the former CEO of the Urban League of Metropolitan St. Louis has observed, “[M]any of these small communities . . . were created to foster segregation.” Rebecca Rivas, *Fragmentation and Segregation*, ST. LOUIS AM. (Mar. 5, 2014), [http://www.stlamerican.com/news/local\\_news/article\\_768055b6-a4d7-11e3-bceb-0019bb2963f4.html](http://www.stlamerican.com/news/local_news/article_768055b6-a4d7-11e3-bceb-0019bb2963f4.html).

<sup>43</sup> See Gordon, *supra* note 35, at 64. Even today, it remains a challenge to reconcile the different interests of the suburbs and City. See *id.* at 69–70.

<sup>44</sup> See Rivas, *supra* note 42 (noting how Louisville’s merger of city and county governments helped to reinvigorate the city by helping it to attract talent, businesses, and jobs, ultimately leading Louisville to become the 16th largest city in 2003).

<sup>45</sup> See Ware, *supra* note 33, at 1162.

hensive regulations designed to address housing issues and segregation in the United States.<sup>46</sup> Ultimately, the FHA's goal was to eliminate housing discrimination and integrate neighborhoods.<sup>47</sup> However, despite the noble origins of the FHA, the statute was afflicted by significant shortcomings, including a limited scope of administrative enforcement and nominal awards for judicial rulings of violations.<sup>48</sup> To rectify these issues, Congress amended the Act in 1988 to provide HUD with expanded power to both enforce the Act and administer stringent sanctions against prohibited conduct.<sup>49</sup>

Under the FHA, all federal departments and agencies and state recipients of HUD grants have a duty to "affirmatively further" the policies of the Act by administering housing and urban development programs.<sup>50</sup> Congress created this duty to ensure that federal and state housing agencies actively promoted fair housing and integration while administering fair housing programs. To satisfy this duty, housing authorities must analyze the impediments to fair housing in their jurisdiction, establish plans to overcome impediments, and document their efforts.<sup>51</sup> A grant recipient's failure to comply could lead to federal prosecution.<sup>52</sup>

However, in 2010, the Government Accountability Office ("GAO") published a report revealing the ineffectiveness of the "Affirmatively Furthering Fair Housing" ("AFFH") mandate.<sup>53</sup> The report indicated that fair-housing grant recipients were not compliant, mainly a result of HUD's failure to maintain adequate oversight.<sup>54</sup> Accordingly, HUD revised its guidelines, which culminated with HUD passing the Final Rule on AFFH in 2015.<sup>55</sup>

Under the Final Rule, housing authorities must take "meaningful actions" to end segregation and foster inclusive communities.<sup>56</sup> To this

<sup>46</sup> See Oliveri, *supra* note 12, at 1074.

<sup>47</sup> See JORGE ANDRES SOTO & DEIRDRE SWESNIK, AM. CONSTITUTION SOC'Y, THE PROMISE OF THE FAIR HOUSING ACT AND THE ROLE OF FAIR HOUSING ORGANIZATIONS 4 (Jan. 2012) (discussing how the FHA was enacted in response to a growing racial divide in the country and with a goal of prohibiting discrimination in real estate transactions).

<sup>48</sup> See Ware, *supra* note 33, at 1162–63.

<sup>49</sup> See SOTO & SWESNIK, *supra* note 47, at 4 (discussing the effect of the 1988 amendments on HUD's ability to investigate and enforce when housing discrimination is present).

<sup>50</sup> See Timothy M. Smyth, Michael Allen, & Marisa Schnaith, *The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients*, 23 J. AFFORDABLE HOUSING 231, 233, 236 (2015).

<sup>51</sup> *Id.* at 236.

<sup>52</sup> *Id.* at 238.

<sup>53</sup> *Id.* at 243.

<sup>54</sup> See *id.* at 244.

<sup>55</sup> 80 Fed. Reg. 42,272 (Aug. 17, 2015) (to be codified in 24 C.F.R. pt. 5).

<sup>56</sup> 24 C.F.R. § 5.150 (2015) ("[T]he purpose of the Affirmatively Furthering Fair Housing (AFFH) regulations . . . is to provide program participants with an effective planning approach to aid program participants in taking meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities . . .").

end, housing authorities that receive federal grants or assistance must submit an Assessment of Fair Housing (“AFH”) for HUD approval.<sup>57</sup> The standards for approval, however, are substantial. To establish that they have affirmatively furthered fair housing, housing authorities must show they have implemented steps to develop affordable housing, removed barriers to such development, and strategically enhanced access to opportunity.<sup>58</sup> Specifically, housing authorities must show “[t]argeted investment in neighborhood revitalization or stabilization[,] preservation or rehabilitation of existing affordable housing[,] promot[ion of] greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity[,] and improv[ed] community assets such as quality schools, employment, and transportation.”<sup>59</sup> Although these new regulations are controversial,<sup>60</sup> HUD hopes that they will lead to a significant growth of integrated communities.<sup>61</sup>

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<sup>57</sup> 24 C.F.R. § 5.154(d) (2015); Smyth, Allen, & Schnaith, *supra* note 50, at 248. Under the AFH, housing authorities must identify fair housing issues, establish fair housing priorities and goals, and provide an assessment and identification of “integration and segregation patterns[,] . . . racially or ethnically concentrated areas of poverty[,] . . . significant disparities in access to opportunity for any protected classes[,] . . . [and] disproportionate housing needs for any protected class . . . .” *Id.*

<sup>58</sup> 24 C.F.R. § 5.150.

<sup>59</sup> *Id.*

<sup>60</sup> See generally LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, REVIEW OF SELECTED CRITICAL COMMENTS ON HUD’S PROPOSED AFFH RULE 2–3 (describing criticisms of HUD’s Proposed Rule, which included criticisms of a lack of effective complaint and enforcement processes, a lack of balancing in promoting mobility, and a lack of guidance on content requirements for AFH assessments); Laura Kusisto, *New HUD Rules Take Aim at Segregated Housing*, WALL ST. J., July 8, 2015, <http://www.wsj.com/articles/hud-announces-rule-designed-to-bolster-so-called-fair-housing-initiatives-1436370563> (noting that critics have “decried” the final rule as forcing integration against the will of residents).

<sup>61</sup> See U.S. DEP’T OF HOUS. & URBAN DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING GUIDE BOOK 8 (2015). Of course, it is important to note the recent developments in U.S. politics that will have a profound impact on U.S. housing policy. Following his nomination by President Trump, Dr. Ben Carson has taken over as the new Secretary of Housing and Urban Development. Zachary Warmbrodt, *Banking Committee Approves Ben Carson Nomination*, POLITICO (Jan. 24, 2017). His nomination will likely put the future of the AFFH Final Rule into question. See Brendan Gauthier, *HUD Secretary Front-Runner Ben Carson Recently Called Fair Housing “Communist”*, SALON (Nov. 28, 2016) (noting that Ben Carson is a “vocal critic of HUD’s ‘affirmatively furthering fair housing,’” regulation); see also Local Zoning Decisions Protection Act, H.R. 482, 115th Cong. (2017) (proposing a bill that would nullify the force and effect of the AFFH Final Rule). Yet even if the AFFH Final Rule is weakened or repealed, the spirit and protections of the FHA—policies that inspired the AFFH regulation—remain in full force. Moreover, despite the current state of uncertainty, the viability of an inclusionary zoning system remains unscathed. Thus, regardless of what HUD ultimately chooses to do with its current regulations, including AFFH, a system of inclusionary zoning would continue to promote many of the same policy rationales and social benefits that underlie the AFFH’s requirements. To understand how and why mandatory inclusionary zoning promotes the spirit and policy of AFFH, see *infra* Part III.

## II. HOW TO ADOPT INCLUSIONARY ZONING

There is a close connection between race and poverty.<sup>62</sup> This connection is even more prevalent in St. Louis. Although city officials have attempted to promote integration,<sup>63</sup> any practical solution to alleviate the plights of St. Louis's racial disparity and concentration of poverty must break down existing barriers and open new opportunities for those who have traditionally been left behind. One way to potentially facilitate community integration is through a greater volume of mixed-income living arrangements.<sup>64</sup> Cue inclusionary zoning.

Under a typical inclusionary zoning ordinance, local governments require developers to integrate affordable housing into new developments as a prerequisite for allowing the development.<sup>65</sup> The affordable housing infrastructure facilitated by inclusionary zoning—in particular, mandatory inclusionary zoning—should, in turn, provide substantial socioeconomic benefits to the St. Louis region through the mandated creation of mixed-income communities. Moreover, in light of recent developments from HUD, the use of mandatory inclusionary zoning can serve as a practical way for cities to comply with HUD's Final Rule on AFFH.<sup>66</sup> The following will contemplate the necessary considerations and strategies that should go into developing a plan for inclusionary zoning in St. Louis.

### A. *Inclusionary Zoning—Why a Mandatory Inclusionary Zoning Policy is Compelling*

In response to exclusionary zoning practices, such as large minimum lot sizes and multifamily residential area limitations, city and local governments began passing inclusionary zoning laws in an effort to promote integration and affordability in their communities.<sup>67</sup> These inclu-

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<sup>62</sup> See FED. RESERVE BANK OF ST. LOUIS, THE DEMOGRAPHICS OF WEALTH: HOW AGE, EDUCATION AND RACE SEPARATE THRIVERS FROM STRUGGLERS IN TODAY'S ECONOMY ESSAY No. 1, at 9–10 (2015).

<sup>63</sup> See, e.g., ST. LOUIS HOUS. AUTH., SECTION 8 (HOUSING CHOICE VOUCHER) BASIC PROGRAM REQUIREMENTS (2016), <http://www.slha.org/for-residents/section-8/>.

<sup>64</sup> See generally Diane K. Levy, Zach McDade, & Kassie Bertumen, *Mixed-Income Living: Anticipated and Realized Benefits for Low-Income Households*, 15 CITYSCAPE: J. POL'Y DEV. & RES. 15, 22–24 (2013) (noting how mixed-income communities can succeed in desegregating households). Note that these researchers have acknowledged that mixed-income housing alone does not help to advantage the poor. *Id.* That said, a comprehensive policy, mixed in with the proper form of mixed-income housing may help to alleviate some of the traditional limitations of mixed-income housing projects. See *infra* Part II.B for an extended discussion on some potential facilitating policies.

<sup>65</sup> Brian R. Lerman, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 387–88 (2006).

<sup>66</sup> See Rivas, *supra* note 7. For an in-depth discussion on how mandatory inclusionary zoning can make St. Louis compliant with AFFH, see *infra* Part III.C.

<sup>67</sup> See Lerman, *supra* note 65, at 386.

sionary zoning laws helped to reverse exclusionary practices and promote greater opportunities for affordable housing where such housing would not otherwise have been provided.<sup>68</sup> Moreover, these inclusionary zoning laws typically offered a multitude of benefits for the community, including racial integration, strengthened economic environments, and protection against displacement of low-income families.<sup>69</sup> Over time, inclusionary zoning programs have developed into two distinct alternatives: voluntary and mandatory.<sup>70</sup>

### 1. Voluntary Inclusionary Zoning—Lacking the Incentives

Under a voluntary inclusionary zoning system, municipalities utilize an incentive-based structure in their zoning codes to entice developers to include affordable housing in their plans.<sup>71</sup> For example, Chicago grants access to discounts and density bonuses if the developer either includes affordable housing or pays a fee.<sup>72</sup> However, if you opt not to pursue the benefits afforded by inclusionary development, you are not barred from developing housing.<sup>73</sup>

Some cities have found success in utilizing a voluntary inclusionary zoning program,<sup>74</sup> and there are certainly merits to a policy that is more flexible than its mandatory counterpart.<sup>75</sup> However, voluntary inclusionary zoning carries significant disadvantages. For one, the level of incentives required to entice development of affordable housing is not necessarily in the best interest of the municipality as a whole.<sup>76</sup> Moreover, the fact that developers have a choice in the process makes the proliferation of affordable housing a more challenging endeavor.<sup>77</sup> Despite the affordable housing goals inherent in voluntary inclusionary zon-

<sup>68</sup> *Id.* at 389.

<sup>69</sup> Cecily T. Talbert & Nadia L. Costa, *Current Issues in Inclusionary Zoning*, 37 *URB. LAW.* 513, 515 (2005).

<sup>70</sup> Lerman, *supra* note 65, at 389.

<sup>71</sup> *See id.* at 391.

<sup>72</sup> AM. PLANNING ASS'N, *ZONING PRACTICE* 4 (Mar. 2007) (describing the “Chicago Way” and how it reflects the “goals and philosophies of the Daley administration”).

<sup>73</sup> *Id.*

<sup>74</sup> *See* U.S. Dep’t of Hous. & Urban Dev., *Inclusionary Zoning and Mixed-Income Communities*, HUDUSER.GOV (2013), <https://www.huduser.gov/portal/periodicals/em/spring13/highlight3.html> (describing how New York City opted to pursue a voluntary inclusionary zoning program to “encourage developer participation and give the city the opportunity to monitor the program” and noting that the system has produced more than 1,700 affordable units) [hereinafter *HUD User*].

<sup>75</sup> Lerman, *supra* note 65, at 391 (noting that voluntary programs provide developers “with the element of choice, thereby avoiding a major obstacle of mandatory programs”).

<sup>76</sup> *Id.* As Lerman notes, the number of incentives required to induce development must exceed—not just offset—the costs of building affordable units. *Id.*

<sup>77</sup> *Id.* (noting how, under a voluntary program, if the ultimate market-rate buyer is willing to pay a premium that exceeds the public incentives for affordable housing, the developer will not develop affordable housing).

ing, such programs generally struggle to encourage the production of affordable housing for low-income families.<sup>78</sup>

These shortcomings demonstrate the untenable nature of voluntary inclusionary zoning for a city like St. Louis that is desperately in need of the integrative effects of inclusionary zoning. The idea of flexibility and choice sounds great on paper, but in practice, because of the sheer volume of concessions and incentives required to entice developers, this flexibility has counterproductive effects on the community. Luckily, these limitations have given way to another breed of inclusionary zoning—mandatory inclusionary zoning.<sup>79</sup>

## 2. Mandatory Inclusionary Zoning—Providing the Necessary Push

Eschewing the choice inherent in voluntary inclusionary zoning, a mandatory inclusionary zoning system requires that developers who pursue a particular development project must allocate a portion of their units to affordable housing.<sup>80</sup> However, many of these mandatory inclusionary zoning mandates provide density bonuses and other incentives that compensate developers for the municipality's zoning mandates, though to a lesser degree than voluntary inclusionary zoning.<sup>81</sup> The net effect of these policies is to guarantee that affordable housing grows in conjunction with new development.<sup>82</sup>

Mandatory inclusionary zoning boasts several key benefits over its voluntary counterpart. First, mandatory inclusionary zoning programs better facilitate the production of affordable housing by *requiring* the production of these affordable housing units.<sup>83</sup> As a result, these programs are more capable of producing housing that serves the needs of

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<sup>78</sup> See Michael Floryan, Comment, *Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning Practices*, 37 PEPP. L. REV. 1039, 1045 n.23 (2010).

<sup>79</sup> See NICK BRUNICK, LAUREN GOLDBERG, & SUSANNAH LEVINE, BUS. & PROF'L PEOPLE FOR THE PUB. INTEREST, VOLUNTARY OR MANDATORY INCLUSIONARY HOUSING? PRODUCTION, PREDICTABILITY, AND ENFORCEMENT 2 (2003) (explaining how the benefits of mandatory inclusionary zoning have prompted municipalities to adopt such programs over voluntary inclusionary zoning).

<sup>80</sup> Lerman, *supra* note 65, at 390. It bears noting that developers may choose to develop units in the form of off-site housing or to pay a fee in lieu of developing affordable units—indeed, such alternatives are required for mandatory inclusionary zoning programs to be valid exercises of governmental power. *Id.*

<sup>81</sup> *Id.* at 390 n.55.

<sup>82</sup> See *id.* at 390

<sup>83</sup> For example, Cambridge, Massachusetts, a jurisdiction that failed to produce any affordable housing units after ten years of implementing voluntary inclusionary zoning policies, saw a total of 135 affordable homes built by shifting to mandatory inclusionary zoning policies. BRUNICK, GOLDBERG, & LEVINE, *supra* note 79, at 2–3.

low-income families.<sup>84</sup> Second, because mandatory inclusionary zoning requires the production of mixed-income housing, such programs better integrate neighborhoods and decentralize concentrations of poverty—critical reforms that will benefit a fragmented region like St. Louis.<sup>85</sup>

However, like voluntary inclusionary zoning, mandatory inclusionary zoning has its own drawbacks. Indeed, critics argue that the benefits, such as density bonuses, that some municipalities offer are not enough to constitute just compensation for a developer's lost profits.<sup>86</sup> Moreover, critics note that mandatory inclusionary zoning policies often lead to costly delays in development due to the challenges to high density planning that often follow after affordable housing mandates.<sup>87</sup> Finally, critics argue that the alternatives, such as in-lieu fees, that municipalities impose on developers who forgo inclusionary development are seldom used to further inclusionary zoning's goal of promoting affordable housing development.<sup>88</sup>

Many of these concerns can be mitigated. Although concern over potential decreases in new development may be valid, critics underestimate how well a comprehensive set of trade-off benefits will encourage investment and development over time.<sup>89</sup> In fact, recent studies of Californian cities show that contrary to the critical assessments, mandatory inclusionary zoning programs and their benefits lead to overall *increases* in housing production.<sup>90</sup> Moreover, in spite of criticisms to the contrary, developers would likely consider the right mix of benefits to be fair compensation for an affordable housing mandate, especially when many of these benefits would not otherwise be available in a normal development scheme.<sup>91</sup> Finally, a widespread mandate will firmly establish general predictability regarding development in the region that should, in due time, counteract any "delays" that may arise from initial challenges. Indeed, developers are typically well aware of the mandates or fees and requisite incentives that are available and often view them as mere con-

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<sup>84</sup> See *id.* at 4.

<sup>85</sup> See Lerman, *supra* note 65, at 390.

<sup>86</sup> Floryan, *supra* note 78, at 1090–91.

<sup>87</sup> *Id.* at 1094.

<sup>88</sup> *Id.* at 1100 n.358 (explaining that in-lieu fees are seldom used to develop affordable housing).

<sup>89</sup> Thomas Silverstein, *In Light of Supreme Court's Denial of Certiorari in San Jose, California Case, The Time Is Right to Advocate for Inclusionary Zoning*, LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW (Mar. 8, 2016), <https://lawyerscommittee.org/2016/03/light-supreme-courts-denial-certiorari-san-jose-california-case-time-right-advocate-inclusionary-zoning/>.

<sup>90</sup> See BRUNICK, GOLDBERG, & LEVINE, *supra* note 79, at 6–7 (citing five cities that have switched from a voluntary program to a mandatory program and saw increases in affordable housing production).

<sup>91</sup> See, e.g., CAL. AFFORDABLE HOUS. LAW PROJECT & W. CTR. ON LAW & POVERTY, *INCLUSIONARY ZONING: POLICY CONSIDERATIONS AND BEST PRACTICES* 19–23 (2002).

tingencies for development.<sup>92</sup> Even with its shortcomings, mandatory inclusionary zoning is an attractive land-use policy for St. Louis, and one that, if properly implemented, may potentially integrate communities over the next several decades.

*B. Important Considerations for Implementing Mandatory Inclusionary Zoning*

It is important to note that some studies have concluded that mixed-income housing alone is not as effective without other services and support in the community in place.<sup>93</sup> Although a mandatory inclusionary zoning program can help to make large strides in fostering important social policies, these programs must nonetheless go beyond the traditional offerings of mixed-income communities. As some studies have explained, this can include (1) implementing more financial policies and job training to set low-income families towards the path of homeownership and financial stability, (2) providing greater social services like childcare and transportation to these new low-income residents, and (3) creating stronger neighborhood associations to help eradicate the social stigma attached to low-income residents.<sup>94</sup>

Although the current iterations of mixed-income housing projects have led to limited improvements thus far, the literature is clear that the potential benefits of a mixed-income program can go far in improving the conditions of low-income families if implemented correctly.<sup>95</sup> Adopting a mandatory program that takes account of additional considerations should ensure the consistent availability of affordable housing for low-income residents in new areas of development with the various benefits that affordable housing can offer. Therefore, by applying mandatory inclusionary zoning programs to facilitate AFFH Final Rule requirements and adopting facilitative measures to help ease the transition to these new neighborhoods, this latest iteration of mixed-income developments could succeed where others have failed. The challenge, however, lies in the implementation.

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<sup>92</sup> *Id.*

<sup>93</sup> See Levy, McDade, & Bertumen, *supra* note 64, at 17–18.

<sup>94</sup> James C. Fraser, Robert J. Chaskin, & Joshua Theodore Bazuin, *Making Mixed-Income Neighborhoods Work for Low-Income Households*, 15 CITYSCAPE 83, 90–94 (2013).

<sup>95</sup> See *id.* at 94–95; Levy, McDade, & Bertumen, *supra* note 64, at 22.

### III. IMPLEMENTING INCLUSIONARY ZONING IN ST. LOUIS TO SATISFY AFFH

#### A. *The Regional Framework*

Traditionally, municipalities will pass inclusionary zoning ordinances to address local housing needs, market conditions, and community development trends.<sup>96</sup> However, the implementation of inclusionary zoning in St. Louis must be a widespread endeavor. Successful integration will require that government officials change course from current policies in place and move the focus from the northern municipalities of the city to the entire metropolitan region.<sup>97</sup>

To this end, the fragmentation between the city and the counties remains the biggest impediment to successfully instituting any inclusionary zoning policy. Local municipalities are typically responsible for implementing zoning laws,<sup>98</sup> but here, relying on each of the St. Louis municipalities to individually implement inclusionary zoning laws would be counterproductive. Although civil leaders do believe that the “Great Divorce” was a mistake, many county residents do not, and that inevitably influences local policy.<sup>99</sup> Plainly, the fragmented nature of St. Louis would make any widespread change difficult, if not impossible—if one locality implements an inclusionary zoning law, another may choose not to and encourage population flight.<sup>100</sup>

The solution to this issue requires a region-wide resolution that binds the various municipalities of the St. Louis metropolitan region and prevents the inevitable prisoner’s dilemma that would occur if relying on local-level implementation.<sup>101</sup> By implementing inclusionary zoning at a

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<sup>96</sup> See, e.g., OR. INCLUSIONARY ZONING COAL., WHITE PAPER: INCLUSIONARY ZONING IN OREGON 2 (2014) (describing how inclusionary zoning laws are developed locally and how their customizability make them attractive to local housing policy).

<sup>97</sup> Rivas, *supra* note 7 (explaining that most housing funding in Missouri goes to North St. Louis).

<sup>98</sup> See generally *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) (holding that a zoning ordinance is a valid use of a locality’s police power and therefore constitutional).

<sup>99</sup> See Salsich & Caluori, *supra* note 34, at 16–17. The City had presented five separate proposals to reverse the “Great Divorce,” but almost all have failed. *Id.* at 16. The one exception is the proposal for a Metropolitan Sewer District, which was ultimately an incremental change. *Id.*

<sup>100</sup> See, e.g., Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373, 387 (1994) (describing, in the public housing context, how it is “difficult to locate minority occupied public housing in white neighborhoods” and how “white flight may well result if such placement occurs”).

<sup>101</sup> Oregon is an example of a state that has adopted a region-wide zoning law. See Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 893–94 (2006). Under Oregon law, each metropolitan service district must adopt an urban growth boundary plan to help limit the amount of land available for conversion to urban use. *Id.* One such district is Portland, which tailored its boundary plan to meet its metro-region’s needs. *Id.* at 894–95. The urban growth plan helped

regional level—likely through state legislation that would preempt the municipalities’ zoning decisions<sup>102</sup>—St. Louis officials can ensure that the influence of inclusionary zoning resonates across municipality lines and has region-wide effects. An umbrella approach to inclusionary zoning planning will help ensure that the municipalities, fragmented as they may be, cannot insulate themselves from the requirements of inclusionary zoning or the AFFH mandate.<sup>103</sup> This regional planning strategy would not be unusual, and it would help to advance integration in a region where social and economic class self-preservation amongst the various municipalities remains prevalent.<sup>104</sup>

Of course, this approach would not be without controversy. Many feel that a regional or state body’s imposition of land use regulations would be nothing more than another imposition of the “state or regional body’s will on local governments.”<sup>105</sup> These criticisms are a legitimate concern, but nonetheless overlook—or at the very least undervalue—the need to prevent the detrimental practices that will inevitably arise if individual municipalities are each left to their own devices. St. Louis, in particular, is prone to adverse effects when the various municipalities are allowed to make self-serving decisions—a fact supported by the prevalence of white flight and the mismatch of priorities between the counties and the City.<sup>106</sup> Granting state or regional authorities a wide scope of

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to decrease segregation in the Portland region. *Id.* at 900–03. These urban growth boundary zones have also been important in helping to make Portland one of the “most class-integrated metropolitan areas in the country.” *Id.* at 903.

<sup>102</sup> Johnstone, *supra* note 100, at 405.

<sup>103</sup> There are some scholars that argue that the stratification of these communities is an economically inefficient outcome. See Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167, 1199–1200 (1981) (arguing that economic integration is inefficient in part due to how upper-income families disvalue proximity to low-income groups). This Note recognizes the complexity of the arguments both supporting and criticizing the economic underpinnings of inclusionary zoning, and that inclusionary zoning must not necessarily be implemented in isolation of other complementary policies. See *supra* Part II.B. Although this Note will not get into a deep discussion of the competing economic arguments underlying inclusionary zoning, this Note does contend that inclusionary zoning policies have legitimate economic benefits, and potential justifications that outweigh Ellickson’s concerns. See *infra* note 156 and accompanying text. These benefits, in particular, help drive many of the social policies underlying AFFH. Cf. *infra* Part III.B.1–4.

<sup>104</sup> Johnstone, *supra* note 100, at 409.

<sup>105</sup> See John R. Nolon, *Grassroots Regionalism Through Intermunicipal Land Use Compacts*, 73 ST. JOHN’S L. REV. 1011, 1012–13 (1999).

<sup>106</sup> Indeed, white flight has played a major role in the composition of North St. Louis. If any meaningful change is to come about, the region as a whole must be locked into this process. See Malcolm Gay, *White Flight and White Power in St. Louis*, TIME (Aug. 13, 2014), <http://time.com/3107729/michael-brown-shooting-ferguson-missouri-white-flight/> (describing how “the wealthier population of St. Louis has always been running from poverty”); Molly Patterson, *How White—And Middle-Class—Flight Continues to Shape North St. Louis County*, THE ROOT.COM (Aug. 25, 2014), <http://www.theroot.com/articles/culture/2014/08/how-white-flight-shaped-north-st-louis.html> (describing how “when middle-class families . . . flee a neighborhood, a school, a county . . . they take resources with them”).

regulatory power is certainly a policy that must be carefully approached, but a regional plan in this case will ensure that St. Louis realizes meaningful change.<sup>107</sup>

*B. Two Goals, One Policy: Social and Economic Integration Through AFFH Compliance*

Under HUD's AFFH Final Rule, city officials in areas receiving HUD funding must demonstrate "targeted investment in neighborhood revitalization or stabilization[,] preservation or rehabilitation of existing affordable housing[,] promot[ion of] greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity[,] and improve[d] community assets such as quality schools, employment, and transportation."<sup>108</sup> As it stands, both the city of St. Louis and its counties receive HUD funding.<sup>109</sup> Unsurprisingly, then, the burden is on city and county officials to ensure AFFH compliance. Such compliance is a high bar that will require St. Louis officials to carefully plan and assess the current housing climate and social composition of neighborhoods and municipalities.

That said, a region-wide mandatory inclusionary zoning plan will be important for St. Louis to both successfully comply with the new regulations and, in turn, promulgate meaningful social change to reverse decades of segregative policies. The following will consider exactly how region-wide mandatory inclusionary zoning will help to satisfy these AFFH requirements.<sup>110</sup>

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<sup>107</sup> Importantly, the benefits of a regional inclusionary zoning program will only implicate new construction. Any fully mature suburb, for example, will not become more inclusionary by virtue of these new regional policies. An increase in general housing demand in the area, however, should help to make the effects of inclusionary zoning resonate more broadly across the region over time, assuming that a steady increase in development is in place.

<sup>108</sup> 24 C.F.R. § 5.150 (2015).

<sup>109</sup> See Press Release, StLouis-Mo.Gov, City of St. Louis Civil Rights Enforcement Agency Hosts Fair Housing Conference, (Feb. 4, 2016), <https://www.stlouis-mo.gov/government/departments/civil-rights-enforcement/news/crea-housing-conference.cfm> (noting the counties in St. Louis that receive HUD funding). For example, in 2015, HUD announced that they would provide more than \$26 million to St. Louis County for residential and commercial development. See Jason Rosenbaum, *HUD Chief Castro Awards St. Louis County \$26 Million in Development Funds*, ST. LOUIS PUB. RADIO (Aug. 19, 2015). Moreover, in 2014, HUD provided St. Louis City with a \$2.5 million grant to provide lead remediation for families in the city.

<sup>110</sup> This analysis reflects extrapolations of existing data as applied to inclusionary zoning in furtherance of AFFH. This area, however, is one that would benefit from increased research.

## 1. Targeted Investment in Neighborhood Revitalization and Stabilization

Implementing mandatory inclusionary zoning should promote investment that would have stabilizing and revitalizing effects. The implementation may initially decrease total development activity, which reflects a natural adjustment period. Despite this initial decrease in the rate of production, however, the total number of units per investment should eventually increase over time.<sup>111</sup> Such increase would result from cities forcing developers to ultimately produce high-density developments.<sup>112</sup> Moreover, the creation of affordable housing units throughout predominantly affluent and wealthy areas of the region should help, in the long term, spread individuals across the region and allow for increased flexibility and mobility.<sup>113</sup> What will result is a socioeconomic revitalization of these new members in the community, particularly given that access to certain areas have historically been only open to those who were more privileged.

A risk of mandatory inclusionary zoning is that the increased costs associated with it will push costs on to those who need the housing most.<sup>114</sup> However, the use of sufficiently incentivizing cost offsets should mitigate these concerns. Whether in the form of affordable housing cost offsets or in-lieu fees, a mandatory inclusionary zoning program will incentivize development<sup>115</sup> and promote targeted investment and revitalization in communities under AFFH.

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<sup>111</sup> See NICHOLAS BRUNICK, BUS. & PROF'L PEOPLE FOR THE PUB. INTEREST, THE IMPACT OF INCLUSIONARY ZONING ON DEVELOPMENT 5 (2003) (noting that "a review of sample inclusionary communities indicates a significant number of new affordable units continue to be produced" and that "[n]o evidence exists that development has slowed in these communities"); Andrew G. Dieterich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 46 (1996); see also FURMAN CTR. FOR REAL ESTATE & URBAN POL'Y, HOUSING POLICY BRIEF: THE EFFECTS OF INCLUSIONARY ZONING ON LOCAL HOUSING MARKETS: LESSONS FROM SAN FRANCISCO, WASHINGTON DC AND SUBURBAN BOSTON AREAS 7–8 (2008), <http://furmancenter.org/files/publications/IZPolicyBrief.pdf> (explaining how the Washington, Boston, and San Francisco areas all have seen increases in affordable units in areas where inclusionary zoning is in place but and also noting that there is no evidence that inclusionary zoning programs have an impact on either the price or production of market-rate houses in some of those areas).

<sup>112</sup> Dieterich, *supra* note 111, at 46, 69.

<sup>113</sup> See Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 521 (2007).

<sup>114</sup> See BRUNICK, *supra* note 111, at 4–5 (describing some of the potential actions a developer could take without proper cost offsets for inclusionary zoning mandates).

<sup>115</sup> *Id.* at 17–18 (describing the different communities with inclusionary housing programs, the number of units the programs produced, the set-aside requirements the programs used, the density bonuses the programs offered, and other incentives the programs provided to developers).

## 2. Preservation or Rehabilitation of Existing Affordable Housing

The preservation and rehabilitation of affordable housing is a critical method to promote livability—hence its emphasis under AFFH. One factor that makes St. Louis such an attractive candidate for the implementation of a mandatory inclusionary zoning scheme is its commitment to promoting greater affordability. To date, the city of St. Louis has established a multitude of affordable housing programs, a result of a \$500 million investment in affordable housing projects between 2003 and 2014.<sup>116</sup> Of course, more needs to be done given the lukewarm success, but it is nonetheless important that any policy promoting affordable housing preserve the existing stock.

Mandatory inclusionary zoning offers that very policy. One of the cornerstones of an inclusionary zoning program is its creation and preservation of affordable housing units into new communities.<sup>117</sup> The end result should be the complementing and facilitating of existing affordable housing initiatives in St. Louis, while the variety and quantity of affordable choices inevitably rise in the form of integrated mixed-income neighborhoods.

It is important to note that mandatory inclusionary zoning is only one of many solutions necessary to promote affordability and integration within the city. Indeed, many have pointed out that inclusionary zoning policies should exist within a “broader and more comprehensive” system.<sup>118</sup> An inclusionary system should recognize that merely developing affordable housing is not enough—a system that integrates the region’s communities must be in place to preserve and support current affordable housing initiatives. By implementing a system that integrates communities, not just builds houses in the same, poverty-stricken areas, the inclusionary zoning regime can foster a desegregation of the city while adding to the preservation, maintenance, and development of affordable housing in the St. Louis region—all with an eye towards integration and affordability. As the menu of possibilities increases, so too does the availability of existing options. By facilitating AFFH’s goal of affordable housing preservation, mandatory inclusionary zoning will in turn allow officials to focus on unlocking areas of the region that have historically been off-limits to low-income families.

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<sup>116</sup> AFFORDABLE HOUS. COMM’N, REPORT TO THE COMMUNITY 5 (2014).

<sup>117</sup> See, e.g., *HUD User*, *supra* note 74 (describing how the New York City “Marketplace Plan” will create and preserve 165,000 affordable homes for city residents or mixed-use development).

<sup>118</sup> CTR. FOR HOUS. POL’Y, FURMAN CTR., THE EFFECTS OF INCLUSIONARY ZONING ON LOCAL HOUSING MARKETS: LESSONS FROM THE SAN FRANCISCO, WASHINGTON DC, AND SUB-URBAN BOSTON AREAS 9–10 (2014).

### 3. Greater Housing Choice and Access to Opportunities Away from Concentrated Poverty

Evidence shows that the creation of economically and socially integrated communities can help to combat concentrations of poverty.<sup>119</sup> With this in mind, an inclusionary zoning mandate can easily satisfy AFFH's third prong: promotion of greater housing choice outside of areas of concentrated poverty and greater access to areas of high opportunity. One of the key characteristics of mandatory inclusionary zoning is its production of large quantities of affordable housing units in conjunction with the development of market-rate housing.<sup>120</sup> Because of this focus on mixed-income communities, many of these affordable units will end up in low-poverty neighborhoods.<sup>121</sup> Such outcomes should look promising to advocates of inclusionary zoning, and the results would be no different in St. Louis.

As more affordable housing opportunities develop in historically affluent areas of St. Louis, low-income residents will benefit from the uptick in housing choices in locations that have traditionally been out of reach to those below the poverty line.<sup>122</sup> These increases of affordable housing choices, in turn, would allow previously entrenched low-income families to transition to new communities. And growing housing choices will help afford greater opportunities to break out of the status quo. Moreover, a region-wide plan would help facilitate this growth by curtailing any risk of mass-flight from these newly integrated neighborhoods. The end result, as mandated by AFFH, is a promulgation of

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<sup>119</sup> See Constanine E. Kontokosta, *Mixed-Income Housing and Neighborhood Integration: Evidence from Inclusionary Zoning Programs*, 36 J. URB. AFF. 716, 736–37 (2014) (concluding that, in the aggregate, inclusionary zoning units increase the level of both racial and income integration above those neighborhoods without inclusionary zoning). Kontokosta's study goes on to state that inclusionary zoning can be an effective policy to counter racial segregation but notes three limitations that policy makers, including those who would be implementing inclusionary zoning in St. Louis, should address: (1) we need better data collection; (2) the success of programs is still contingent on housing market conditions and community reactions to these programs; and (3) that the current allocations of units after construction is not proportionate to the eligible population. *Id.* at 737.

<sup>120</sup> See BRUNICK, *supra* note 111, at 6, 8 (describing how development of housing under inclusionary zoning programs has been rapid and has not impacted the development rate of market-rate housing).

<sup>121</sup> About 76% of inclusionary zoning homes were located in low-poverty neighborhoods, while only 2.5% were in areas considered "high-poverty." HEATHER L. SCHWARTZ ET AL., RAND CORP., IS INCLUSIONARY ZONING INCLUSIONARY? A GUIDE FOR PRACTITIONERS 13–14 (2012).

<sup>122</sup> Moreover, what is great about this policy is that the effects are not just limited to low-income families. Middle-income residents will also benefit from the effects of inclusionary zoning. See Kontokosta, *supra* note 119, at 737.

increased housing choices and access to opportunities through the dissolution of St. Louis's historically black-white dichotomy.<sup>123</sup>

#### 4. Improving Community Assets Such as Quality Schools, Employment, and Transportation

In addition to generating increased investment in the city, preserving existing affordable housing, and expanding access to housing choices, mandatory inclusionary zoning will further the community-improvement components of AFFH. As the following will reveal, the implementation of this policy will ultimately benefit St. Louis in a number of complementary manners, including increased community development, economic growth, and bolstered job opportunities.

##### a. Increase Community Development—Access to Quality Schools and Increased Education

Access to education is one of the fundamental building blocks needed to achieve community development and integration. Not surprisingly, this is one of the critical policy goals underlying mandatory inclusionary zoning. Although not a tremendous amount of research exists on the relationship between residing in lower-poverty school districts and familial benefits, the existing research *does* indicate a correlation between a neighborhood's affluence and its residents' quality of life and, more importantly, its residents' educational welfare.<sup>124</sup> From this, one can see how offering more affordable housing through mixed-income community development in affluent areas should increase overall educational quality for a broader spectrum of people in a region.<sup>125</sup>

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<sup>123</sup> Of course, decades of segregative housing practices cannot be undone in the stroke of a pen. However, the requisite steps to accomplish inclusionary zoning will allow St. Louis to show that it is AFFH compliant.

<sup>124</sup> See Lan Deng, *Comparing the Effects of Housing Vouchers and Low-Income Housing Tax Credits on Neighborhood Integration and School Quality*, 27 J. PLAN. EDUC. & RES. 20, 31–32 (2007); see also SCHWARTZ ET AL., *supra* note 121, at 9–10 (“Research about the effects of poverty in neighborhoods and schools suggests that [inclusionary zoning] recipients have better life chances to the degree that [inclusionary zoning] policies provide low-income persons access to low-poverty neighborhoods and high-performing schools.”). Schwartz et al. note a study in 2012 that tracked the schooling outcomes of Montgomery County children who lived in affordable housing through the county's inclusionary zoning policy. SCHWARTZ ET AL., *supra* note 121, at 9. The study found that those children who attended low-poverty schools and lived in public housing outperformed those children who attended higher-poverty schools and lived in public housing. *Id.* Schwartz et al. do acknowledge, however, that there is a “dearth of research,” but they recognize that the existing research does indicate a strong correlation between low-poverty places and the positive conditions therein. *Id.* at 10.

<sup>125</sup> In fact, research has shown that “school quality is one of the most important determinants of residential location,” particularly because standardized test scores are correlated with school quality. Deng, *supra* note 124, at 28–30.

As it pertains to St. Louis, many of the best schools are located in the region's most affluent areas.<sup>126</sup> Thus, any meaningful change to educational outcomes in St. Louis must focus on providing greater access to these schools. Mandatory inclusionary zoning provides a ready solution. The key is its proliferation of mixed-income communities. With increases in social and economic integration, more families, especially those in low-income brackets, will be able to capitalize on this new access to higher-quality schooling opportunities. As access to education increases, so too should educational performances. The result is an uptick in the positive education outcomes that can beneficially influence community integration and development—the very outcomes envisioned and encouraged by AFFH.<sup>127</sup>

b. Develop Economic Growth Through Bolstered Job Opportunities

Since the 2008 recession, St. Louis has struggled to recover.<sup>128</sup> However, the counties and the City have not borne these struggles equally. The counties boast unemployment rates far below the national average; meanwhile, the City maintains unemployment rates that are above the national average.<sup>129</sup> This disparity in unemployment rates is

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<sup>126</sup> See Nikole Hannah-Jones, *School Segregation, the Continuing Tragedy of Ferguson*, PROPUBLICA (Dec. 19, 2014), <https://www.propublica.org/article/ferguson-school-segregation> (explaining the stark educational and schooling differences between the Normandy School District in Ferguson, MO, a predominantly poor and segregated area, and the Clayton Public Schools in Clayton, MO, a predominantly white and affluent city in St. Louis County). Compare U.S. Census Bureau, *Quick Facts: Ladue City, Missouri*, CENSUS.GOV, <http://www.census.gov/quickfacts/table/PST045215/2939656> (last visited Nov. 29, 2016) (reporting a median household income (in 2014 dollars) of \$179,464 in Ladue), and MO. DEP'T OF ELEMENTARY & SECONDARY EDUC., LADUE DISTRICT REPORT CARD, <https://mcds.dese.mo.gov/guidedinquiry/School%20Report%20Card/District%20Report%20Card.aspx?rp:SchoolYear=2016&rp:DistrictCode=096106> (last visited Nov. 29, 2016) (reporting that the Ladue School District has a 98.40% graduation rate (the Missouri average is 88.9%) for 2016 and that 81.7% of its graduates go on to a 4-year college or university (the Missouri average is 37.5%)), with U.S. Census Bureau, *Quick Facts: St. Louis City, Missouri*, CENSUS.GOV, <http://www.census.gov/quickfacts/table/PST045215/29510> (last visited Nov. 29, 2016) (reporting a median household income (in 2014 dollars) of \$34,800), and MO. DEP'T OF ELEMENTARY & SECONDARY EDUC., <https://mcds.dese.mo.gov/guidedinquiry/School%20Report%20Card/District%20Report%20Card.aspx?rp:SchoolYear=2016&rp:DistrictCode=115115> (last visited Nov. 29, 2016) (reporting that the St. Louis City School District has a 71.45% graduation rate and that 34.1% of its graduates go on to a 4-year college or university).

<sup>127</sup> The main thrust here is that many of these school districts have a strong tax base that support these schools. Although there could be fears that low-income families will make it more difficult to fund education over time, it is important to remember that an inclusionary zoning program is developing both affordable housing and fair-market housing, which should help continue to fund schooling.

<sup>128</sup> Jim Gallagher, *St. Louis Has a Jobs Problem*, ST. LOUIS POST-DISPATCH (Feb. 22, 2015), [http://www.stltoday.com/business/local/st-louis-has-a-jobs-problem/article\\_fe9a7ae0-832c-590e-b14f-402541d7c96d.html](http://www.stltoday.com/business/local/st-louis-has-a-jobs-problem/article_fe9a7ae0-832c-590e-b14f-402541d7c96d.html).

<sup>129</sup> U.S. BUREAU OF LABOR STATISTICS, ST. LOUIS AREA ECONOMIC STUDY 1 (2016).

likely compounded by the location of St. Louis's top employers. Of the region's top fifty employers, only fifteen are located in the City.<sup>130</sup> Only about 24% of jobs in the area are reachable within 90 minutes via public transportation.<sup>131</sup> There are jobs in St. Louis, but not being able to reach them negates their benefits.<sup>132</sup>

Although troubling, the foregoing statement should come as no surprise to the reader. Research has shown that concentrations of poverty in neighborhoods contribute to decreased employment opportunities, among other negative outcomes.<sup>133</sup> Part of this is compounded by factors such as lack of access to living-wage jobs or transportation to reach said jobs.<sup>134</sup> With so many job opportunities concentrated in St. Louis's counties, it is clear then how such disparities in employment rates exist between the counties and the City. Ultimately, this disparity is exactly what HUD aims to correct, particularly given the connection between low-income communities and the lack of job opportunities afforded to residents.<sup>135</sup>

Based on HUD's reasoning for implementing the AFFH final rule, affordable housing mandates should take steps to deliver economic growth and opportunity to have any legitimate force.<sup>136</sup> Again, mandatory inclusionary zoning provides a ready solution. Studies have shown that the creation of mixed-income communities—the ultimate outcome of a properly applied mandatory inclusionary zoning scheme—may help to promote greater access to employment opportunities and

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<sup>130</sup> ST. LOUIS REG'L CHAMBER, ST. LOUIS MSA – LARGEST EMPLOYERS (2015), <http://www.stregionalchamber.com/regional-data/documents-library> (filter “largest” in Document Title and select download button for document titled “St. Louis MSA – Largest Employers”).

<sup>131</sup> See BROOKINGS INST., MISSED OPPORTUNITY: TRANSIT AND JOBS IN METROPOLITAN AMERICA—ST. LOUIS, MO-IL METRO AREA (2014), <http://www.brookings.edu/~media/Series/jobs-and-transit/SaintLouisMO.PDF>.

<sup>132</sup> Cf. Margaret Simms, *Creating Employment Opportunities for Low-Income African American Men*, URB. WIRE: JOB MKT. & LAB. FORCE (May 20, 2015) (“One of the reasons African American men have difficulty finding work is because they live in segregated communities that lack jobs. . . . [F]ew people have connections to jobs outside the community.”).

<sup>133</sup> SCHWARTZ ET AL., *supra* note 121, at 10.

<sup>134</sup> See, e.g., OR. INCLUSIONARY ZONING COAL., *supra* note 96, at 4 (explaining the relationship between poverty stricken neighborhoods and lack of access to employment opportunities and transportation).

<sup>135</sup> Cf. Press Release, PolicyLink, Low-Income Communities Can't Get to Jobs: New Brookings Institution Study Finds Uneven Transit Service Cuts Off Families from Regional Job Centers (May 12, 2011), <https://www.policylink.org/sites/default/files/pr-new-study-highlights-impact-of-uneven-transit-access-on-low-income-communities.pdf> (explaining that low-income residents in suburban neighborhoods of cities have difficulty accessing the majority of low and middle-skill jobs in their region via transit).

<sup>136</sup> Cf. 80 Fed. Reg. 42,272, 42,272 (2015) (explaining that the goal of the Final Rule is to “make program participants better able to evaluate their present environment to assess fair housing issues such as segregation, conditions that restrict fair housing choice, and disparities in access to housing and opportunity”).

better job outcomes.<sup>137</sup> With such a concentration of poverty in the north, St. Louis would likely achieve similar results through a region-wide implementation of mandatory inclusionary zoning. This integration will hopefully—and most likely—bring low-income St. Louisans closer to the region’s employment opportunities and curb decade-long patterns of poverty. Ultimately, through AFFH compliance, city officials have an opportunity to end this disparity and build a bridge that connects low-income families and individuals to positions of economic viability.

*C. Alternative Approaches and Why Mandatory Inclusionary Zoning Remains Most Viable*

Not every scholar is convinced that an inclusionary zoning regimen provides the most effective solution to combating the societal inequalities within cities.<sup>138</sup> These scholars contend that current inclusionary zoning programs do not provide enough economic subsidies to make housing compelling for low-income families and also note skepticism regarding the capacity for mixed-income housing to actually enhance community integration.<sup>139</sup> As part of his argument regarding the shortcomings of mixed-income housing policies, Robert Ellickson notes how “most poor minority households do not warm to the prospect of moving to wealthier white neighborhoods.”<sup>140</sup> In the alternative, Ellickson argues that housing voucher programs—government subsidy programs where the tenant pays a set percentage of rent based on household income and the government provides the rest—are better equipped to create affordable housing and integration.<sup>141</sup> Ellickson observes, based on selected studies, that voucher holders are less likely to end up in areas of high poverty and that the voucher programs ultimately do more to promote neighborhood economic integration.<sup>142</sup> Other studies on housing voucher programs have noted that these programs create more freedom

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<sup>137</sup> See DIANE K. LEVY, ZACH MCDADE, & KASSIE DURLAO, URBAN INST., EFFECTS FROM LIVING IN MIXED-INCOME COMMUNITIES FOR LOW-INCOME FAMILIES 13 (2010) (noting several studies that reported increased job opportunities when residents of low-income neighborhoods moved to high-income neighborhoods). *But see* Fraser, Chaskin, & Bazuin, *supra* note 94, at 89 (noting that studies focusing on low-income residents returning to redeveloped HOPE VI sites, a program with mixed-income housing as its central feature, did not generate “clear benefits” regarding employment opportunities).

<sup>138</sup> See generally Robert C. Ellickson, *The False Promise of Mixed-Income Housing Project*, 57 UCLA L. REV. 983 (2010).

<sup>139</sup> *Id.* at 1006, 1009–10. Ellickson also argues that “[t]here is substantial evidence that in some societal contexts the enhancement of opportunities for bridging among members of different social groups simultaneously diminishes internal bonding of an individual group.” *Id.* at 1009. Ellickson also notes other studies that cast doubt on whether economic integration actually provides meaningful social benefits. *Id.* at 1015.

<sup>140</sup> *Id.* at 1015.

<sup>141</sup> *Id.* at 1010.

<sup>142</sup> *Id.* at 1011.

to choose the kinds of housing and locations that best meet the recipients' needs.<sup>143</sup>

Notwithstanding these contentions, critics acknowledge the shortcomings inherent in voucher programs—in particular, the lack of social integration.<sup>144</sup> As one study noted, despite noble motivations, these programs can fail to actually subsidize housing units in affluent areas.<sup>145</sup> In fact, many voucher-holders, predominantly due to outside influences, tend to be concentrated in areas of high to above-average poverty and these voucher programs do little to combat the racial disparity in the region.<sup>146</sup> As others have acknowledged, mixed-income housing programs may not be a “cure-all,”<sup>147</sup> but they nonetheless allow for the creation of affordable housing in areas that have otherwise been off-limits.

Ellickson concedes that (1) the studies he relies on examined the integrative effects of fully, rather than partially, subsidized projects and that (2) “mixed-income projects conceivably could foster integration better than housing vouchers.”<sup>148</sup> Others have noted this flaw in Ellickson's criticism as well, stating that the argument implicitly acknowledges that no program *alone* is going to be an effective tool for integration.<sup>149</sup> Critically, some literature points out that these voucher programs oftentimes force voucher-holders to remain in impoverished neighborhoods because of the significant constraints imposed by the voucher programs' fair market rent cut-off points.<sup>150</sup> And even where the fair market price cut-offs allow potential tenants to actually afford the housing, many landlords can refuse to rent to these voucher recipients.<sup>151</sup> Because of landlord fears that voucher-tenants may drive away market-rate tenants, voucher recipients are often trapped in purgatory—despite receiving vouchers, they are

<sup>143</sup> See MARGERY AUSTIN TURNER, *URBAN INST., STRENGTHS AND WEAKNESSES OF THE HOUSING VOUCHER PROGRAM 2* (2003).

<sup>144</sup> See Ellickson, *supra* note 138, at 1010 (discussing how many observers view that the main shortcomings of Section 8 vouchers is that they do not enhance racial integration). Ellickson's main focus is on voucher program's economic integration.

<sup>145</sup> See, e.g., Aaron Wiener, *This is Where D.C.'s Housing Voucher Recipients Live*, *WASH. CITY PAPER* (June 12, 2012).

<sup>146</sup> See *id.* (noting that a recent study found that D.C. voucher-holders were concentrated in areas of higher-than-average poverty). There may be initial reservations regarding integration within areas that have historically been racially homogenous, but as this Note has already noted, the path towards realizing the effects of a mandatory inclusionary zoning program will be a long-term process. See *supra* Part III.A–B.

<sup>147</sup> See Matthew Shiers Sternman, *Integrating the Suburbs: Harnessing the Benefits of Mixed-Income Housing in Westchester County and Other Low-Poverty Areas*, 44 *COLUM. J.L. & SOC. PROBS.* 1, 29 (2010).

<sup>148</sup> See Ellickson, *supra* note 138, at 1010.

<sup>149</sup> See Sternman, *supra* note 147, at 28 n.166 (2010).

<sup>150</sup> Alana Semuels, *How Housing Policy is Failing America's Poor*, *ATLANTIC* (June 24, 2015), <http://www.theatlantic.com/business/archive/2015/06/section-8-is-failing/396650/>.

<sup>151</sup> *Id.*

forced to stay in low-income neighborhoods with no options to escape to more affluent areas.<sup>152</sup>

In general, there certainly are advantages to a voucher program—and indeed the lessons from the successes of such programs could be applied when constructing an inclusionary zoning program<sup>153</sup>—but these programs often fall victim to racial discrimination and segregated housing markets.<sup>154</sup> Overall, these voucher programs have not done their job in promoting residential mobility and choice, especially amongst minority recipients—an issue that would certainly be salient in St. Louis.<sup>155</sup> Ellickson may be correct that there are some economic shortcomings inherent in inclusionary zoning,<sup>156</sup> and in some cities or towns, an inclusionary program may just not be tenable. But when taking the societal benefits inherent in inclusionary zoning into account as applied to St.

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<sup>152</sup> See *id.* (explaining how, in Dallas, some landlords who owned units throughout the city would rent to voucher-holders in low-income neighborhoods but not in high-income neighborhoods).

<sup>153</sup> See, e.g., Sternman, *supra* note 147, at 29 (“The use of mixed-income housing does not, however, preclude the implementation of other low-income housing programs.”).

<sup>154</sup> See TURNER, *supra* note 143, at 3.

<sup>155</sup> *Id.* at 2.

<sup>156</sup> However, it is unclear, at best, that the economic underpinnings of inclusionary zoning have more shortcomings than benefits. As noted earlier in this Note, there are other studies that indicate ways to make inclusionary zoning economically palatable to developers. See *supra* Part II.A.2. For example, although inclusionary zoning typically targets moderate-income households, these polices can nevertheless use subsidies and incentives to increase the number of below-market units that developers create. See URBAN LAND INST., THE ECONOMICS OF INCLUSIONARY DEVELOPMENT 7–8 (2016). One can, in turn, argue that the overall increase in supply of low-income housing will help to lower the price of said housing across the board, including areas where said affordable housing is being built. Cf. Benjamin Harney, *The Economics of Exclusionary Zoning and Affordable Housing*, 38 STETSON L. REV. 459, 475 (noting that the primary goal of any affordable housing program must be to reduce the number of exclusionary zoning regulations, thereby increasing the low-income housing supply). In fact, certain studies have reported that, although some areas have had limited production of affordable housing where inclusionary zoning ordinances are in place, there has been a bountiful development of affordable housing units over a long period of time where inclusionary zoning policies are allowed to fully take form and grow. See LAURA SWANSON, INCLUSIONARY ZONING & OTHER POTENTIAL INCENTIVES FOR AFFORDABLE HOUSING DEVELOPMENT IN TENNESSEE 8 (2015). These studies have also noted that it is quite possible to create an inclusionary zoning program that is profitable for developers. See *id.* (noting that it is possible to set aside twelve to fifteen percent of units as affordable while still allowing developers to earn a ten percent profit). Thus, Ellickson may be correct that, from a short-term perspective, inclusionary zoning may not move the needle drastically in terms of overall affordability. See Ellickson, *supra* note 138, at 1006. However, over time the programs can allow developers to achieve a profit and can help to alleviate concerns of a lack of development of affordable units by consistently adding to the supply. See SWANSON, *supra* note 156, at 8. Of course, situations exist where the affordability period mandated by the ordinance expires, thus leading to a diminishing number of affordable units, but this can be rectified through an increase in the affordability period mandated by ordinances. See *id.* In any event, some studies reveal that mandatory inclusionary zoning, when compared to other affordable housing programs, including housing vouchers, is the best equipped to promote the goal at the heart of this Note—social integration. See *id.* at 9.

Louis, as well as the legitimate historical limitations of housing voucher programs, one can see how mandatory inclusionary zoning stands out as the most appealing option to comply with AFFH. By requiring developers to set aside affordable housing options during development, mandatory inclusionary zoning does what voucher programs often fail to do—it creates an opportunity to integrate that goes on to facilitate the various AFFH requirements.

#### *D. Inclusionary Zoning in Real Life—Successes and Challenges*

Mandatory inclusionary zoning provides both enticing policy benefits and a legitimate method to establish AFFH Final Rule compliance. Although the benefits are certainly enticing in theory, one need not look far to see the real-life effects of inclusionary zoning policies. The zoning ordinances created by Montgomery County, Maryland, and Nassau County, New York, exemplify the successes and challenges, respectively, of implementing an inclusionary zoning program.

##### 1. Montgomery County, Maryland—An Example of Success

Montgomery County, a suburb of Washington, D.C., is one of the pioneers of inclusionary zoning.<sup>157</sup> The County developed their program in 1974 to address the lack of affordability of housing through the development of moderately priced, affordable housing.<sup>158</sup> The need for affordability resulted from Montgomery County's affluence—the County was (and is) one of the twenty richest counties in the United States.<sup>159</sup>

The program, titled the “Moderately Priced Dwelling Unit” Program, is straightforward but comprehensive, requiring that up to 15% of new developments of twenty units or more be moderately priced and that 40% of new developments be offered through public housing agencies and non-profit housing providers.<sup>160</sup> Although deemed “administratively complex” and subjected to several modifications over time,<sup>161</sup> Montgomery County's program experienced impressive success. Over thirty years, the program has produced a total of 13,000 affordable units.<sup>162</sup>

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<sup>157</sup> URBAN INST., EXPANDING HOUSING OPPORTUNITIES THROUGH INCLUSIONARY ZONING: LESSONS FROM TWO COUNTIES 8–9 (2012).

<sup>158</sup> EDWARD A. TOMBARI, NAT'L ASS'N OF HOME BUILDERS, SMART GROWTH, SMART CHOICES SERIES: THE BUILDER'S PERSPECTIVE ON INCLUSIONARY ZONING 3 (2005).

<sup>159</sup> Alexandra Holmqvist, *The Effect of Inclusionary Zoning on Racial Integration, Economic Integration, and Access to Social Services: A Davis Case Study 11* (2011) (unpublished master's thesis, University of California, Santa Cruz) (on file with University of California, Santa Cruz Office of Graduate Studies).

<sup>160</sup> Nat'l Low Income Hous. Coal., *40 Years Ago: Montgomery County, Maryland Pioneers Inclusionary Zoning*, NLIHC.ORG (May 16, 2014), <http://nlihc.org/article/40-years-ago-montgomery-county-maryland-pioneers-inclusionary-zoning>.

<sup>161</sup> URBAN INST., *supra* note 157, at 53.

<sup>162</sup> *Id.* at 5.

And despite critics' initial concerns of potentially declining development, Montgomery County's program has generated a total of \$477.4 million of private sector investment in affordable housing programs across the county.<sup>163</sup> More importantly, the program integrated a traditionally homogenous county through increased racial and economic diversity.<sup>164</sup> Such success, even in the face of the program's complexity, is encouraging for those hoping to replicate similar results in St. Louis.<sup>165</sup>

## 2. Nassau County, New York—An Example of the Challenges

Nassau County, New York, a more recent addition to the inclusionary zoning game, has had its fair share of prevalent racial and economic disparity throughout the area.<sup>166</sup> This disparity was tied to a dearth of affordable housing in the region, an issue that state officials have sought to mitigate.<sup>167</sup> In response, the New York State Legislature passed the Long Island Workforce Housing Act ("LIWHA") in 2008, mandating that new developments set aside 10% of the units to affordable housing in return for at least a 10% density bonus.<sup>168</sup> However, the implementation of this inclusionary zoning policy has been a challenge for Nassau County. Part of the issue is a lack of direction at the regional level that has led to disagreement amongst municipalities over the proper implementation of the LIWHA. Some municipalities view the bill as optional and only a complement to local inclusionary zoning laws—both volun-

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<sup>163</sup> BRUNICK, *supra* note 111, at 6. Despite some economists' fears that inclusionary zoning would decrease development by making development more costly, developers working in Montgomery County have characterized inclusionary programs as "part of the cost of doing business." URBAN INST., *supra* note 157, at 25.

<sup>164</sup> See KAREN DESTOREL BROWN, BROOKINGS INST., EXPANDING AFFORDABLE HOUSING THROUGH INCLUSIONARY ZONING: LESSONS FROM THE WASHINGTON METROPOLITAN AREA 16, 27 (2001); Henry G. Cisneros, *Regionalism: The New Geography of Opportunity*, CITYSCAPE: A COLLECTION OF ESSAYS 46–47 (1996) (explaining how inclusionary zoning helped Montgomery County look "more like a 'rainbow'" by integrating the county with increased population diversity).

<sup>165</sup> Of course, the program is not immune from challenges. As one study has noted, expiring price regulations have led to a decrease in affordable units in Montgomery County, a decline in construction will lead to a decline in the number of affordable units created, and the public sentiment remains a barrier to future construction of affordable housing units. See BROWN, *supra* note 164, at 17–21. Even so, these are issues that can likely be mitigated through a mix of mandatory inclusionary zoning and longer mandated affordability periods for the newly developed housing.

<sup>166</sup> See INST. ON RACE & POVERTY, RACISM AND THE OPPORTUNITY DIVIDE ON LONG ISLAND 10 (2002) (explaining the large gap in household poverty rates between black and white residents in Nassau County and Suffolk County).

<sup>167</sup> See *id.* at 11 ("Nassau-Suffolk is among the most racially segregated residential areas in the country.").

<sup>168</sup> POPULAR CTR. FOR DEMOCRACY, THE CRISIS OF FAIR, AFFORDABLE HOUSING ON LONG ISLAND 7 (2015).

tary and mandatory—in place.<sup>169</sup> Others view it as a mandate.<sup>170</sup> Such confusion has stagnated the development of affordable housing in the area.<sup>171</sup> The challenges of implementing inclusionary zoning in Nassau County—and more generally Long Island—highlight the need for an integrated, region-wide policy. More importantly, the expectations and goals must be clearly communicated across the region, particularly where there are a multitude of municipalities with differing views on the promulgation of affordable housing through zoning.<sup>172</sup>

#### CONCLUSION

St. Louis has a problem. With the promulgation of HUD's Final Rule for AFFH potentially affecting fair housing funding in the region, finding a practicable remedy is more imperative than ever. To that end, inclusionary zoning provides a legitimate solution.

Although plagued by socially and economically segregated communities, St. Louis has the potential to benefit from an inclusionary zoning plan. By implementing a regional mandatory inclusionary zoning policy to increase the availability of affordable housing through the development of mixed-income communities, St. Louis could revitalize stagnant and segregated neighborhoods while preserving and rehabilitating existing affordable housing in the area. Further, a mandatory inclusionary zoning program, over the course of time,<sup>173</sup> should help to increase the housing choices for St. Louisans of all income levels and create greater access to social resources, education, and employment opportunities that for years have been unattainable. These gains would do more than enough to immediately satisfy the main requirements of HUD's Final Rule on Affirmatively Furthering Fair Housing. Above all else, these benefits over the course of time will help St. Louis to reap substantial socioeconomic gains by breaking down the barriers of communities traditionally proscribed to low-income—and often ethnically diverse—St. Louisans. By taking steps to include the excluded, St. Louis can begin to institute a fundamental paradigm shift towards the path of social integration, economic revitalization, and increased prosperity.

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<sup>169</sup> *Id.* at 8.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *See, e.g.,* *Mhany Mgmt. v. Cty. of Nassau*, 819 F.3d 581, at 589–616 (2d Cir. 2016) (describing the opposition of Garden City residents to rezoning ordinances that would increase the number of affordable housing units in the area).

<sup>173</sup> As previously mentioned, any social and economic benefits that mandatory inclusionary zoning may provide will be realized over the course of decades. The current state of St. Louis is the product of decades of segregative practices—to reverse the results will likely require an equal amount of time.

