

Planning for Fair Housing

Addressing fair housing and civil rights through planning and zoning

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on behalf of the Office of Councilor Lydia Edwards

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Acknowledgements

I am indebted to the scholars, planners and Boston residents I spoke to for this project, specifically Anne Draddy, Michael Hubner, Nick Welch, Lisa Bates, Sy Mintz, Steve Hollinger and Carolyn Chou. I am also indebted to my professors at Northeastern University School of Law who gave me the framework and language to think about property, zoning and the Fair Housing Act as tools to advance racial justice, specifically Aziza Ahmed, Rashmi Dyal-Chand and Melvin Kelley.

Thank you to Chris Schildt and James Jennings for being early readers. Thank you to the Rappaport Center for Law and Public Policy for providing the financial support to undertake a fellowship in the public interest, and the Office of Councilor Lydia Edwards for supporting this project.

I. Executive Summary

Boston has become a highly desirable city to live in, a hub of high-tech industries and a pristine waterfront community. It was not always this way. After World War II, the City was in dire need of investment. This came in the form of the federal urban renewal program. The City primarily used those urban renewal dollars to spur private investment and lure back high-income, often white, residents. In its operation, urban renewal often displaced low-income communities of color and communities of immigrants. The decisions driving urban renewal may not have been driven by outright racially discriminatory intent. But the effects of those decisions, the weight of that history, created a damaging and discriminatory impact.

Urban renewal, together with explicitly discriminatory lending, real estate "blockbusting," inequitable city services, and exclusionary land use practices in communities outside of Boston, shaped communities over the course of the 20th century. Collectively, these practices help explain why, now, as Boston is in the midst of an affordable housing crisis, the communities most harmed by displacement, eviction and housing instability are low-income communities of color, that bore the earlier harms of urban renewal and disinvestment.

How can the City intervene in the private housing market, to ensure that the burdens of development are not borne disproportionately by people of color and other protected classes, and that the benefits of economic growth are shared? A key point of intervention is through municipal land use regulations, which the Boston Planning and Development Agency (BPDA) largely shapes. BPDA is a staggeringly powerful agency. It creates the conditions for private development through its neighborhood planning processes and its oversight of Article 80

projects. In this role, the BPDA has two very powerful tools at its disposal to inform its own operations, and the operations of private developers: the Fair Housing Act and zoning.

The Fair Housing Act creates an obligation for local governments to affirmatively further fair housing — that is, governments have an obligation to undo residential segregation. Part of this obligation is accounting for how land use policies affect outcomes for protected classes. City planning departments in Portland, Oregon, Seattle and Baltimore have incorporated equity frameworks in their planning processes. This ranges from developing authentically participatory community processes, to developing analytical frameworks for assessing the risk of displacement. These procedural changes have had substantive outcomes: the community processes have identified issues that would not have otherwise come to light, and the displacement analyses provide robust empirical evidence to guide development and particularize government interventions to fit community needs. Reframing whose needs we center when we engage in planning — from the developer's to the community's — is possible, and it is being done in other cities.

Zoning has been the main tool municipalities have used to impose conditions and restrictions on how private property is used since the early 20th century. At its core, zoning is a balance of values: the entitlements of private property and the public good. The Fair Housing Act is already enforceable against private actors. Enshrining fair housing obligations in the zoning code — as proposed by the Fair Housing zoning amendment — would give the City leverage over private actors to advance development that is just and equitable. Boston is not unique in its disparities. Overcoming them is possible. It just requires courage and imagination.

II. Introduction

Local land use controls, including city planning processes and zoning, have been major drivers of residential segregation, and in conjunction with federal policies and private actors in the real estate and banking industries, have shaped modern U.S. cities along racial lines.

The Fair Housing Act of 1968 creates a statutory obligation for municipalities and other local government actors receiving HUD funding to actively remedy a history of residential segregation, and the consequent unequal distribution of opportunity that has followed these segregated living patterns. This is known as the obligation to affirmatively further fair housing.ⁱ

Local land use controls, including city planning processes and zoning, have been major drivers of residential segregation, and in conjunction with federal policies and private actors in the real estate and banking industries, have shaped modern U.S. cities along racial lines.ⁱⁱ

But land use controls can be used to remedy the harms they created. Indeed, this is what the Obama Administration's 2015 ruleⁱⁱⁱ interpreting the obligation to affirmatively further fair housing recognizes.^{iv} The rule "incorporate[s] explicitly, fair housing planning into existing planning processes...which in turn, incorporate[s] fair housing priorities and goals more effectively into housing, and community development decision-making."^v Crucially, the obligation to affirmatively further fair housing does not merely mean ensuring the housing market operates in a non-discriminatory manner, but demands more ambitious and far-

reaching interventions from local government actors: "taking meaningful actions...that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics."^{vi}

It is this reparative vision of fair housing and local planning that the City of Boston should incorporate into all its land use regulations. The City of Boston has demonstrated a commitment to remedying past racially discriminatory actions. The Mayor's Office of Resiliency and Racial Equity (MORRE) released its Report on Resiliency in 2017, identifying ways the City could embrace an equity framework in all aspects of its operations.^{vii} This year, Mayor Marty Walsh issued an executive order requiring all city departments to train staff and implement plans to ensure they operate with a racial equity framework.^{viii}

There are three city agencies directly involved in housing production: the Boston Housing Authority (BHA), which administers public housing and Section 8 vouchers, the Department of Neighborhood Development (DND), which builds and preserves low- and moderate-income housing, and the Boston Planning and Development Agency (BPDA, also known as the Boston Redevelopment Authority), which permits large commercial and residential building projects, and is in charge of long-term city and neighborhood planning. All three agencies are taking important steps to meet their fair housing obligations, as will be described below. But remedying the harms of residential segregation requires greater leadership from the BPDA, which, given its oversight of private development, has a particularly important and powerful role to play in affirmatively furthering fair housing.

The BHA, as the oldest of the three housing agencies in Boston, has the longest history of efforts to reform the organization. In 1988, a landmark lawsuit forced the Boston Housing Authority to integrate white housing projects,^{ix} and when white residents terrorized families of color after they moved in,^x BHA reached a settlement requiring it to adopt a Civil Rights Protection Plan.^{xi} In recent years, BHA has gone through an ambitious process of rehabilitating its housing projects, while promoting economic integration. The BHA is partnering with private developers to achieve a one-for-one replacement of public housing units^{xii} while expanding the developments to include market-rate units. Additionally, BHA sought and received approval from HUD to implement the Small Area Fair Market Rent (SAFMR) program that allows the Section 8 rental subsidy to adjust based on the zip code. Section 8 voucher holders have been limited in their housing choice, because their fixed subsidy did not make it financially feasible to move to areas of higher opportunity, where rental housing costs are higher.^{xiii} These are significant achievements for an agency that has historically been mired in racial segregation,^{xiv} patronage^{xv} and significantly, a lack of adequate funding to maintain its housing.

The Department of Neighborhood Development utilizes inclusionary development funds and linkage funds — money that for-profit developers pay as a condition of building in the City — to build or acquire and deed-restrict housing for low- and moderate-income households. DND also partners with developers to build new income-restricted housing, by putting city-owned land out to bid. To bid on this land, DND requires developers to meaningfully include people of color and women in the development of the project, and to create a plan to mitigate displacement.^{xvi}

The Boston Planning and Development Authority (BPDA), the last leg in the three-legged stool of city agencies that provide housing, has taken steps to be more cognizant of its Fair Housing commitments. BPDA works in conjunction with peer agencies to ensure the marketing for housing lottery units is non-discriminatory, and following a planning process for Dudley Square, has incorporated anti-displacement and developer team diversity and inclusion requirements on proposals for city and BPDA-held land.^{xvii} Since the Mayor's executive order, BPDA has engaged in some staff trainings focusing on personal bias. However, BPDA does not appear to have clear policies or a commitment to promote racial equity through planning. The BPDA — as the Boston Redevelopment Agency — was the key agency making land use decision that entrenched residential segregation, displaced vulnerable communities, and contributed to inequitable development and distribution of resources in Boston, a legacy the City and its residents have inherited.^{xviii} Not only does the BPDA have a legal obligation to affirmatively further fair housing, it has a moral obligation to remedy the harms of its past decisions. The current leadership of the BPDA has acknowledged historic actions that devastated the West End.^{xix} As the planning agency, BPDA has incredible regulatory power to remake the City into one that is just and equitable. However, to do this, BPDA needs to embrace a holistic equity lens in its planning decision. It needs to utilize its role as curator and primary author of the zoning code, and as lead negotiator for public interest concessions from development projects to impose fair housing obligations on private developers.

The changes BPDA would need to undertake are significant, but not impossible. As residents across the city weigh the merits of broader structural reforms to city planning, zoning and

appeals, changes to further fair housing can begin today, and such changes could also be advanced in any successor agencies. Other cities with complicated and entrenched histories of racism — such as Baltimore and Seattle — have incorporated a racial equity framework in their planning through different mechanisms. The City of Baltimore amended its municipal charter, requiring city departments to use a racial equity lens to inform their work, and the Baltimore's Planning Department utilizes an equity framework in its decisionmaking. Of note in Baltimore is how the Planning Department has centered "procedural equity" — meaningfully engaging communities who are often not heard in the planning process. The City of Seattle utilized a Growth and Equity Analysis to inform its comprehensive planning process, leading to long-term planning priorities and zoning changes that are cognizant of displacement and access to opportunity.

With respect to zoning, Article 80 in Boston's zoning code gives BPDA a great deal of oversight of large development projects. However, the Article 80 process is fundamentally driven by developers, and the process (Article 80C) for Planned Development Areas — complex developments of at least one acre in size — allows for substantial amendment or attrition over time, with community benefits often getting lost as parcels change hands.

The Fair Housing zoning amendment that Councilor Lydia Edwards has proposed amends Article 80 to require developers to account for fair housing consequences of planned projects — and mitigate adverse fair housing outcomes — with a particular focus on larger projects, including Planned Development Areas. Furthermore, the zoning amendment requires regular assessments, to hold developers accountable in multi-phase, multi-year projects. The Fair

Housing Act already applies to private actors, and the zoning amendment simply creates a mechanism for BPDA to hold private developers accountable. Boston would not be alone in seeking to impose fair housing obligations on private developers through municipal powers. Councilors in New York City as well as the New York Public Advocate are seeking to amend New York's environmental review criteria to include racial and socioeconomic impact, which would achieve a similar result as the Fair Housing zoning amendment.

This memo is in two parts. The first focuses on city planning, tracing how historic and contemporary planning decisions in Boston — that did not account for disparate racial impacts — have resulted in disparate outcomes for people of color. The section then goes on to highlight tools and methods other cities have employed to adopt a racial equity framework in planning, and how this framework informs long-term planning decisions. The second section focuses on zoning, describing briefly its historical development and use as an exclusionary tool. The section goes on to describe in greater detail how the Fair Housing zoning amendment would be vital tools in moving Boston toward its obligation to overcome residential segregation, and describes a similar move in New York City to enforce fair housing obligations on developers by amending the permitting process.

III. Planning

From the West End, to the South End, to Chinatown and the Seaport, Boston's modern history of planning and development has been marked by contested land use decisions. What does this mean for Boston's future?

The Harms of Past Boston Redevelopment Authority Policies

The Boston Redevelopment Authority was formed in 1957 to facilitate ambitious urban renewal projects after World War II. After the war, Boston experienced severe economic and population declines — losing businesses and residents to the suburbs. This was a result of changing industries and white flight from the city, facilitated by federal government-backed development in the suburbs, and redlining in the city's immigrant and Black neighborhoods. At the same time that the federal government was encouraging suburban development, it passed the Housing Act of 1949 enabling urban renewal. Title I of the Act provided federal funding for public and private development projects to rehabilitate or clear "slums" or blighted areas.^{xx} As set forth in Title I of the Act, the government made loans to a local municipal authority to help it acquire and assemble land for redevelopment.^{xxi} However, there was no language in the federal law requiring that the land designated for urban renewal be utilized for housing, or that federal urban renewal dollars be tied to building low-income (i.e. public) housing.^{xxii} The built environment of Boston that we experience now is largely a function of urban renewal in the 1950s and 1960s.

The Boston Redevelopment Authority gets its authority from Massachusetts General Laws Chapters 121A and 121B, and its powers are further defined through special legislation, including Chapter 665 of the Acts of 1956 and Chapter 652 of the Acts of 1960. M.G.L. ch. 121B §4 establishes how an urban renewal agency is formed, and 121B §46 outlines the powers of the urban renewal agency. M.G.L. ch. 121A creates the procedure for the BRA to partner with private developers to undertake urban renewal projects deemed to be in the public interest. Significantly, M.G.L. ch. 121A §2 allows the BRA to deem an area "blighted," utilize its eminent domain powers, and hand over the land to a private developer for redevelopment.

City leaders' key strategy to revitalize Boston in the 1950s and 60s was to bring back retail, housing and jobs geared toward upper- and middle-class residents.^{xxiii} The mayor and business leaders saw the state's highway projects to build the Central Artery and Mass Pike extension into Boston as vehicles to promote travel by wealthy suburban commuters into the City to work and shop. The highway projects were devastating to Chinatown, with the neighborhood, losing half of its physical size and a third of its housing to the highways by 1963, when the construction on the Pike ended.^{xxiv} Meanwhile, the City deemed the ethnically diverse neighborhoods of the West End and the New York Streets of the South End "slums," evicted their residents, and demolished their neighborhoods — to replace with market-rate housing, high-end retail and new commercial space.^{xxv}

Boston's working-class and poor residents saw development that did not benefit them.^{xxvi} Most Bostonians did not have cars and could not access new jobs in the suburbs,^{xxvii} they were losing

their homes to eminent domain, and they were being dislocated from their neighborhoods. What they needed were quality jobs and quality housing they could afford.^{xxviii} As the historian of public housing Larry Vale puts it, Boston city and business leaders' priorities during the 1950s "focus[ed] on clearance and redevelopment that had little to do with providing new low-income housing for anyone."^{xxix}

What follows is a brief accounting of major contested land use decisions between neighborhood actors and the BRA. The purpose of this exposition is to demonstrate the ways in which the City's planning and land use policies molded residential segregation and inequity in Boston, by disproportionately displacing vulnerable populations — low-income families, immigrants and people of color — to make way for housing and other amenities for higher-income individuals. Many of these low-income residents, displaced by urban renewal, found themselves concentrated in, what the language of the Fair Housing Act calls, "areas of low opportunity."

The West End



Photo: West End project area looking northeasterly, circa 1959-1964. Urban Redevelopment Division, Boston Housing Authority photographs in Boston Redevelopment Authority photographs, Collection # 4010.001, City of Boston Archives.

City leaders selected the West End for demolition because it was close to downtown shopping.

As noted above, the Hynes administration's approach to revitalization focused on bringing back wealthy suburbanites by creating shopping, job opportunities and high-end housing downtown, and facilitating suburban travel to downtown Boston through new highways.^{xxx}

"The nature of the renewal process became almost irreversible when it was decided to create luxury apartments aimed at attracting well-to-do tenants from the suburbs, designed to generate handsome profits for the developers, and organized to furnish additional income for the city. A more balanced mixture of high-rent and low-rent apartments might not have restored the old West End to what it had been, but at least

it would have provided an opportunity for some families to remain in a neighborhood they loved and where they had spent all of their lives.”^{xxxii}

While initial plans for the West End included building new, low-income housing on site, by 1958, when the demolition finally occurred, there was no more mention of new low-income housing.^{xxxiii} It is believed 7,000 West End residents were displaced in the demolition.^{xxxiv} In the West End’s place, rose a number of high-rent apartment buildings with almost 500 units of housing.

As for those West End residents displaced by the demolition, most did not find better housing. As the urban planner Chester Hartman documented at the time, one quarter of displaced residents were living in substandard housing, 86 percent were paying more for housing — and one fourth of those were paying significantly more to live in substandard housing — and only 15 percent of West End families found their new apartments through the BRA’s relocation officials.^{xxxv} Hartman wrote, “In city after city, one sees that the great amount of time and effort spent in investigating and condemning housing conditions in the slums that local authorities wish to tear down is in no sense matched by corresponding public and professional interest in the fate of displaced families once they have been dislodged.”^{xxxvi}



Photo: Courtesy of the West End Museum

The West End was the last time Boston undertook urban renewal by wholesale razing.

However, Hartman notes that even though there were no longer (as many) physical bulldozers, urban renewal still functioned as a "financial bulldozer," that displaced low-income residents in targeted urban renewal areas:

"Massive projects, such as the Washington Park urban renewal project in Boston ...even [with] only 20 percent or 30 percent clearance, wound up clearing out as many dwelling units and their occupants as the smaller, total clearance projects. And saving buildings through rehabilitation did not necessarily mean saving their occupants. Often the renovation projects necessitated displacement. The economics of rehabilitation, even with financial assistance from the urban renewal program, created a 'financial bulldozer' no less potent in terms of its displacement potential than the former demolition approach, as low-income tenants simply could not afford the new rents in their renovated buildings. Renewal work ... also supported private investment decisions that created gentrification pressures equally effective in changing the class composition of the neighborhoods. The early 1960s urban renewal program, especially in the hands of

sophisticated practitioners like Edward Logue and the competent Redevelopment Authority he ran, clearly took sides: the poor were rarely the beneficiaries; middle- and upper-class residents of and returnees to the city were."

The sociologist Herbert Gans noted the middle-class bias of urban planners, developers and city leaders:

"Many people, spurred on by the downtown business community, the real estate industry and the press among others, believed that if the West End, and areas like it, could be replaced with 'luxury housing,' the affluent new residents would perhaps revitalize a moribund downtown shopping district, and with it begin to uplift the city economy itself...To be sure, Bostonians were hardly the only Americans to be innocent about how to revive the cities, naive about the magic powers of 'luxury housing,' or foolish about how to help imagined or real slum dwellers."^{xxxvi}

South End

The New York Streets in the South End was the first urban renewal plan that City undertook under its new powers between 1952 - 1958. Mel King, the former state representative and legendary community activist, recalls the neighborhood where he grew up:

"Up and down Harrison Avenue there were shops and stores of all descriptions and families who lived over them in apartments upstairs ... On Seneca Street, where I lived with my parents, there were also Irish, Portuguese, Albanians, Greeks, Lithuanians, Armenians, Jews, Filipinos, Chinese and a few (very few) Yankees...Although our buildings were pretty well sorted out by color and ethnic background, the street belonged to all of us. There was a street baseball team and when the Armenian twin sisters down the block had a double wedding, they washed down the whole street for dancing and celebration."^{xxxvii}



Photo: New York Streets, Harrison Avenue looking south. Urban Redevelopment Division, Boston Housing Authority photographs in Boston Redevelopment Authority photographs, Collection # 4010.001, City of Boston Archives, Boston.

The City's Planning Board (before the BRA was created in 1957) determined that the area was blighted and slated it for total demolition. In its place, the City planned to change zoning for commercial and light industrial uses.^{xxxviii} The headquarters of the Boston Herald would later be located there.^{xxxix} The BRA's relocation report noted that the City had, since the 1930s, acquired 50 parcels through tax foreclosures and demolished the buildings, leaving the neighborhood pock marked with vacant lots.^{xl} The BRA report also noted that once residents heard about the demolition plan in the summer of 1953 many just left the neighborhood,

adding to vacancies and worse vandalism and deterioration leading up to the eminent domain takings and demolition in 1957-1958.^{xli} In 1954, 931 families were living in the area. By 1955, only 368 families lived there, and these remained long enough to get relocation assistance.^{xlii}



Photo: Boston Herald Traveler Site from corner of Broadway and Albany Street. 1958 May 23. Urban Redevelopment Division, Boston Housing Authority photographs in Boston Redevelopment Authority photographs, Collection # 4010.001, City of Boston Archives, Boston.

The South End proved to be a battleground for many years after the New York Streets demolition, as city leaders and planners tried to lure upper- and middle-class residents back to its genteel townhouses, that had been divided up into low-income apartments and rooming houses.^{xliii} The historian Thomas O'Connor notes, that despite a public process, the BRA

already had a plan that it was going to pursue, and it just was trying to convince the neighborhood to adopt it:

"...in order to achieve the upgraded property values, the moderate and high-rent housing, and the influx of salaried homeowners and well-to-do tenants who would transform the South End into the kind of respectable middle class neighborhood they saw as their ultimate goal, members of the BRA realized they would have to engage in precisely the kind of substantial demolition and wholesale clearance they had promised to avoid. To justify their actions, especially in light of the widespread public revulsion against what happened in the old West End, city planners projected an image of a neighborhood so 'pathologically disorganized' ... that its recuperation would require nothing short of drastic 'social surgery.'"^{xliv}

In fact, while there certainly were social problems and the housing stock in the South End was deteriorating, residents in the 1960s, "resented outsiders' depiction of the entire neighborhood as a slum. They were quick to point out that, by and large, drug dealing, drinking and prostitution were limited to certain areas well known to insiders."^{xlv} The South End was a vibrant multiracial, multi-ethnic neighborhood, composed largely of low-income but law-abiding citizens whose lives revolved around their "churches, social clubs, restaurants, stores and taverns."^{xlvi} However, the focus was on the crime, the filth,^{xlvii} and the number of families on public assistance. O'Connor notes the reports justifying such drastic clearance in the South End bear a striking resemblance to those justifying total demolition in the West End.^{xlviii}

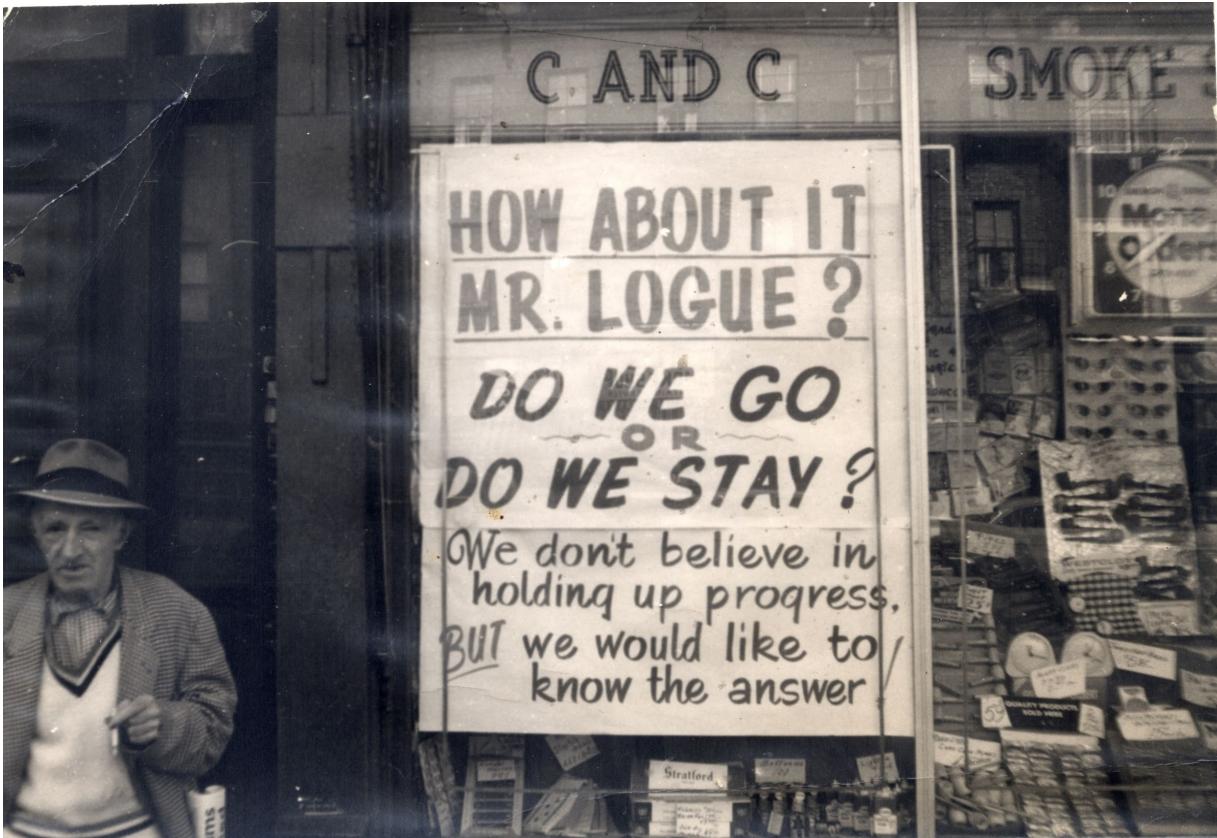


Photo: South End, sign protesting urban renewal. Boston Landmarks Commission image collection, Collection 5210.004, City of Boston Archives, Boston.

The final South End Urban Renewal Plan, adopted in 1966, provided for rehabilitating over 3,000 structures, demolishing and constructing over 3,000 new market rate units, and 800 public housing units, along with amenities including new schools, new playgrounds, and improvements to parks, streets and streetlights. However, the Plan would directly displace over three thousand households, because their housing would be torn down.^{xlix} More displacement occurred as buildings were torn down faster than they were put up, federal money for rehabilitation was prioritized for upper-middle-class housing, and subsidized housing was slow to be created.^l Additionally, because of the new public investment in the neighborhood, private market investors saw an opportunity to return a large profit on a small investment: "Real estate investors rapidly acquired the Victorian housing stock, evicted the old tenants ... and

reconverted the structures to single-family or rental apartment use.^{lvi} At the same time, the Mayor John Collins asked banks to stop the practice of redlining the South End, so that more potential, high-income homeowners could purchase in the neighborhood.^{lvi} The result, was that low-income tenants became displaced with this new influx of public capital and improvements, many moving on to Roxbury.^{lvi}

A result of urban renewal, critics of the time argued, was to push displaced residents into worse slum conditions.^{lvii} As historical residential patterns developed, most of Boston's Black residents lived in the South End or Lower Roxbury by the 1930s.^{lviii} As urban renewal projects continued, centering the needs of new white-collar business and housing their workers, more Black former residents moved out of the South End into Roxbury and North Dorchester.^{lvix} The U.S. Civil Rights Commission identified 15 census tracts where 70 percent of Boston's Black population lived — in the South End, Roxbury and North Dorchester.^{lvii} Because residential choices for Black Bostonians was circumscribed by racism, they had to settle for whatever housing they could get in the neighborhoods where they were able to rent. The Commission's study found that residents of the "black boomerang" paid more for less: unscrupulous slumlords routinely price-gouged Black residents for overcrowded and substandard housing.^{lviii} Where 78 percent of white households in Boston lived in decent housing in 1960, only 47 percent of non-white households lived in decent housing.^{lx} These segregated neighborhoods not only had substandard housing, they had poor city services. The four public schools in Washington Park —where Roxbury and Dorchester meet — were not fireproofed, and one was almost 100 years

old. There was almost no playground and park space, and there were mountains of trash because there had been inconsistent city garbage collection.^{lx}

This description of the South End's development and dislocation of its low-income residents in the 1960s should raise alarm bells because it is eerily similar it is to contemporary development, and the displacement pressures residents of formerly "undesirable" neighborhoods are now experiencing.

Chinatown

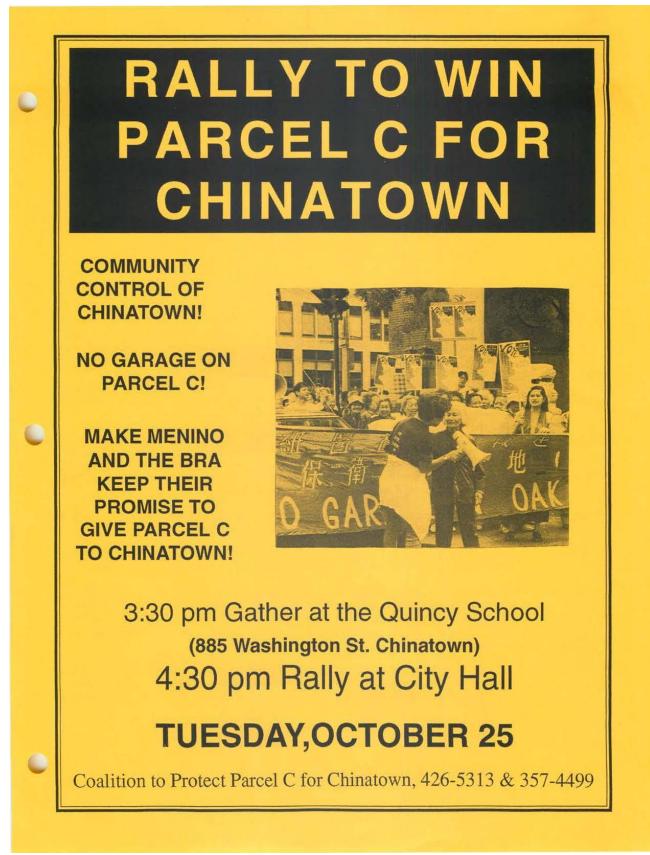


Photo: Parcel C flyer. From the Chinese Progressive Association records, courtesy of the Northeastern University Archives and Special Collections. <https://www.lib.neu.edu/archives/collect/findaids/m163find.htm>

As described above, Chinatown was devastated by the highway projects of the 1950s and 60s, pursued by the State and backed by Boston city leaders. Separately, in the South Cove Urban Renewal Plan, the BRA took more Chinatown land through eminent domain.^{lxii} The agency estimated 400 individuals and 130 families would be displaced as a result of the urban renewal project.^{lxiii} New England Medical Center (NEMC), now Tufts Medical Center, had become an institutional force in Chinatown, utilizing many of the parcels taken through eminent domain for its expansion.^{lxiv} The BRA expected that the health industry would continue to grow, and focused on facilitating that growth.^{lxv}

One of the key battlegrounds was over land known as Parcel C — land that used to have housing units and that the BRA took through eminent domain in 1966, and sold to NEMC.^{lxvi} In 1987, NEMC proposed a parking garage on Parcel C for the first time, and the BRA joined with the Chinatown community to oppose it.^{lxvii} As a result of a lawsuit in 1988, NEMC gave the BRA Parcel C in exchange for two other parcels, and BRA promised the Chinatown community that it would reserve Parcel C for use as a community center.^{lxviii} Additionally, the controversy served as a catalyst for a neighborhood master plan — the Chinatown Community Plan. Adopted in 1990, the Community Plan was an early example of the BRA centering community needs over business needs, in planning for the neighborhoods future development.^{lxix} However, as a recession hit and under new leadership, the BRA reneged on its promise, and took NEMC's offer to buy Parcel C for two million dollars in 1992. NEMC proposed a 455 car parking garage.^{lxix}



Photo: Protesters hold signs and banners on Oak Street, as they demonstrate against the New England Medical Center's plan to build a parking garage on Parcel C in Chinatown. Photo from the Chinese Progressive Association records, courtesy of the Northeastern University Archives and Special Collections. <https://www.lib.neu.edu/archives/collect/findaids/m163find.htm>

For Chinatown residents, the proposed use was wasteful and dangerous. Parcel C was in the residential subdistrict as defined by the 1990 Master Plan and adopted into zoning, where institutional expansion was prohibited.^{lx} The garage would have abutted a day care center, and was in close proximity to a school, community center and housing development for seniors

and people with disabilities.^{lxxi} A Boston Transportation Department report noted that Washington street, nearby Parcel C — was one of the most deadly for pedestrians.^{lxxii} Given the density of children and elderly and disabled residents, a parking garage compounded the traffic safety hazards Chinatown already experienced. The community coalition also raised the issues of congestion and air pollution, estimating an additional 3,000 daily vehicle trips as a result of the garage.^{lxxiii} Nevertheless, the BRA backed the NEMC parking garage project. As Andrew Leong notes,

“the Boston Redevelopment Authority totally discounted the community’s opposition to the proposed garage. Instead, the Authority had the audacity to suggest that the Chinatown community actually favored the proposed garage because the Chinatown Neighborhood Council had approved the deal. The Authority and City Hall held out the council as the true representatives of the Chinatown community, despite the fact that 2,500 community members had registered their protest against the garage proposal.”^{lxxiv}

Through over a year of legal action and community organizing, Chinatown residents stopped the project. NEMC withdrew the proposal in 1994.^{lxxv} Ultimately, the City turned over Parcel C to a joint venture of the Asian Community Development Corporation and a private developer to build The Metropolitan, a 251 unit, mixed commercial and residential building. The majority of units are income-restricted at 60 percent AMI, and it provides office space for community organizations.^{lxxvi} As the prior three historical examples demonstrate, while an obvious racially discriminatory intent might not have motivated the redevelopment decisions, the effects of the redevelopment plans were racially discriminatory. It is these discriminatory effects of land use decisions that the Fair Housing Act recognizes and seeks to remedy.

Seaport

In more recent history, the development of the Seaport has been criticized for missing an opportunity to utilize government-held land and \$18 billion in public investments to create an inclusive neighborhood.^{lxvii} Like in the South End and the West End, the expenditure of public money made the Seaport desirable and valuable for private development. Arguably, the City had leverage over the character of the development or to extract community or city-wide benefits beyond linkage and IDP units, but did not use its leverage to create an integrated neighborhood. As the Globe reported, the financial benefits of the Seaport have landed in the hands of a few, exclusively white, businesses, and the neighborhood is only affordable to wealthy individuals and households.^{lxviii}



Photo: Aerial view of Fort Point Channel - Boston Redevelopment Authority photographs, Collection #4010.001, City of Boston Archives, Boston

In 2010, the census tract that compromises the Seaport already had a relatively high median household income at \$78,750.^{lxxix} In seven years, median income almost doubled to \$151,250.^{lxxx} The population of this census tract has also almost doubled, but it remains over 80 percent white.^{lxxxi} Like in the development of the West End, no significant provision was made for low-income housing. While the Seaport does have a substantial number of inclusionary development (or IDP) units,^{lxxxii} the income-restrictions on IDP units are often beyond the reach of Boston renter households of any race, and Black and Latino households, whose median incomes are substantially lower.^{lxxxiii}

Beyond the Seaport's racial and economic make-up, another issue has been the erosion of public benefits in major development projects, such as the Seaport Square PDA.^{lxxxiv} While the project notification stage is not legally binding, it is part of the public process, a way for developers to build excitement and neighborhood support for a significant project. The Seaport Square PNF had promised generous community benefits: it included plans for a K-12 school and a pre-K-1 school, a 250,000 square foot plan for a performing arts center, a plan for a public library,^{lxxxv} and 25 percent of the development area set aside for green space.^{lxxxvi} Following approval of the PDA, originally submitted in September 2010, a series of amendments filed by the developer and approved by the BPDA eliminated the public library space and the two schools (although there is provision for two 5,000 square foot educational/civic facilities).^{lxxxvii} The three parks remained in the PDA, with designated minimum acreage, but their design was not set in stone.^{lxxxviii} One of the parks, because it was in Phase I of the construction plan, did get delivered as promised (Block Q). However the other two parks

have suffered in their design. The 2010 PDA promised a 1.26 acre Seaport Hill Park, with a significant open green space.^{lxxxix} By 2017, Seaport Hill Park had been “supplanted”^{xc} by a pedestrian way with a small open green space, as the surrounding L block buildings have consumed more of the open land. Even the BPDA weighed in on the plan for a “linear plaza lined with shops along three blocks from Summer Street to Northern Avenue” calling it, “a promising pedestrian link, [but] not fundamentally public open space in the way that the original plan intended.”^{xci}

The 2010 PDA promised a second park, Seaport Square Green, at a minimum of 1.3 acres, expecting it to be a “grand civic lawn large enough to support recreation and concerts.”^{xcii} However, by 2017, there was no plan for moving the District Hall (which occupied the park parcel) and returning the area to park space.^{xciii} Furthermore, the amended PDA called for adding another building onto the park parcel, again reducing open park space.^{xciv} Finally, the promise of a performance space, or a series of performance spaces, has been contested. The 2010 PDA promised a minimum of 200,000 square feet set aside for a performing arts center.^{xcv} By 2017, there was talk of no performing arts center at all.^{xcvi} But after uproar from the arts community, and BPDA and the City’s intervention, three theaters of varying sizes are back on the table, although there is no mention of how much square footage will be devoted to performing arts uses.^{xcvii}

The PDA process, despite a public comment phase, is largely driven by developers. BPDA is the regulatory agency which can attach conditions to development and ensure such conditions are enforced, but as the Seaport Square example illustrates, a loss in institutional memory over

time or a lack of political will has resulted in the BPDA needing to renegotiate for public benefits that were already promised (and lost through amendments) in an area that is now mostly developed. The current process for PDAs obligates residents to perform a watchdog function, holding developers accountable for public benefits. Even with resident advocacy, unless such benefits, such as open space, public access to private space or the production of cultural facilities, are permanently protected through a conservation restriction, deed restriction or public easement, they are vulnerable to amendment, changing in staffing of city agencies or changes in ownership should the private developer sell a parcel. While it is understandable that large, yearslong construction projects require flexibility to adjust to market conditions over time, fundamental community benefits should not be so easy to discard. Community benefits that are not memorialized in a separate and permanent agreement that is attached to and conveyed with the land, or at least enunciated in a legally binding document, such as a cooperation agreement, are vulnerable to eroding over time or being replaced by plans the community has not agreed to.

Suffolk Downs

Suffolk Downs will be the largest private development project in Boston's history, with 161 acres on the prior site of the Suffolk Downs horse racing track, situated between East Boston and the neighboring City of Revere,^{xcviii} two majority Latino communities.^{xcix} The majority of the development, 109 acres, will be in East Boston. Like the Seaport, Suffolk Downs presents the City of Boston with an opportunity to build a neighborhood from scratch. What values does the City want to embed in this neighborhood? As of this writing, the PDA process for Suffolk

Downs is ongoing. Multiple stakeholders have raised issues with regard to affordable housing, family housing and the need to plan for an inclusive community — given that East Boston and Revere have high concentrations of low-income renters and people of color.^c



Image: Suffolk Downs Concept, HYM Investment Group, LLC, accessed via BostonPlans.org

There is a reasonable risk that siting a largely market-rate development with thousands of new, market-rate housing units, and retail and office space geared toward higher-income consumers, between two census tracts where largely low- and moderate-income people of color live, would "produce a demographically isolated and physical separate neighborhood."^{ci} The developer is pursuing the project with the presumption that the housing distribution on site will accommodate 1.58 persons per household.^{ci} This does not reflect the makeup of East Boston households — which have 2.8 persons per household.^{ciii} This could have the foreseeable result of excluding families from the development.^{civ} Furthermore, although the developer is abiding by the inclusionary development requirement to set aside 13 percent of

units as income-restricted — these units are generally targeted for households at 80% AMI or higher, placing them outside of the grasp of most East Boston households,^{c_v} where the median household income is \$55,777^{c_{vi}} — closer to 50% AMI.

Finally, the developer is undertaking significant infrastructure improvements estimated to cost hundreds of millions of dollars.^{c_{vii}} Private mitigation would save the City the cost of doing these upgrades. However, the City and State are able to bond for or seek grant funding for certain infrastructure improvements, such as the construction of public roads.^{c_{viii}} With a "limited pool of private dollars" it is critical to consider what mitigation would most effectively further fair housing in Boston's next neighborhood to put it toward creating meaningful integrated housing.^{c_{ix}} Put another way, the City of Boston and BPDA have discretionary financial choices that affect how and whether fair housing is advanced.

We state this history to illuminate the way planning decisions, even when not made with racially discriminatory intent, have racially discriminatory results. The BPDA has a legal obligation to remedy these effects, and to pursue planning that does not perpetuate segregation. The BPDA can only remedy the past and contribute to an inclusive future if it adopts policies that center racial equity.

Adopting a Racial Equity Framework in Planning

The Mayor's recent executive order on racial equity creates a mandate for operationalizing an equity framework in all aspects of government services. In part, the executive order requires city departments to support staff with adequate training and education, to engage in meaningful community outreach, and crucially for the BPDA:

"[to] support the use of racial equity framing to review current and proposed policies, programs, initiatives, practices and budget allocations to prevent decision making that adversely impacts communities of color and other marginalized populations."^{cx}

What would a planning framework guided by consideration of racial justice and fairness look like? There are at least four key avenues that the BPDA could explore. First, BPDA could engage in more robust staff trainings that include structural and institutional racism, including relevant legal and social case studies about urban planning that resulted in inequitable development. This is training beyond the personal bias training that BPDA has already undertaken. The second involves crafting authentically participatory community processes, and the third involves developing analytical frameworks to assess relevant indicators and data on displacement and access to opportunity, to guide equitable development decisions. Finally, enshrining the obligation to affirmatively further fair housing in the zoning code would provide BPDA and other city agencies with tools to enforce fair housing obligations on private actors.

Baltimore: Creating an Authentically Participatory Community Process

An often-repeated critique of the BPDA is that its public processes are not genuinely participatory, that developers steer the ship, and that BPDA accommodates developers — rather than regulating them and negotiating in the present community's interests. Understanding what the community needs — instead of telling them what they need — comes through authentic participation, which centers those residents most impacted by development. Community leaders have guidance about what meaningful engagement looks like, and BPDA should incorporate their suggestions into its processes. Some of these suggestions include pursuing creative outreach programs — such as partnering with community organizations;

consistent attention to accessibility — including childcare and interpretation services, regardless of whether these services are utilized at every meeting, and a genuine back-and-forth dialogue between BPDA and residents, where BPDA meetings are not merely informative, but geared toward soliciting feedback and meaningfully integrating it into future plans.^{cxi}

Baltimore's experience might be instructive, as its Planning Department has adopted an equity framework, that includes "procedural equity" as a goal. The Baltimore Planning Department's internal Equity in Planning Committee developed a framework that applies to every planning project or policy change:

1. **"Structural Equity:** *What historic advantages or disadvantages have affected residents in the given community?*
2. **Procedural Equity:** *How are residents who have been historically excluded from planning processes being authentically included in the planning, implementation, and evaluation of the proposed policy or project?*
3. **Distributional Equity:** *Does the distribution of civic resources and investment explicitly account for potential racially disparate outcomes?*
4. **Transgenerational Equity:** *Does the policy or project result in unfair burdens on future generations?"^{cxii}*

A key highlight is the participatory process the Office of Sustainability (housed under the Planning Department) utilized to gather community input on the 2019 Sustainability Plan. The office wanted to go beyond experts and community association meetings, to hear from residents who normally would not attend.^{cxiii} To do that, the City recruited "resident ambassadors" from the neighborhoods, ensuring that the ambassadors' demographics reflected the City. The Office hired an equity consultant to train the ambassadors, and fanned them out to administer an open-ended survey with residents, meeting them in parks, on their

stoops — quite literally meeting residents where they were.^{cxiv} They received 1,200 responses.^{cxxv} This approach recognized that those vulnerable residents the City wanted to hear from likely would not have attended a city-sponsored meeting, for a variety of reasons. Using neighborhood residents to engage with their neighbors established a greater level of trust, and reached a wider variety of residents.

Engaging at this deeper level took two years and much more coordination than prior sustainability processes.^{cxxvi} But the results were worth the effort, as some items in the Sustainability Plan would not have been included without the greater resident participation.^{cxxvii} For example, noise was not something experts would have identified as a priority; it came to light because more young residents (those under 18) responded to the surveys and identified noise as a concern.^{cxxviii} The Plan memorializes the concern with noise as an equity issue. The main sources of noise are police sirens and police helicopters, and Black neighborhoods are most impacted by these sources of noise.^{cxxix} The action items recognize that solutions should come from those most impacted by noise, with the City working to facilitate engagement.^{cxxxi} A future challenge for the City will be tracking and implementation of the plan's action items.^{cxxx} Baltimore's planning department was the first of the city's agencies to center racial equity. Soon after, the Mayor and City Council amended the city charter, requiring all city departments to adopt and realize a racial equity framework in their operations.^{cxxii}

Seattle: Utilizing Data to Make Equitable Decisions about Growth

The City of Seattle presents us with an example of analyzing projected growth patterns with an equity lens. In conducting its comprehensive plan, Seattle 2035, the City's planning

department conducted a supplementary Growth and Equity Analysis to evaluate the potential effect each of the four growth options proposed in the Draft Environmental Impact Statement would have on displacement and access to opportunity.^{cxxiii}

The Growth and Equity Analysis asked the following questions:

- “Is the intensity of expected growth in particular urban centers and villages likely to have an impact on displacement of marginalized populations?”
- Is the intensity of expected growth in particular urban centers and villages likely to have an impact on marginalized populations’ access to key determinants of physical, social, and economic well-being?
- What strategies and levels of investment are necessary to mitigate the impacts of expected growth and to maximize opportunities for equitable outcomes?”^{cxxiv}

To assess this, the Analysis identified and analyzed indicators of displacement and access to opportunity to create a typology that categorized each neighborhood based on its risk of displacement (high/low) and its access to opportunity (high/low).^{cxxv} (See figure below for a visual representation of this typology.)^{cxxvi}

Each neighborhood required a different approach to development and investment based on its typology. The Analysis noted that private-sector development was not out-of-the-question in high displacement risk/low access to opportunity areas, just that these neighborhoods needed appropriate mitigation strategies before such growth occurred.^{cxxvii} Significantly, the Analysis recommended more and higher density development in neighborhoods categorized as low displacement risk/high access to opportunity, in order to give marginalized residents the option of moving into these neighborhoods.^{cxxviii} After the Growth and Equity Analysis, the City amended its Environmental Impact Statement, and

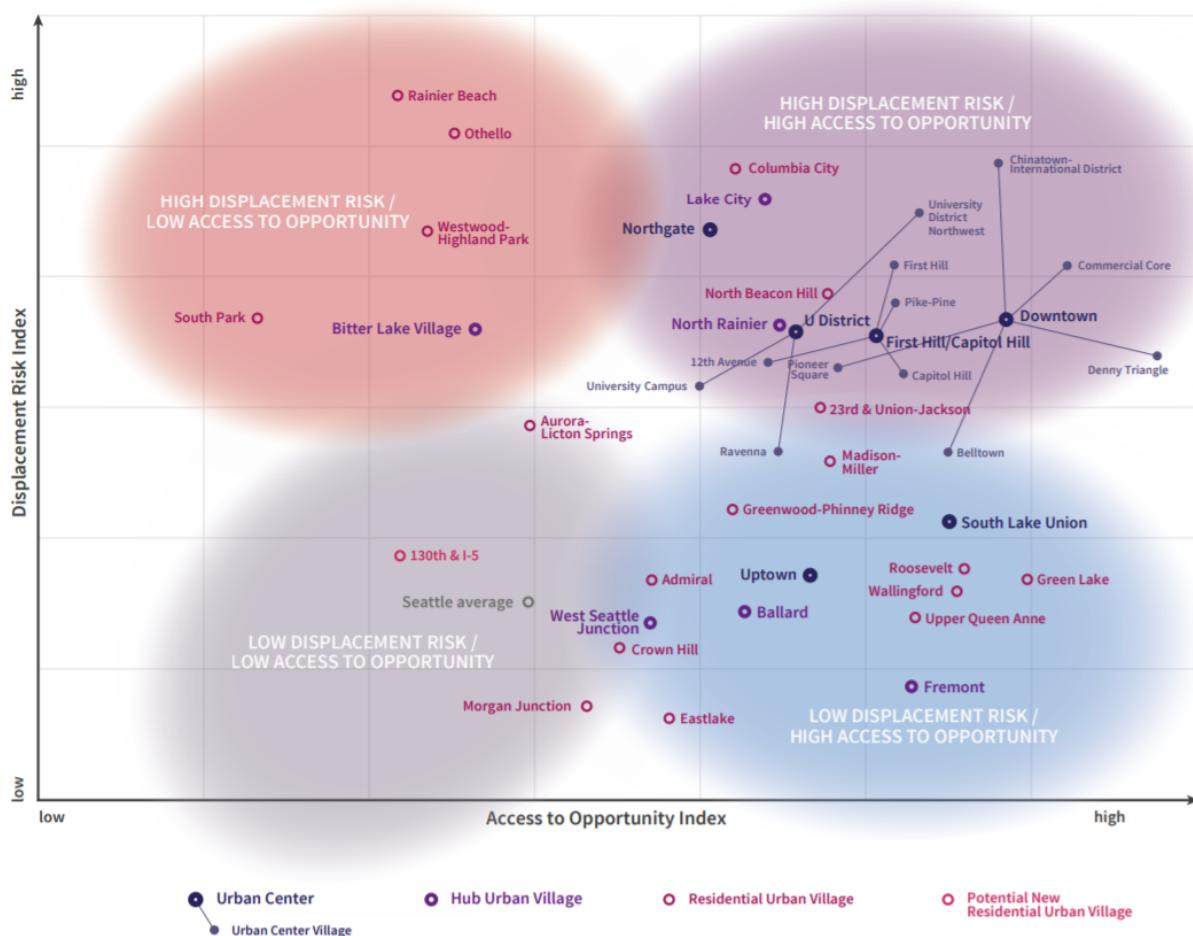


Figure: Analysis of Displacement Risk / Access to Opportunity, City of Seattle

created a fifth, preferred alternative that would guide growth away from the urban villages identified in the Growth and Equity Analysis as having a high risk of displacement and low access to opportunity, while still promoting transit-oriented development.^{cxxxix}

Alongside the Comprehensive Plan, the City implemented its Mandatory Housing Affordability (MHA) program through zoning changes. MHA targets higher density zoning changes in neighborhoods zoned for multi-family housing and commercial uses to create low-income affordable housing.^{cxxx} Like inclusionary zoning, MHA requires private developers to set aside income-restricted units or pay into a city fund. The structure of MHA is significant because

income-restricted units are targeted for 60% AMI and below households, and payments are structured based on gross floor area, with those neighborhoods with higher housing costs and greater zoning density, requiring higher percentage of affordable units set-aside and higher in-lieu payments.^{cxxxii} However, the percentage set aside for on-site affordable units is low — from 5 to 11 percent at the most — given the feasibility of providing such deeply subsidized apartments.^{cxxxiii} Seattle has a separate program targeting income-restricted units for moderate-income households.^{cxxxiv}

Seattle's comprehensive plan is significant for operationalizing an equity lens — utilizing a data-driven framework to answer questions about the effect of development and growth on vulnerable residents. More importantly, the City changed its approach to development and siting affordable housing as a result of the equity analysis. This was achieved through a years-long participatory planning process, that had room to change as a result of community and other input, and effected through zoning changes, guided by consciousness about racial and social equity.

Equity in Boston's Neighborhood Planning Process

Notably, city planners in Seattle did not have to invent this methodology. They were able to draw on work and expertise of regional partners and subject matter experts who had already undertaken displacement and access to opportunity mapping, and adapt it to Seattle's context.^{cxxxv} This is to say, methodologies exist and are being implemented to incorporate equity into planning.^{cxxxvi} BPDA could partner with these organizations, or engage with colleagues in other cities, in order to fill gaps in staff knowledge and training, and

operationalize analytical methods to incorporate equity in planning. The first step in planning with an equity lens is to ask the right questions. Once those questions are framed, then a department can begin to select the appropriate indicators that it needs to analyze and track, and determine how to constitute those indicators with appropriate data. For example, the City of Portland, Oregon, wanted to develop a gentrification policy. It needed to know how neighborhoods are changing, and how the City could anticipate changes that lead to displacement.^{cxxxvi} The City approached Portland State University professor Lisa Bates, who developed a neighborhood typology (see table below) assessing every census tract in the City based on whether its population is vulnerable to displacement, and how its demographic composition and its housing market conditions have changed.^{cxxxvii}

Neighborhood Type	Vulnerable population?	Demographic change?	Housing market condition
Susceptible	Yes	No	Adjacent
Early: Type 1	Yes	No	Accelerating
Early: Type 2	Yes	Yes	Adjacent
Dynamic	Yes	Yes	Accelerating
Late	Yes	Yes	Appreciated
Continued Loss	No	Has % white and % with BA increasing	Appreciated

Figure: Neighborhood Typology, Vulnerability to Displacement, Dr. Lisa Bates, Portland State University.

What data points constitute these indicators? Selecting just the category "vulnerable population," Bates settled on the census tracts' racial makeup, housing tenure (renter vs.

homeowners), educational attainment, and income-levels as factors that would signal a populations' vulnerability.^{cxxxviii} Having this kind of neighborhood-level analysis lets the City be cognizant of how public investment in certain areas might spur market development and displacement, and allows it to proactively mitigate potential adverse consequences of development before they happen.^{cxxxix}

The results of planning with an equity lens might mean that a department or a city's priorities change or that stronger steps are taken to mitigate risks of displacement or adverse consequences of a given policy or project.^{cxl} The BPDA sees its mandate as growing the municipal tax base.^{cxli} But this is only one aspect of what a planning department is supposed to do, as cities like Baltimore, Seattle and Portland demonstrate. Asking the right questions, that center equity and neighborhood needs is urgent as BPDA is in the midst of neighborhood planning processes. BPDA often comes into a neighborhood planning process with a set of assumptions that center a private developers' needs: how does zoning need to change to make private development financially feasible in a neighborhood? What level of housing affordability is financially feasible for developers?^{cxlii} Instead, the BPDA could ask: what kinds of housing does the community need, and how could we put together public and private tools to achieve that balance? If we create higher density zoning, would it have an adverse effect on protected classes? How does the proposed unit distribution (i.e. is there any provision for three- or four-bedroom units?) in a building affect protected classes? If there are disparate impacts on protected classes, can we mitigate those effects? There is something of a one-size-fits-all approach to neighborhood planning — if financial feasibility is the starting point, then

the limit will always be about the same. But if BPDA saw development in neighborhoods vulnerable to displacement from a community-centered lens, then it could figure out how to adjust the required transportation, climate and housing requirements on private developers to meet community needs. Could the City pick up transportation-related costs for the developer, allowing the developer to contribute more to affordable housing? Creative, iterative approaches like this might make more sense.

BPDA has demonstrated it can center community needs in its Plan: Dudley Square process.^{cxliii} Dudley Square was unique, in that it involved planning for the disbursal of publicly-owned land. In this planning process, the neighborhood expressed a desire for housing built on the public parcels to be evenly split: $\frac{1}{3}$ for low income housing, $\frac{1}{3}$ for moderate income housing and $\frac{1}{3}$ for market rate housing, and a desire for more homeownership and community control through co-operative housing or land trusts.^{cxliv} The BPDA determined to do this, it would need four million dollars of subsidy.^{cxlv} Significantly, because of the Plan: Dudley Square process, the City adopted a displacement risk analysis for RFPs on public land.^{cxlvi} Understandably, BPDA has more flexibility to impose conditions on publicly-owned land, but it can impose similar displacement risk analysis requirements through zoning, as will be discussed below.

IV. Zoning

Zoning is a critical exercise of state powers to protect the public health and welfare, but too often, these powers have been deployed to exclude groups based on racial or class characteristics. Cities and states can lead on using zoning to further fair housing and reverse historic discrimination.

At its core, zoning is not about aesthetics or building heights. Zoning is the principle mechanism municipalities have to regulate private property use, choosing how to balance property owners' rights, which are not absolute, with the public good. Zoning is an exercise of the state's police powers, which have long been interpreted as extending to:

"...all matters which concern [the State's] internal regulation. It embraces those which affect the lives, limbs, health, comfort and welfare of all in their persons and their property. It subjects both persons and property to those restraints and burdens which are necessary in order that the general comfort and welfare may be secured. It prescribes the modes in which it is reasonable that each shall use and enjoy his own property, in order that others may be guarded in the reasonable use and enjoyment of theirs, and thus prevents a conflict of rights, by determining what uses and enjoyments by each are consistent with those to which others are entitled."^{cxlvii}

After the Home Rule Amendment was adopted in 1966, municipalities in the Commonwealth of Massachusetts were understood to inherently possess these same broad police powers, described above, subject to some limitations from the state

legislature.^{cxlviii} The mode of zoning that most American municipalities adopted divides the municipality up into zones based on the kinds of uses — residential, commercial, industrial — allowed in each area. Residential uses are separated from commercial uses, which are separated from industrial uses. There are legitimate reasons some types of uses are allowed in some areas, but not in others — such as for public health, environmental protection^{cxlix} and historic preservation.^{cl} In more recent years, as transit-oriented and pedestrian-friendly development has come into favor, and more municipalities adopt inclusionary zoning, municipalities have changed zoning to accommodate these mixed commercial and residential uses — zoning for taller, higher density buildings, where people can “live, work and play.”

A History of Exclusion

While zoning has legitimate uses, it is important to recognize that since zoning’s first adoption in the early 1900s, municipalities have used it with discriminatory race- and class-based motives. In a landmark 1917 case, *Buchanan v. Warley*, the Supreme Court found municipal ordinances which, on their face, promoted residential racial segregation were unconstitutional — not because they were racially discriminatory, but because they violated the property owner’s fundamental contractual rights: “The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make

such disposition to a white person.”^{cl} An obvious weakness of *Buchanan*, of course, is that it did not reach racially discriminatory private contracts, known as racially restrictive covenants, which barred the sale of property in majority white neighborhoods to non-white buyers.^{clii} Not until 1948 in *Shelley v. Kraemer*, did the Supreme Court strike down racially restrictive covenants as unconstitutional.^{cliii}

While the Court deemed facially discriminatory ordinances unconstitutional, it upheld zoning as a legitimate exercise of police power in *Village of Euclid, Ohio v. Ambler Realty*. The Supreme Court created an extremely deferential standard of review, where zoning was presumptively valid unless it could be shown to be unreasonable or arbitrary.^{cliv} So, while facially racially discriminatory zoning was unconstitutional, other facially neutral zoning was presumptively valid. But of course, facially neutral laws can have racially discriminatory effects, as the Fair Housing Act recognizes. A perhaps more truthful and perceptive interpretation of the zoning scheme in *Village of Euclid* came from the lower court’s decision invalidating the zoning regime:

“In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic.”^{clv}

Arguably, *Euclid* allowed municipalities to use race-neutral language to achieve the racially-motivated goals of *Buchanan*.^{clvi} Exclusionary zoning is the prime example,

using ostensibly neutral considerations about land dimensions and building heights to permit only single-family houses and exclude apartment buildings. In this way, exclusionary zoning selectively engineered the kinds of people who would be able to live in a particular city or a particular area of a city, and has contributed to entrenched residential segregation.

It was only in the 1970s, after the passage of the Fair Housing Act and the Civil Rights Act that advocates had the legal tools to challenge exclusionary zoning.^{clvii} In the landmark *Mount Laurel* cases, the New Jersey Supreme Court required all municipalities in the state to provide their “fair share” of affordable housing.^{clviii} Massachusetts adopted Chapter 40B before the *Mount Laurel* cases, allowing affordable housing developers to by-pass local zoning in municipalities where less than 10 percent of the housing stock is affordable to low- or moderate-income households.^{clix}

Zoning reform legislation proposed by Massachusetts Governor Charlie Baker has prompted ample debate about municipal and state powers in shaping local development. This bill, H.3507, would allow some zoning changes to be approved by a simple majority — rather than a super majority — in municipalities, encouraging greater housing production.^{clx} Because getting zoning variances or permits has required a super majority in towns that are zoned for single-family houses on large lots,

developers outside of Boston/Somerville/Cambridge find it difficult to build high-density apartment buildings. While other municipalities certainly need to contribute to housing production, and take the pressure off Boston, there are legitimate critiques about Governor Baker's bill as written, notably, that it does not account for possible displacement as a result of market-rate and luxury development in low-income communities, and it does not impose any affordable housing requirements for developers who benefit from the expedited zoning process. However, some public officials have noted these values should not have to be in conflict and the state can have both a pro-growth and a pro-equity agenda.^{clxi} Separately, another bill under consideration, S.781, would make it a violation of the state's anti-discrimination law for municipalities to engage in land use practices that have the effect of excluding affordable housing development.^{clxii}

Boston can Lead on Using Zoning to Overcome Residential Segregation

About 20 percent of Boston's housing is income-restricted for low- and moderate-income households.^{clxiii} Boston's main mechanism for promoting integrated affordable housing is the inclusionary development program — inclusionary zoning effected through an executive order — which was first adopted in 2000. Inclusionary zoning requires an exaction from private developers in the form of affordable housing set aside on-site, off-site or as a payment into the City's affordable housing fund.

Inclusionary zoning, like the fair share doctrine, is also a relatively recent development, finding early adopters in the 1970s, but not gaining traction until after 2000.^{clxiv} Using zoning to promote racial and economic integration is only a recent development. This is an exciting moment for Boston to build on this momentum, and potentially lead using zoning to promote fair housing.

The proposed Fair Housing zoning amendment to Boston's zoning code provide additional, vital strategies for integration that the City is already pursuing through inclusionary zoning and linkage. The proposed Fair Housing zoning amendment simply centers racial equity in the City's land use regulations and create a framework to enforce Fair Housing obligations on private actors as a condition of being able to use their property. Because of their scale, Article 80 projects have the most meaningful impact on either remedying or perpetuating segregation, and it is here that the City can best intervene to remedy segregation.

Broadly, the Fair Housing zoning amendment would require the following:

1. a contract between the developer and the City affirming their compliance with fair housing laws, including, "affirmative marketing, the participation of protected classes, the prevention of exclusionary displacement, and strategies for promoting racially, ethnically and economically integrated communities and, including but not limited to strategies to address affordability, prevention of

displacement, and integrations of communities facing language isolation or access barriers.”

2. A requirement for BPDA to conduct an assessment of Article 80 projects for their positive and negative impacts, including for their effects on fair housing issues.
3. For Planned Development Areas, which may be built in phases over many years or heavily amended over time, a requirement that the developer execute a separate, binding agreement with the City that includes, “measures for assessing compliance and amending strategies, interventions or public benefit requirements should the initial implementation of such a Plan fail to further fair housing,” and a mandatory review.

The Fair Housing Act is enforceable against private actors. Most commonly, the disparate treatment theory of liability — that is interpersonal discrimination — is pursued against private actors in the housing market. However, the disparate impact theory of liability — that a policy has a disparate effect on a protected class — has also been held as cognizable against private actors.^{cixv} Private enforcement (i.e. litigation) is the key mechanism for enforcing the Fair Housing Act. This is, of course, extremely expensive and time-consuming. The Fair Housing zoning amendment would simply incorporate what is already required of municipalities and private actors under federal law. Furthermore, the amendment would enable the City to proactively enforce the Fair

Housing Act, rather than reacting by either suing a private actor or being sued for failing to deliver on its fair housing obligations.

Private action, alongside state action, has contributed to patterns of residential segregation. The effects of disinvestment and redlining in Boston's outer neighborhoods have artificially lowered prices of land, now making them attractive to develop, given the low cost of land and the high possible rates of return, as we saw with urban renewal in the South End. This results in the disproportionate displacement of protected classes as the neighborhood's composition changes, and surrounding property values increase. Displacement is a fair housing issue because its effects most burden protected classes. Therefore, local government has an obligation to intervene to ensure development occurs in an equitable way, and to ensure that land use regulations — the most powerful tool available to municipalities — work to remedy the past and ongoing harms of residential segregation.

Displacement is a Fair Housing Issue

Understanding the racial dimensions of development and displacement is one of the key areas BPDA needs to address in all aspects of its planning and permitting processes, and the Fair Housing zoning amendment would require this analysis. As noted in its Draft Assessment of Fair Housing, the City identifies segregation and integration as a key fair housing issue, and displacement as one of the primary barriers

preventing the City from meeting its obligation to affirmatively furthering fair

housing.^{clxvi}

Low-income residents and communities of color have seen the worst effects of displacement in the past decade. Indeed, while the median price of housing in Boston rose 36 percent between 2010 – 2015, it rose 70 percent in Roxbury and 52 percent in East Boston.^{clxvii} Between 2009 and 2017, rents across Boston increased 55 percent.^{clxviii}

Housing advocates report seeing mass evictions, where a landlord will significantly raise the rent in an entire building overnight in order to clear out the tenants, who are usually low-income or people of color.^{clix} While the federal Fair Housing Act does not include income as a protected class, people of color and people with disabilities are more likely to be low-income individuals. Tenants who do fight their evictions in court often represent themselves, as there is no right to counsel. Low-income tenants lose their homes over technicalities because they do not have a lawyer to advise them.^{clxx}

While the process of gentrifying low-income or segregated neighborhoods looks like it is integrating them, it ultimately results in perpetuating segregation and denying access to opportunity for low-income residents, who are more likely to be members of a protected class:

“In fact, with its displacement of low-income residents, gentrification and perpetuation of concentrated poverty are not opposite trends, but actually operate similarly and recursively. Both push low-income people of color away from resources, opportunities and vital institutions. Displaced low-income

families are given no other option in today's housing market than to relocate to other areas where affordable housing exists, areas which are more often than not, as a result of regional forces, also unstable, declining, and economically isolated from the opportunities of high performing schools, employment growth, and a strong municipal tax base.”^{cxxi}

Because displacement more often than not has a disparate impact on communities of color and individuals in protected classes, planning decisions that accelerate this process have fair housing implications, and indeed, may give rise to legal liability.

Cases pursuing a disparate impact theory of liability need to establish a *prima facie* showing that a planning or land use decision has caused a disparity for a protected class.^{cxxii} If they do, the burden shifts to the defendants to demonstrate that they had a legitimate, non-discriminatory reason for their actions, and that there was no “alternative course” that would enable that interest to be achieved in a less discriminatory manner.^{cxxiii} If the defendant meets this “burden of justification,” the plaintiffs must demonstrate there is a less discriminatory way to advance the legitimate interest.^{cxxiv} Historically, disparate impact cases have dealt with refusals by municipalities to allow multi-family housing or low-income housing in white neighborhoods or majority white towns.^{cxxv} But in an urban context, plaintiffs have challenged redevelopment projects which would have the effect of displacing low-income residents and people of color.

In *Munoz-Mendoza v. Pierce*, a group of Chinatown and South End residents challenged HUD’s decision to issue a grant, facilitating the development of Copley

Place.^{clxxvi} The court credited the plaintiffs' argument that the rise in rents and property value that would come with such a large development would have a displacing effect.^{clxxvii} The question, however, turned on whether the displacement would have a segregating effect. The court found the displacement would have a segregating effect in the South End, an already integrated neighborhood,^{clxxviii} but the resident from Chinatown did not have standing.^{clxxix} In *Pleune v. Pierce*, a group of Brooklyn residents challenged HUD's approval of the Atlantic Terminal development on similar grounds, arguing the development would bring in an influx of wealthier, white residents, raising rents and property values in their neighborhood, with the effect of segregating their integrated neighborhood.^{clxxx} The issue in both cases turned on whether the displacement would segregate an already integrated neighborhood, not on whether the burden of displacement disproportionately impacted people in a protected class. While no cases have specifically forwarded this latter framing in a gentrification context, fair housing contemplates the disparate burden development places on protected classes.

In *Mount Holly Citizens in Action, Inc., v. Tp. of Mount Holly*,^{clxxxi} the town undertook a redevelopment plan, that demolished housing in a primarily low-income Black and Latino neighborhood, and would replace the housing with market-rate housing the residents could not afford.^{clxxxii} The Township argued, in part, that it had a legitimate governmental interest in eliminating blight, and the plan was not discriminatory

because it treated all the residents of the neighborhood (white and people of color), the same.^{cxxxiii} The Appeals Court explained that,

"We need not simply ask whether the White residents at the Gardens are treated the same as the minority residents at the Gardens. The logic behind the FHA is more perceptive than that. It looks beyond such specious concepts of equality to determine whether a person is being deprived of his lawful rights because of his race. Rather, a disparate impact inquiry requires us to ask whether minorities are disproportionately affected by the redevelopment plan. Thus the residents can establish a *prima facie* case of disparate impact by showing that minorities are disproportionately burdened by the redevelopment plan or that the redevelopment plan '[falls] more harshly' on minorities."^{cxxxiv}

The *Mount Holly* framing could be utilized to forward an argument about the effects of development that result in displacement.^{cxxxv}

New York City: Rezoning and displacement

The effect of rezoning on displacement is a contested issue in New York City. Like Boston, New York City has been undertaking a neighborhood by neighborhood rezoning process, starting in 2002 under former mayor Michael Bloomberg.^{cxxxvi} An early analysis of the effects of former Mayor Bloomberg's rezoning push found that majority Black and Latino census tracts were more likely to be upzoned, while majority white census tracts were more likely to be downzoned.^{cxxxvii} Practically this means that majority minority census tracts in rezoned areas have borne greater development pressure,^{cxxxviii} while downzoned white neighborhoods have generally not.^{cxxxix}

In 2014, Mayor Bill de Blasio continued the neighborhood rezoning campaign, but with an eye to creating more affordable housing.^{cxc} The main thrust of Mayor de Blasio's

strategy is to encourage higher density zoning, and impose affordable housing exactions on developers. However most of the rezoning under Mayor de Blasio has focused on upzoning very poor neighborhoods that are majority people of color, such as East New York.^{cxcii} Indeed, the Inwood rezoning process was so fraught, that neighborhood organizations sued to stop its adoption.^{cxciii} In the lawsuit, the plaintiffs argued that the environmental impact study required by the rezoning process was inadequate, because it did not take into account how the rezoning would affect tenants with preferential leases (i.e. those living in rent-stabilized units) and people of color in the planned rezoning area.^{cxciii}

As a result of community pushback to rezoning, the New York City Council is considering a group of changes to the City's environmental review process, so that it would include an assessment of disparate socioeconomic outcomes of proposed rezonings.^{cxciv} New York City's approach is very similar to the proposed Fair Housing zoning amendment, in that the municipality has found a procedural step where it can intervene, so that affirmatively furthering fair housing becomes a condition of development.

Recommendations for the City of Boston and BPDA

- 1. Fully implement racial equity training, include a history of land use and structural discrimination in planning:** An aspect of implementing a racial equity framework as required by the Mayor's Executive Order should include staff trainings for BPDA, or any successor planning board or department, about structural and institutional racism, that include an examination of historical land use paradigms that have had discriminatory effects, and an examination of contemporary issues in fair housing and land use decisions.
- 2. Expand impacted communities' involvement in guiding development:** Boston should work with communities deeply impacted by the housing crisis and with community organizations to develop an authentically participatory community process to guide Article 80 projects and neighborhood planning initiatives. Planning staff should also consult with subject matter experts and colleagues in other municipalities to develop this process, if necessary. While the current Implementation Advisory Group (IAG) process provides for some local input, it lacks sufficient breadth and may not be fully representative of the diversity in economic status, race/ethnicity and housing tenure in Boston neighborhoods. Additionally, much of the information shared directly with IAG groups, such as the language of specific zoning changes or legally binding cooperation agreements between the BPDA and developers, could and should be shared broadly with the general public as soon as drafts are available.
- 3. Analyze displacement and gentrification risk during neighborhood planning:** The City and BPDA should develop a robust analytical framework to guide equitable growth, by taking into consideration indicators of vulnerability to gentrification/displacement, access to opportunity and housing need. This data analysis can be used to guide development priorities and target neighborhood interventions. BPDA should consult with subject matter experts and colleagues in other municipalities to develop a framework that fits Boston's context.
- 4. Adopt zoning changes to further fair housing:** Boston should adopt zoning changes to impose fair housing obligations on both city and developer as a condition of private development, and expand BPDA's and the City of Boston's staff capacity to monitor compliance with fair housing agreements. This could come through staff training or through involving and investment in capacity-building of city offices, such as the Department of Neighborhood Development and the Office of Fair Housing and Equity, to analyze and review planning and zoning changes.

V. Conclusion

A key disagreement many residents in low-income communities of color have with the City's development priorities is whether or not more housing will result in their displacement, and how best to prevent or mitigate any displacement that may occur. The assumption from the City's side is that a housing shortage can be alleviated by permitting more housing units. What appears to go unconsidered is how particular neighborhoods bear this housing shortage, and how they would be affected — positively and negatively — by more growth.^{cxcv} At the very least, a review of the racial and fair housing consequences of a development project or of planned development on a multi-acre site would allow the city, developers and residents to work from the same baseline of information, which they are not doing right now. Like in Seattle, a comprehensive analysis that includes racial equity as a centerpiece could guide more equitable development.

Such planning does not prevent development from happening, it just means that the City is more able to intentionally intervene and guide growth in a way that does not harm vulnerable residents. Communities do want more assets, they do want higher standards of living, but they want to be able to remain, and the right to remain is encompassed by the Fair Housing Act. To achieve the equitable city we all want, we need to be cognizant of our past and actively pursue strategies that center racial

equity. BPDA, and any successor planning agencies or boards, must lead in this effort. As Boston's planning agency, the BPDA bears a great deal of responsibility for residential segregation and inequitable development. It is time for it to make amends for that past, not only by apologizing for any historic harm, but by implementing procedures to avert similar mistakes going forward.

Today, BPDA needs to change how it operates and come into line with comparable cities' planning departments that are actively trying to overcome their history of residential segregation. Specifically, the agency should adopt and implement a robust racial equity lens in its work. Part of adopting racial equity is staff education and training that takes a historical and structural look at the relationship between housing segregation and urban planning. Another part of incorporating racial equity in planning is creating genuinely participatory engagement models that center vulnerable communities. A third part is realizing and implementing data collection and analysis to help the City answer questions of how development decisions affect displacement, residential segregation, access to opportunity and other fair housing concerns — and back up those findings and future decisions with robust empirical evidence. Such data can be used in neighborhoods with significant development and construction activity as well as neighborhoods with less activity, in diverse neighborhoods as well as those with less demographic diversity, in neighborhoods and districts with restrictive development regulations as well as those with ample large-scale development.

And finally, the City and BPDA should support adoption of Fair Housing zoning changes at the Zoning Commission and at other stages of consideration. The proposed zoning amendment is a crucial tool in overcoming segregation as it creates a municipal enforcement mechanism to impose fair housing obligations on private actors, so that private developers also take meaningful steps to engage in equitable development.

Cities often argue that they have very little power to intervene in the private market, but this is a disingenuous claim. By creating the background legal and regulatory conditions^{cxcvi} under which development at all scales can occur — through zoning, tax incentives, permitting, tenant protections (or lack of them), advocacy and informal negotiations with developers — cities wield a great deal of power to affect housing and its outcomes. As the sociologist Matthew Desmond notes,

"Those who profit from the current situation — and those indifferent to it — will say that the housing market should be left alone to regulate itself. They don't really mean that. Exploitation within the housing market relies on government support. It is the government that legitimizes and defends landlords' right to charge as much as they want; that subsidizes the construction of high-end apartments, bidding up rents and leaving the poor with even fewer options; that pays landlords when a family cannot, through onetime or ongoing housing assistance; that forcibly removes a family at landlords' request by dispatching armed law enforcement officers; and that records and publicizes evictions."^{cxcvii}

In the end, a regulatory and legal framework is a judgment about what we value. If we value fair housing and equity, we need to build these values into our framework, and have them guide our future growth.

Appendix: Fair Housing Zoning Amendment

TO THE ZONING COMMISSION OF THE CITY OF BOSTON:

Boston City Council through and by **Boston City Councilor Lydia Edwards** petitions to amend the text of the Boston Zoning Code, as established under Chapter 665 of the Acts of 1956, as amended, as follows:

1. By amending **Articles 2 (Definitions) and 2A (Definitions applicable in neighborhood districts and in Article 80, Development Review and Approval)** by adding the following term and definition:

Affirmatively Furthering Fair Housing. As defined in 24 CFR 5.152: Taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. "Civil rights and fair housing laws" shall include but not be limited to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3608, Chapter 151B of the Massachusetts General Laws, and Chapters 10-3 and 12-9 of the Boston Municipal Code.

Analysis of Impediments. A review of potential actions, omissions, conditions or decisions that have the effect of restricting housing choices or the availability of housing choices on the basis of age, color, creed, disability, gender identity, marital status, familial status, national origin, race, religion, sex, sexual orientation, presence or absence of dependents, or public assistance source of income, or other protected classes listed under Chapter 151B of the Massachusetts General Laws; policies, practices, or procedures that appear neutral on their face, but which operate to deny or adversely affect the availability of housing to protected classes; and accompanying corrective actions designed to overcome such impediments.

Exclusionary displacement. Unwilling departure, removal or economic dislocation, in a district or in an adjacent and impacted district, occurring when neighborhood choices become limited due to increasing rent burden or a lack of housing that is affordable to area residents, area renters, low-income residents, or residents belonging to protected class or a set of protected classes, thereby restricting housing choice for the impacted population.

Meaningful Actions. A fair housing standard defined in 24 CFR 5.152 and case law indicating significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity.

2. By amending **Article 80 (Development Review and Approval)**, as follows:
 - a. In Section 80-1, Statement of Purpose and General Provisions:

- i. Insert in the second paragraph, following the text "To that end, the goals of these development review requirements include the following:", the phrase:

to take meaningful actions that promote racially, ethnically and economically integrated communities and secure the city's obligations towards affirmatively furthering fair housing;

- b. In Section 80-A-5, Agreements:
i. Insert after the second paragraph, the new paragraph:

The cooperation agreement shall also include, or shall require the Applicant and the Boston Redevelopment Authority to execute a separate agreement, with the Department of Neighborhood Development and the Office of Fair Housing and Equity, or such Department or Offices assuming their responsibilities, regarding compliance with fair housing laws and affirmatively furthering fair housing provisions, which shall address affirmative marketing, the participation of protected classes, and strategies for promoting racially, ethnically and economically integrated communities and, including but not limited to strategies to address affordability, prevention of exclusionary displacement, and integration of communities facing language isolation or access barriers. In the case of a PDA Development Plan or PDA Master Plan the agreement shall also include measures for assessing compliance and amending strategies, interventions or public benefit requirements should the initial implementation of such a Plan fail to further fair housing, including, for a multi-phase development, a mandatory review not less than once per phase.

- c. In Section 80-B-3, Scope of Large Project Review; Content of Reports:
. Delete the text:
 (7) tidelands; and
 (8) Development Impact Project, as set forth in this Section 80B-3.
ii. and insert in its place:
 (7) tidelands;
 (8) Development Impact Project, as set forth in this Section 80B-3; and
 (9) Fair Housing, as set forth in this Section 80B-3.
- d. And in Section 80-B-3, Scope of Large Project Review; Content of Reports:
1. Insert, at the end of the section and after the enumerated item entitled "8. Development Impact Project Component" the following text:

9. Fair Housing. In its Scoping Determination, the Boston Redevelopment Authority shall, in conjunction with city agencies, assess the positive and negative impacts of a Project, including proposed public benefit, on (1) the city's efforts toward Affirmatively Furthering Fair Housing, with particular regard to concerns identified in an Analysis of Impediments and (2) addressing impediments to fair housing, including both those identified citywide and in the neighborhood or district in which the project is

proposed.

- e. In Section 80-C-4, Standards for Planned Development Area Review Approval:

1. Delete the text:

and (e)

2. and insert in its place the following:

(e) such plan complies with, facilitates, and advances the City of Boston's obligations, responsibilities, goals and programs regarding affirmatively furthering fair housing, specifically ensuring integrated communities and averting racial, ethnic or economic segregation or the displacement of protected classes, with particular regard to concerns identified in an Analysis of Impediments, and with regard for impacts that may trigger exclusionary displacement; and (f)

- f. In Section 80-C-5, Boston Redevelopment Authority Procedures for Planned Development Area Review:

1. Delete the following text:

4. Boston Redevelopment Authority Review and Approval. No later than sixty (60) days after the Boston Redevelopment Authority has received the PDA Development Plan or PDA Master Plan filed pursuant to subsection 2 of this Section 80C-5, the Boston Redevelopment Authority shall approve the plan submitted for review and authorize its Director to petition the Zoning Commission to approve the plan and designate the area of the Proposed Project or Master Plan development concept as a Planned Development Area, or shall conditionally approve the plan, or shall disapprove the plan. Before it issues its decision, the Boston Redevelopment Authority shall hold a public hearing, for which it shall publish notice pursuant to Section 80A-2, and shall consider the public comments received.

2. and insert in its place the following text:

4. Boston Redevelopment Authority Review and Approval. No sooner than sixty (60) days after the Boston Redevelopment Authority has received the PDA Development Plan or PDA Master Plan filed pursuant to subsection 2 of this Section 80C-5, the Boston Redevelopment Authority shall consider approval of the plan submitted for review and authorize its Director to petition the Zoning Commission to approve the plan and designate the area of the Proposed Project or Master Plan development concept as a Planned Development Area, or shall conditionally approve the plan, or shall disapprove the plan. Before it

issues its decision, the Boston Redevelopment Authority shall (1) hold a public hearing, for which it shall publish notice pursuant to Section 80A-2, (2) allow for written and electronic comment and issue written responses, individually or in the aggregate, to comments received no later than three business days before the date of a public hearing and (3) consider all public comments received. Prior to approval of a plan, the Boston Redevelopment Authority shall also produce a Certification of Fair Housing from the City of Boston's Department of Neighborhood Development and the Office of Fair Housing and Equity, or their successor agencies, indicating that the PDA Development Plan or PDA Master Plan complies with, facilitates, and advances the City of Boston's obligations, responsibilities, goals and programs regarding affirmatively furthering fair housing.

- g. In Section 80-C-7, Amendment of Planned Development Area Plans:
. Insert, after the text "approval of such plan", the following text:

, provided that the Boston Redevelopment Authority shall, upon receipt of a proposed amendment of a Planned Development Area, assess compliance with the city's obligations regarding Affirmatively Furthering Fair Housing and offer further amendment as necessary to further fair housing, and provided further that the public benefits associated with the Planned Development Area and such amendment shall be subject to public benefits required within a pertinent Neighborhood District or overlay district.

4. In Article 53, East Boston Neighborhood District,
. In Section 53-49, Planned Development Areas: Public Benefits:

1. Delete the text:

The Boston Redevelopment Authority may approve a Development Plan for a Proposed Project as meeting the requirement of Section 80C-4 (Standards for Planned Development Area Review) for compliance with the applicable planning and development criteria of this Article if the Development Plan proposes a plan for public benefits, including one or more of the following: (a) diversification and expansion of Boston's economy and job opportunities through economic activity, such as private investment in manufacturing, commercial uses, or research and development; or (b) creation of new job opportunities and establishment of educational facilities, career counseling, or technical assistance providing instruction or technical assistance in fields related to such jobs; or (c) provision of Affordable Housing available to East Boston and Boston residents; or (d) improvements to the aesthetic character of the development site and its surroundings, which may include the provision of open space connections to the waterfront, the provision of street trees and other improvements that enhance open space, the improvement of the urban design characteristics of the site and its surroundings, or the enhancement of existing open space or the

creation of new open space.

2. and insert in its place the following text:

The Boston Redevelopment Authority may approve a Development Plan for a Proposed Project as meeting the requirement of Section 80C-4 (Standards for Planned Development Area Review) for compliance with the applicable planning and development criteria of this Article if the Development Plan proposes a plan for public benefits, including two or more of the following: (a) creation of new job opportunities and jobs training pipelines for low- and moderate-income residents and establishment of educational facilities, English as a Second Language programming, career counseling, or technical assistance providing instruction or technical assistance in fields related to such jobs; or (b) provision of Affordable Housing available to East Boston and Boston residents, including protected classes, based on an analysis of the median incomes of renters and homeowners in East Boston and Boston; or (c) the provision, financing or facilitation of affordable childcare services for Boston residents, provided that such benefit should maximize opportunities for local employment; or (d) improvements to the aesthetic character of the development site and its surroundings, which may include the provision of open space connections to the waterfront, the provision of street trees and other improvements that enhance open space, the improvement of the urban design characteristics of the site and its surroundings, or the enhancement of existing open space or the creation of new open space.

Notes and References

ⁱ 42 U.S.C. §3608, and as interpreted by Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015)

ⁱⁱ For a comprehensive history of how government policy and private actors segregated United States cities, see RICHARD ROTHSTEIN, THE COLOR OF LAW (2017). See also, Brief of the Housing Scholars as Amici Curiae Supporting Respondents, Texas Dept. of Comm. Affairs v. Inclusive Communities 135 S. Ct. 2507 (2015) (No. 13-1371).

<https://haasinstitute.berkeley.edu/sites/default/files/Amicus%20Brief%20EPI%20and%20Haas%20Institute%20Texas%20Housing%20Dec%202014.pdf>

ⁱⁱⁱ Even though the Trump administration has taken steps to delay implementation of the 2015 Obama rule, the City of Boston has, commendably, decided to abide by the rule, and is in the process of conducting its assessment of fair housing as the Obama rule required.

^{iv} Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,272.

^v *Id.* at 42,273.

^{vi} *Id.* at 42,289. Put another way, “A question that lies at the crux of the [affirmatively furthering fair housing] regulation is how exactly does one go about affirmatively furthering fair housing [AFFH]. If fair housing means that a person’s housing choice should not determine their access to opportunity and amenities, then AFFH means taking steps to eliminate or reduce existing disparities in income, housing and other areas. While there are many possible approaches, including, for example, reparations to families who have been harmed by past discriminatory actions, in the case of the Fair Housing Act, the question is more specific in that it looks to housing-related policies to create incentives and make resources available to address existing disparities.” Rafael W. Bostic and Arthur Acolin, *Affirmatively Furthering Fair Housing: the Mandate to End Segregation*, in THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 193 (Gregory D. Squires, ed., 2018).

^{vii} MAYOR’S OFFICE ON RESILIENCY AND RACIAL EQUITY, RESILIENT BOSTON: AN EQUITABLE AND CONNECTED CITY (2017). https://www.boston.gov/sites/default/files/document-file-07-2017/resilient_boston.pdf

^{viii} Exec. Order Relative to Racial Equity and Leadership (Jan. 31, 2019)

https://www.boston.gov/sites/default/files/executive_order.pdf

^{ix} Consent Decree, 723 F. Supp. 1554 (D. Mass. 1989). <https://law.justia.com/cases/federal/district-courts/FSupp/723/1554/1630316/>

^x United States v. Boston Housing Authority (Civil Action No. 99-11587-RCL) (filed on July 26, 1999).

<https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-187>

^{xi} Settlement Agreement and Order, United States v. Boston Housing Authority (Civil Action No. 99-11587-RCL) and Jane Doe No. 1, et al., v. The City of Boston and The Boston Housing Authority (Civil Action No. 96-12540 RCL).

<https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-568>

^{xii} Under the Obama administration’s Choice Neighborhoods program, public housing redevelopment requires a one-to-one replacement of public housing units, while promoting redevelopment of public housing into mixed-income communities. However, the replacement units only need to be income-restricted for 20 years.

DEPARTMENT. OF HOUSING AND URBAN DEVELOPMENT, DEVELOPING CHOICE NEIGHBORHOODS:AN EARLY LOOK AT IMPLEMENTATION IN FIVE SITES (2013).

https://www.huduser.gov/portal/publications/choice_neighborhoods_interim_rpt.pdf. Under the prior HOPE VI program, which also sought to use public-private partnerships to redevelop public housing projects into mixed-income communities, thousands of public housing units were lost to in the redevelopment process. TARYN GRESS ET AL., NATIONAL INITIATIVE ON MIXED-INCOME COMMUNITIES, HOPE VI DATA COMPILATION AND ANALYSIS 12 (2016). <https://case.edu/socialwork/nimc/sites/case.edu.nimc/files/2018-09/HOPE-VI-Data-Compilation-and-Analysis.pdf>.

^{xiii} *With A Policy Tweak, Boston Wants To Give Poor Renters More Housing Choices*, WBUR (May 15, 2019), <https://www.wbur.org/news/2019/05/15/boston-housing-choice-vouchers>.

^{xiv} LAWRENCE VALE, FROM THE PURITANS TO THE PROJECTS: PUBLIC HOUSING AND PUBLIC NEIGHBORS 301 -308 (2000).

^{xv} *Id.* at 290-297

^{xvi} Press Release, City of Boston, New Measures Aim To Increase Diversity In Development, Prevent Displacement (Oct. 9, 2018) <https://www.boston.gov/news/new-measures-aim-increase-diversity-development-prevent-displacement>.

^{xvii} *Id.*

^{xviii} There is no question that the post-World War II Boston that the BRA inherited was in dire need of investment. However, the fact that the benefits of urban renewal generally did not improve the lives of low-income Bostonians, that their needs were an ancillary consideration in urban renewal plans, and that these residents were consistently harmed by urban renewal, created a rift we still have not overcome: "...two decades of seeing an upper-class, pro-growth coalition of big-city politicians, downtown financiers, out-of-state developers, and university-educated professionals demolish their homes, displace old residents and put up high-rent apartment complexes ... caused the working-class neighborhoods to withdraw even further from the orbit of municipal influence ... This new controlling class no longer seemed to be speaking the same language of even its own people in the old white neighborhoods, much less that of the... people of color who lived in communities that were increasingly segregated and isolated from the rest of the city. There were ... two Bostons...the inhabitants were separated by the size of their wallets and the color of their skin." THOMAS O'CONNOR, BUILDING A NEW BOSTON: POLITICS AND URBAN RENEWAL 295-296 (1995).

^{xix} Jon Chesto, *BRA Director Offers Formal Apology For West End's Demolition*, BOSTON GLOBE (Sept. 28, 2015), <https://www.bostonglobe.com/business/2015/09/28/bra-director-offers-formal-apology-for-west-end-demolition/lz7v4TLDdrmAG45FRxPldK/story.html>.

^{xx} Housing Act of 1949, ch. 338, 63 Stat. 413 (1949), available at <https://www.loc.gov/law/help/statutes-at-large/81st-congress/session-1/c81s1ch338.pdf>.

^{xxi} 42 U.S.C. 102, *elim.*

^{xxii} VALE, *supra* note 14, at 271.

^{xxiii} See generally O'CONNOR, *supra* note 18, at 66 -149.

^{xxiv} Karilyn Crockett, "People before Highways": Reconsidering Routes to and from the Boston Anti-Highway Movement 9 (May 2013) (unpublished Ph.D. dissertation, Yale University). (Retrieved from ProQuest Dissertations and Theses database).

^{xxv} "In its plans to modernize the central business district in the downtown area, the City Planning Board had assumed early on that the renewal of blighted areas immediately abutting downtown Boston was an essential part of the overall process. In that respect, both the South End and West End were obvious and natural targets for slum clearance and urban renewal." O'Connor at 124.

^{xxvi} Crockett at 7.

^{xxvii} *Id.*

^{xxviii} *Id.*

^{xxix} VALE, *supra* note 14, at 271.

^{xxx} The business community was interested in replacing the West End's residents with suburban shoppers: "With so many new suburban shopping malls siphoning off profits from the old downtown department stores, the heads of such established concerns as Jordan Marsh and Filene's, along with members of the chamber of commerce, saw the redevelopment of the West End and the creation of a whole new residential area in the downtown area as a strategic way of bringing middle-income families — 'quality shoppers' — back to the heart of the city."

O'CONNOR, *supra* note 18, at 134.

^{xxxi} *Id.* at 133

^{xxxii} *Id.* at 126.

^{xxxiii} *Id.* at 139

^{xxxiv} CHESTER W. HARTMAN, *Lessons For Urban Planners*, in THE LAST TENEMENT: CONFRONTING COMMUNITY AND URBAN RENEWAL IN BOSTON'S WEST END 72 (Sean Fisher and Carolyn Hughes, eds., 1992).

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- ^{xxxv} *Id.* quoting Chester Hartman, *The Housing of Relocated Families*, 30:4 Journal of the American Institute of Planners 266 (Nov. 1964).
- ^{xxxvi} HERBERT J. GANS, *The Urban Village Revisited: The World of the West End just before its Destruction*, in THE LAST TENEMENT, *supra* note 34, at 15.
- ^{xxxvii} MEL KING, CHAIN OF CHANGE 20-21 (1981).
- ^{xxxviii} O'CONNOR, *supra* note 18, at 124-125.
- ^{xxxix} *Id.* at 124
- ^{xl} BOSTON REDEVELOPMENT AUTHORITY, FINAL RELOCATION REPORT: NEW YORK STREETS PROJECT 1 (March 1958).
- ^{xli} *Id.* at 10.
- ^{xlii} *Id.* at 2.
- ^{xliii} O'CONNOR, *supra* note 18, at 227-228
- ^{xliv} *Id.* at 227-228.
- ^{xlv} MARIO LUIS SMALL, VILLA VICTORIA: THE TRANSFORMATION OF SOCIAL CAPITAL IN A BOSTON BARRIOS 28 (2004).
- ^{xlvii} O'CONNOR, *supra* note 18, at 228.
- ^{xlviii} It is worth noting that part of the reason the South End was filthy and had become abandoned was because city services, such as garbage collection and park maintenance, had basically ceased. Small, *supra* note 45, at 30. Perhaps the South End's decline was the realization of a self-fulfilling prophecy once services were withheld.
- ^{xliii} O'Connor, *supra* note 18, at 228.
- ^{xlix} BOSTON REDEVELOPMENT AUTHORITY, SOUTH END URBAN RENEWAL PLAN 9 (1965).
- ^I O'CONNOR, *supra* note 18, at 232.
- ^{II} *Id.*
- ^{III} *Id.* at 232-233.
- ^{IV} *Id.* at 233.
- ^{IV} Herbert J. Gans, *The Failure of Urban Renewal*, 39:4 Commentary Magazine 29 (Apr 1, 1965).
<http://herbertgans.org/wp-content/uploads/2013/11/9-%C2%AB-The-Failure-of-Urban-Renewal-Commentary-Magazine.pdf>.
- ^{IV} O'CONNOR, *supra* note 18, at 58-59.
- ^{VI} KING, *supra* note 37, at 26.
- ^{VII} MASSACHUSETTS ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT ON MASSACHUSETTS: HOUSING IN BOSTON, 3, 7 (Dec. 1963). <https://hdl.handle.net/2027/uiug.30112064635847>.
- ^{VIII} *Id.* at 11-16.
- ^{IX} *Id.* at 13.
- ^X *Id.* at 18
- ^{XI} BOSTON REDEVELOPMENT AUTHORITY, SOUTH COVER URBAN RENEWAL PLAN (1965).
- ^{XII} *Id.* at 14.
- ^{XIII} Andrew Leong, *The Struggle over Parcel C: How Boston's Chinatown Won a Victory in the Fight Against Institutional Expansionism and Environmental Racism*, Institute for Asian American Studies Publication, Sept. 1, 1997, at 2. https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1021&context=iaas_pubs.
- ^{XIV} Michael Chung-Ngok Liu, Chinatown's Neighborhood Mobilization and Urban Development 118 (1999) (unpublished Ph.D dissertation, University of Massachusetts, Boston) (Retrieved from ProQuest Dissertations and Theses database).
- ^{XV} H. Bissell Carey, III et al., COMMENT OF THE COALITION TO PROTECT PARCEL C FOR CHINATOWN IN OPPOSITION TO THE PROPOSAL OF THE NEW ENGLAND MEDICAL CENTER HOSPITAL, INC. TO DEVELOP A 455-CAR PARKING GARAGE ON PARCEL C AND AMEND ITS MASTER PLAN TO BRA 1-2 (Oct. 5, 1993), Northeastern University Archives and Special Collections, Chinese Progressive Association records (M163) Series 3: Community Organizing, Box 07 Folder 01, hereinafter Coalition Comment Letter.

^{lxvi} *Id.* at 2.

^{lxvii} Leong, *supra* note 63, at 4.

^{lxviii} "Previously, the BRA analyzed land use decisions in the neighborhood in the context of institutional needs. In July of 1987, the BRA rejected its prior perspective and shifted to 'community needs and values as a standard of reference,' thereby changing 'both the nature of questions asked and the resulting answers.' This new methodology

required a community-based comprehensive planning process guided by the overriding principle that future development must maintain the quality of life in Chinatown and enhance its residential character. Henceforth, '(e)valuation of 'highest and best' land use scenarios will be viewed from the perspective of community needs.' Coalition Comment Letter at 30.

^{lxix} Leong, *supra* note 63, at 5.

^{lxx} Coalition Comment Letter at 32-33.

^{lxi} Leong, *supra* note 63 at 3.

^{lxxii} *Id.* at footnote 50.

^{lxxiii} Coalition Comment Letter at 15-16.

^{lxxiv} Leong, *supra* note 63 at 6.

^{lxxv} *Id.* at 12.

^{lxxvi} Press Release, City of Boston, Mayor Menino, Chinatown Community Come Together to Break Ground on Parcel C Project (Aug. 15, 2002). <https://www.cityofboston.gov/oldnews/Default.aspx?id=1431>

^{lxxvii} Andrew Ryan et al. *A Brand New Boston, Even Whiter than the Old*, BOSTON GLOBE, Dec. 11, 2017, <https://apps.bostonglobe.com/spotlight/boston-racism-image-reality/series/seaport/>.

^{lxxviii} *Id.*

^{lxxix} See 2006-2010 American Community Survey 5-Year Estimates, AMERICAN FACT FINDER, <http://factfinder.census.gov/> (last visited Aug. 8, 2019) (access Table S1901, "Income in the Past 12 Months (in 2010 Inflation-Adjusted Dollars)," searching by place for Boston, MA and by census tract 606).

^{lxxx} See 2013-2017 American Community Survey 5-Year Estimates, AMERICAN FACT FINDER, <http://factfinder.census.gov/> (last visited Aug. 8, 2019) (access Table S1901, "Income in the Past 12 Months (in 2017 Inflation-Adjusted Dollars)," searching by place for Boston, MA and by census tract 606).

^{lxxxi} See 2006-2010 American Community Survey 5-Year Estimates, AMERICAN FACT FINDER, <http://factfinder.census.gov/> (last visited Aug. 8, 2019) (access Table DP05, "Demographic and Housing Estimates," searching by place for Boston, MA and by census tract 606), and 2013-2017 American Community Survey 5-Year Estimates, AMERICAN FACT FINDER, <http://factfinder.census.gov/> (last visited Aug. 8, 2019) (access Table DP05, "Demographic and Housing Estimates," searching by place for Boston, MA and by census tract 606)

^{lxxxii} According to BPDA's most recent accounting, 13 percent of IDP units are in the Seaport. BOSTON PLANNING AND DEVELOPMENT AGENCY, BRIDGING THE GAP: CREATING INCOME RESTRICTED HOUSING THROUGH INCLUSIONARY DEVELOPMENT 5 (2018). <http://www.bostonplans.org/getattachment/fb05806a-d218-4a3b-bdef-e1221d7159d3>.

^{lxxxiii} IDP units are targeted for Boston households at 70% - 100% of the area median income (AMI) -- from \$60,400 (70% AMI) to \$90,050 (100% AMI) for a two-person household. BRIDGING THE GAP, *supra* at 5. The median income for a Latino household of four in Boston is \$31,400, and \$35,800 for a Black family of four. LYDIA EDWARDS, SUFFOLK DOWNS COMMENT LETTER 1 (May 31, 2019). <https://www.docdroid.net/1Kgh109/5-31-19-councilor-lydia-edwards-suffolk-downs-comment-letter-final.pdf>.

^{lxxxiv} This section is indebted to Fort Point resident and watchdog Steve Hollinger, who walked the author through the Seaport PDA process and its multiple amendments during an interview on July 23, 2019.

^{lxxxv} GALE INTERNATIONAL, MORGAN STANLEY AND W/S DEVELOPMENT ASSOCIATES, LLC, SEAPORT SQUARE PROJECT NOTIFICATION FORM 7 (JUNE 2, 2008). <http://www.bostonplans.org/getattachment/bd010580-f56c-4cb9-adf7-3b35596cc97d>.

^{lxxxvi} *Id.* at 2-30.

^{lxxxvii} MS BOSTON SEAPORT LLC, DEVELOPMENT PLAN FOR PLANNED DEVELOPMENT AREA NO. 78 (Sept. 21, 2010)

<http://www.bostonplans.org/getattachment/713c8336-46ad-4e96-aa14-6827559910eb>, hereinafter 2010

PLANNED DEVELOPMENT AREA.

^{lxxxviii} *Id.* at 9-10.

^{lxxxix} *Id.* at 10.

^{xc} Tim Logan, *Is This The Last Chance To Create Open Space In Booming Seaport?*, BOSTON GLOBE, June 26, 2017, <https://www.bostonglobe.com/business/2017/06/26/city-says-developer-plan-for-key-part-seaport-gives-short-shrift-public/unZChlutF1xwiLokWOKbVL/story.html>.

^{xcii} *Id.*

^{xcii} 2010 PLANNED DEVELOPMENT AREA at 9.

^{xciii} SEAPORT SQUARE DEVELOPMENT COMPANY LLC, AMENDED AND RESTATED DEVELOPMENT PLAN FOR PLANNED DEVELOPMENT AREA NO. 78 11 (Nov. 16, 2017).

<http://www.bostonplans.org/getattachment/63cd8095-1ae1-4b7c-902c-6a7ff8484dcf>, hereinafter, 2017 PLANNED DEVELOPMENT AREA. See also Logan, *supra* note 89: "The startup hub [i.e. District Hall] was planned as a temporary facility, to be replaced by park space after 10 years. In its proposal earlier this year, WS Development made no mention of District Hall but planned to add a 100,000 square-foot office building on the same block, across a small park. That raised questions about District Hall's future, and how the project might make room for both the popular civic space and for parks. The BPDA urged the developer to solve that puzzle. A park is 'still the preferred use,' the agency wrote, but District Hall has become 'a beloved fixture' of the neighborhood. Any plan for that block would need to account for both, the agency wrote."

^{xciv} See Logan, *supra* note 89.

^{xcv} 2010 PLANNED DEVELOPMENT AREA at 12.

^{xcvi} WS Development's project manager, Yanni Tsipis, told the Boston Globe, "[The performing arts center] wasn't a requirement...This was essentially a placeholder for this notional 200,000-square-foot performing arts center with a whole list of caveats and subject-to's." Tim Logan and Malcolm Gay, *With Seaport Theater Plans Scaled Back, What's Next for Cultural Space?*, BOSTON GLOBE, Feb. 16, 2017,

<https://www.bostonglobe.com/business/2017/02/16/seaport-plan-scales-back-arts-facility/IQrZiCGLDwMIPYmtV8LZQO/story.html>.

^{xcvii} "Three Performing Arts venues are currently planned for the Project, with a combined total seat count of approximately 750 seats. The Proponent, in consultation with the BPDA, will determine, based on the Proponent's outreach to area arts organizations and other analysis, the final dimensions, funding and operational arrangements, and programming for the performing arts space or spaces that will comprise the SeaPAC." 2017 PLANNED DEVELOPMENT AREA AT 14. See also, Tim Logan, *Bowing to Civic Pressure, Seaport Developer Plans for Theaters*, BOSTON GLOBE, Sept. 12, 2017, <https://www.bostonglobe.com/business/2017/09/12/theater-proposed-for-seaport-district/OPvEfs2bi6FQR8T0YRHu3I/story.html>.

^{xcviii} BOSTON PLANNING AND DEVELOPMENT AUTHORITY, REQUEST FOR SUPPLEMENTAL INFORMATION SUFFOLK DOWNS 1, Feb. 12, 2019. <http://www.bostonplans.org/getattachment/0753c2f2-0d0a-478a-a102-b24876c86bbe>.

^{xcix} EDWARDS, *supra* note 83, at 7.

^c See generally, public comments on the Suffolk Downs Planned Development Area, available at <http://www.bostonplans.org/getattachment/f11edd1b-2ddf-4b4c-9fb8-026140eea9c1>. See also EDWARDS, *supra* note 83.

^{ci} EDWARDS, *supra* note 83, at 7.

^{cii} BOSTON PLANNING AND DEVELOPMENT AGENCY, *supra* note 98, at 9.

^{ciii} *Id.*

^{civ} EDWARDS, *supra* note 83, at 7.

^{cv} *Id.* at 4-5.

^{cvi} BOSTON PLANNING AND DEVELOPMENT AGENCY, RESEARCH DIVISION, EAST BOSTON (May 2017).

<http://www.bostonplans.org/getattachment/28c2e99c-af11-47e0-b65e-b609fbdc44bd>.

^{cvi} THE MCCLELLAN HIGHWAY DEVELOPMENT COMPANY, LLC, SUFFOLK DOWNS MASTER PLAN 11 (Feb. 1, 2019).

<http://www.bostonplans.org/getattachment/dc3111e8-3c12-411e-920e-06b483ca6dc3>.

^{cvi} EDWARDS, *supra* note 83, at 20.

^{cix} *Id.* at 19.

^{cx} See Executive Order, *supra* note 8.

^{xi} These suggestions were made by Carolyn Chou, Executive Director of Asian American Resource Workshop and a member of Dorchester Not For Sale, based on a phone interview she had with the author on July 8, 2019.

^{cxi} *Equity in Planning Committee*, CITY OF BALTIMORE DEPARTMENT OF PLANNING,

<https://planning.baltimorecity.gov/equity-planning-committee> (last visited Aug. 8, 2019). Baltimore's planning department adopted the equity definition from the Urban Sustainability Directors Network.

^{cxi} Telephone interview with Anne Draddy, City of Baltimore Sustainability Coordinator (July 12, 2019).

^{cxiv} BALTIMORE OFFICE OF SUSTAINABILITY, THE 2019 BALTIMORE SUSTAINABILITY PLAN 21-22 (Jan. 16, 2019).

https://www.baltimoreresustainability.org/wp-content/uploads/2019/01/SustainabilityPlan_Compressed_01-28-19.pdf

^{c xv} *Id.* at 21.

^{c xvi} Draddy, *supra* note 110.

^{c xvii} Email from Anne Draddy (July 16, 2019, 12:45 EDT)(on file with author).

^{c xviii} *Id.*

^{c xix} BALTIMORE SUSTAINABILITY PLAN at 74.

^{c xx} *Id.*

^{c xxi} Draddy, *supra* note 110.

^{c xxii} BALTIMORE, MD., CHARTER, art. 1, § 39. <http://ca.baltimorecity.gov/codes/Art%20001%20-%20MayorCouncil.pdf>.

^{c xxiii} See generally SEATTLE OFFICE OF PLANNING AND COMMUNITY DEVELOPMENT, SEATTLE 2035: GROWTH AND EQUITY (May 2016).

<https://www.seattle.gov/Documents/Departments/OPCD/OngoingInitiatives/SeattlesComprehensivePlan/FinalGrowthandEquityAnalysis.pdf>.

^{c xxiv} *Id.* at 5.

^{c xxv} *Id.* at 13-14.

^{c xxvi} Figure 7 from SEATTLE 2035: GROWTH AND EQUITY at 22.

^{c xxvii} *Id.* at 23.

^{c xxviii} *Id.* at 24.

^{c xxix} SEATTLE OFFICE OF PLANNING AND COMMUNITY DEVELOPMENT, SEATTLE 2035: FINAL ENVIRONMENTAL IMPACT STATEMENT 1-4 (May 2016).

http://www.seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/p2427612.pdf.

^{c xxx} Telephone interview with Nick Welch and Michael Hubner, City of Seattle Department of Planning and Community Development on July 17, 2019. It's worth noting as well that MHA eases up its high density zoning changes on neighborhoods with high displacement risk: "Our proposal targets more housing choices close to community assets, such as frequent transit, parks, and jobs. We are proposing less intensive changes in areas with higher risk of displacement, environmentally sensitive areas, and areas with fewer community assets." CITY OF SEATTLE, HOUSING AFFORDABILITY AND LIVABILITY AGENDA: IMPLEMENTING MANDATORY HOUSING AFFORDABILITY (MHA) CITYWIDE (n.d.)

https://www.seattle.gov/Documents/Departments/HALA/Policy/MHA_Overview.pdf.

^{c xxxi} SEATTLE OFFICE OF PLANNING AND COMMUNITY DEVELOPMENT, DEPARTMENT OF NEIGHBORHOODS, OFFICE OF HOUSING AND DEPARTMENT OF CONSTRUCTION AND INSPECTIONS, MANDATORY AFFORDABLE HOUSING: CITYWIDE IMPLEMENTATION, DIRECTOR'S REPORT AND RECOMMENDATION 8-12 (February 2018).

https://www.seattle.gov/Documents/Departments/HALA/Policy/Directors_Report_MHA_Citywide.pdf.

^{c xxxii} *Id.*

^{cxxxiii} Welch and Hubner, *supra* note 127. See also Josh Cohen, *Seattle's Affordable Housing Explained*, CROSCUT (April 12, 2014). <https://crosscut.com/2014/12/affordable-housing-explained>.

^{cxxxiv} Welch and Hubner, *supra* note 127.

^{cxxxv} A brief set of mapping initiatives that operationalize an equity lens by seeking to understand gentrification risk or the geography of opportunity (and how to improve access to opportunity) provided by the Nick Welch include the following:

Opportunity Mapping Initiative and Project Listing, KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY AT THE OHIO STATE UNIVERSITY, <http://kirwaninstitute.osu.edu/researchandstrategicinitiatives/opportunity-communities/mapping/>. (last visited Aug. 5, 2019).

THE URBAN DISPLACEMENT PROJECT, <https://www.urbandisplacement.org/research>. (last visited Aug. 5, 2019).

Gentrification and Displacement Study, CITY OF PORTLAND PLANNING AND SUSTAINABILITY, <https://www.portlandoregon.gov/bps/62635>. (last visited Aug. 5, 2019).

Mr. Welch's master's thesis includes a very helpful literature review and explanation of various mapping tools and methodologies to measure and monitor gentrification risk: Nicolas Welch, City for All? A Geospatial Approach to Equity, Sustainability, and Gentrification in Seattle, Wash. (Aug. 2013) (unpublished Master's thesis, Tufts University)(on file with the Tufts Library) <https://dl.tufts.edu/concern/pdfs/dz011206q>.

^{cxxxvi} LISA BATES, GENTRIFICATION AND DISPLACEMENT STUDY: IMPLEMENTING AN EQUITABLE INCLUSIVE DEVELOPMENT STRATEGY IN THE CONTEXT OF GENTRIFICATION 26 (May 18, 2013).

<https://www.portlandoregon.gov/bps/article/454027>.

^{cxxxvii} *Id.* at 29-34.

^{cxxxviii} *Id.* at 28. The City's adoption and application of Bates' methodology can be found here: PORTLAND BUREAU OF PLANNING AND SUSTAINABILITY, 2018 GENTRIFICATION AND DISPLACEMENT NEIGHBORHOOD TYPOLOGY ASSESSMENT (Oct. 2018), <https://www.portlandoregon.gov/bps/article/700970>.

^{cxxxix} BATES, *supra* note 133, at 26. Please note that Professor Bates' analysis is rich, and this brief description does not do it justice. It should be read in its entirety, as it also notes shortcomings of the methodology.

^{cxl} An open question Bates asks about Portland's use of a mapping tool is whether/how this new information should change the City's priorities. The City has the option of using it narrowly or broadly: "Does the City use the typology map to create a broad anti-gentrification strategy for housing, economic development, and community development and planning (shifting priorities of bureaus altogether)—where all areas identified as gentrifying have a new set of policies/tools? Or do Bureaus use the map when planning a direct public investment/project/etc in a particular neighborhood, to assess a need for tools to be used piecemeal?" *Id.* at 57.

^{cxi} "The BPDA is charged with growing the tax base, cultivating the private jobs market, training the workforce, encouraging new business to locate in Boston and existing businesses to expand, planning the future of neighborhoods with the community, identifying height and density limits, charting the course for sustainable development and resilient building construction, advocating for multi modal transportation, responding to the city's changing population, producing insightful research on our City, and ensuring Boston retains its distinctive character." *Who We Are*, BOSTON PLANNING AND DEVELOPMENT AGENCY, <http://www.bostonplans.org/about-us/planning-boston-s-future> (last visited Aug. 5, 2019).

Compare that description with Seattle's planning department: "The Office of Planning and Community Development (OPCD) is a new office that supports thriving communities through an integrated and equitable approach to planning and community investment. OPCD works across City departments to assess community needs, prioritize resources, and develop a vision for how Seattle grows to ensure that we are coordinating and implementing our plans with a cohesive vision." About Us, SEATTLE OFFICE OF PLANNING AND COMMUNITY DEVELOPMENT, <http://www.seattle.gov/opcd/about-us>. (last visited Aug. 5, 2019).

^{cxlvi} Plan JP/ROX was the first neighborhood plan BPDA undertook under the Walsh administration, after the release of the City's Master Plan, Imagine Boston 2030. A key sticking point between some community organizers and BPDA was over the assumption of the depth of affordability private developers could handle before it was unfeasible to build. Jule Pattison-Green, *Plan JP/Rox Passes After Protests*, BAY STATE BANNER (March 8, 2017), <https://www.baystatebanner.com/2017/03/08/plan-jp-rox-passes-after-protests/>.

^{cxlvi} BOSTON PLANNING AND DEVELOPMENT AGENCY, PLAN DUDLEY SQUARE (July 2019).

(<http://www.bostonplans.org/getattachment/c3e8d68f-4658-479d-9808-47c4fd2cdb47>).

^{cxliv} *Id.* at 35-36.

^{cxlv} *Id.* at 37.

^{cxlvi} “Respondents are also required to submit plans to mitigate displacement from development, which will contribute to helping current residents remain in their communities, afford housing, and find pathways to economic opportunity. Much of the policy language was written in collaboration with the community during the PLAN: Dudley Square process and will now continue to influence and impact RFP responses in the future.” *Id.* at 36.

^{cxlvi} *Comm. v. Bearse*, 132 Mass. 542, 546 (1882).

^{cxlviii} See MASS. CONST. art. 89, §6, which discusses in broad terms municipalities’ powers, and §7, which describes the limitations on municipal powers. The key case interpreting municipal powers, *Marshal House, Inc. v. Rent Review & Grievance Bd. of Brookline*, interpreted art. 89, §6 as giving municipalities, “broad powers to adopt by-laws for the protection of the public health, morals, safety, and general welfare, of a type often referred to as the ‘police’ power.” 357 Mass. 709, 717 (1970). However, *Marshal House* invalidated Brookline’s rent control ordinance, finding that it violated §7, which limits municipalities from regulating civil relationships (in this case, the landlord/tenant relationship) “except as an incident to an independent municipal power.” *Id.* at 718. The Court found that there was no independent municipal power that would encompass rent control.

^{cix} *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221 (1972), finding flood plain district zoning ordinance that prohibited residential development was a valid exercise of Town’s police power. Reasons given for the zoning ordinance included, “to preserve and maintain the ground water table; to protect the public health and safety, persons and property against the hazards of flood water inundation; for the protection of the community against the costs which may be incurred when unsuitable development occurs in swamps, marshes, along water courses.” *Id.* at 224.

^{cl} *Opinion of the Justices of the Senate*, 333 Mass. 773 (1955) finding a proposed law creating a historic districts commission in Nantucket was a legitimate use of the police power.

^{cli} 245 U.S. 60, 81 (1917).

^{clii} Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 Minn. L. Rev. 739, 750-751 (1993).

^{cliii} 334 U.S. 1 (1948).

^{cliv} *Village of Euclid, Ohio v. Ambler Realty*, 272 U.S. 365, 395 (1926).

^{clv} *Ambler Realty v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924), *rev’d* 272 U.S. 365 (1926). While perceptive about class, the lower court’s decision was, nevertheless, mired in racism.

^{clvi} Thomas Silverstein, *Overcoming Land Use Localism: How HUD’s New Fair Housing Regulation Can Push States To Eradicate Exclusionary Zoning*, 5 U. Balt. J. Land & Dev. 25 (2015). Silverstein argues that racial and economic exclusion were at the heart of zoning. New York City was the first city to develop zoning in 1916, and Silverstein argues Midwestern suburbs were keenly interested in zoning in response to demographic changes: “In particular, zoning held a strong allure for newly forming suburban municipalities outside of industrial cities in the Northeast and Midwest. The populations of these cities were booming at the time due to a combination of European immigration (prior to the adoption of restrictive laws in 1921 and 1924), and the first Great Migration of African Americans from the rural South, beginning just before World War I. In the wake of World War I, nativist and white supremacist sentiment were at their height, Prohibition became the law of the land, and the Ku Klux Klan expanded from a regional to a national political force. In this context, economically mobile white Protestants effectively used zoning to create buffers between the neighborhoods in which they resided and those in which perceived outsiders were permitted to live.” *Id.* at 25. See also Dubin, *supra* note 147.

^{clvii} While this memo focuses primarily on the racially exclusionary component of zoning, it has been used to discriminate against other protected classes. See e.g. *Granada House Inc., v. City of Boston*, No. CIV. A. 96-6624-E, 1997 WL 106688 (Mass. Super. Ct. Feb. 28, 1997), finding denial of a zoning variance to site a group home for people with substance abuse disorders violated the Fair Housing Act. The denial was not motivated by a legitimate purpose, but illegally discriminated against people with substance use disorder, treating them differently than other people with mental or physical disabilities. *Id.* at 6. See also *Brockton Coalition for the Homeless v. Tonis*, No.

CA 03-00226, 2004 WL 810296 (Mass. Super. Ct. March 5, 2004), finding a homeless shelter for families fell in the educational use exception to the zoning code, and revoking its building permit for non-compliance with the town's zoning code was an error.. It is also worth noting a recent high-profile case in Dudley, where the zoning board denied a permit for a proposed Islamic cemetery. Based on press reports, there is significant evidence the denial was motivated by anti-Muslim animus. Debbie LaPlaca, *ACLU, Boston law firm take up Muslim cemetery case*, WORCESTER TELEGRAM & GAZETTE, July 9, 2016, <https://www.telegram.com/news/20160708/aclu-boston-law-firm-take-up-muslim-cemetery-case>.

^{c1vii} *Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp.*, 67 N.J. 151, 173 (1975), finding municipalities cannot use their land use regulations to make it "physically and economically impossible to provide low and moderate income housing."

^{c1x} MASS. GEN. LAWS ch. 40B §§20-23.

^{c1x} H. 3507, 191st Gen. Ct. (Mass. 2019).

^{c1xi} Rep. Mike Connolly, *Inherent Inequity: The Push to Enact Gov. Baker's 'Housing Choices' Bill In An Informal Session*, OFFICE OF STATE REP. MIKE CONNOLLY, (n.d.)

https://www.repmikeconnolly.org/inherent_inequity_baker_housing_choices_informal_session.

^{c1xii} S. 781, 191st Gen. Ct. (Mass. 2019).

^{c1xiii} DEPARTMENT OF NEIGHBORHOOD DEVELOPMENT, INCOME-RESTRICTED HOUSING IN BOSTON 4 (Nov. 2018).

https://docs.google.com/document/d/15gKQAmtrddx6JqiAZIECsSG_RwneYbA8cdrZif8_ms/edit. This count does not include Boston Housing Authority units.

^{c1xiv} Benjamin Schneider, *City Lab University: Inclusionary Zoning*, CITYLAB, July 17, 2018, <https://www.citylab.com/equity/2018/07/citylab-university-inclusionary-zoning/565181/>.

^{c1xv} Many of these private actor cases involve lending and insurance policies that have the effect of excluding people of color. See e.g. *National Fair Housing Alliance v. Travelers Indemnity Company*, 261 F. Supp. 3d 20, 29 (D.D.C. 2017) finding claim against insurers for a policy to not provide habitational insurance to landlords who rent to Section 8 tenants is cognizable under the Fair Housing Act: "Numerous courts have applied disparate-impact liability to insurers that provide (or don't provide) insurance to homeowners or renters;" *Bank of America Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296 (2017) finding the City's claim of economic harm as a result of the defendant banks' discriminatory lending practices cognizable under the Fair Housing Act. Separately, in a case of first impression, the Massachusetts Supreme Judicial Court, established that housing discrimination complaints brought under a disparate impact theory of liability are cognizable under Massachusetts' anti-discrimination statute.

Burbank Apartments Tenant Ass'n v. Kargman, 474 Mass. 107 (2016).

^{c1xvi} CITY OF BOSTON, ASSESSMENT OF FAIR HOUSING DRAFT #2 125-134 (2017).

https://www.boston.gov/sites/default/files/document-file-08-2017/working_draft_2_-_part_iii.pdf.

^{c1xvii} BARRY BLUESTONE AND JAMES HUESSY, THE BOSTON FOUNDATION, GREATER BOSTON HOUSING REPORT CARD 40 (2017) <https://www.tbf.org/-/media/tbf/reports-and-covers/2017/2017-housingreportcard.pdf>

^{c1xviii} *Id.* at 48.

^{c1xix} Kathleen Conti, "*Mass displacement is a crisis*": *Building clearouts are becoming increasingly common in Boston*, BOSTON GLOBE, Aug. 24, 2017, <https://www.bostonglobe.com/business/2017/08/24/building-clearouts-are-rise-housing-advocates-say/7f0egrovQqCoQqeMbc79cL/story.html>; Jennifer McKim and Alejandro Serrano, *As rents soar in Boston, low-income tenants try to stave off eviction*, NEW ENGLAND CENTER FOR INVESTIGATIVE REPORTING, Feb. 19, 2019, <https://www.bostonglobe.com/magazine/2019/02/19/rents-soar-boston-low-income-tenants-try-stave-off-eviction/QddCq1bLrV3JQhaFTzYnGP/story.html>

^{c1xx} McKim and Serrano, *supra*.

^{c1xi} John A. Powell and Marguerite L. Spencer, *Giving them the old "one-two": Gentrification and the K.O. of impoverished urban dwellers of color*, 46 How. L.J. 433, 442 (2003). Empirical studies in the Bay Area by the Urban Displacement Project have found that rising housing costs in cities like San Francisco and Oakland have led to new concentrations of low-income households of color in lower-resourced, peripheral municipalities, where housing costs are more affordable. See e.g. URBAN DISPLACEMENT PROJECT AND THE CALIFORNIA HOUSING PARTNERSHIP, RISING HOUSING COSTS AND RE-SEGREGATION IN THE SAN FRANCISCO BAY AREA (2019).

https://www.urbandisplacement.org/sites/default/files/images/bay_area_re-segregation_rising_housing_costs_report_2019.pdf.

^{clxxii} *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, 135 U.S. 2507, 2523 (2015). *Inclusive Communities* is a landmark Fair Housing case because it upheld the disparate impact theory of liability under the Fair Housing Act. Because claimants do not need to show the policy was adopted with a racially discriminatory intent, the Fair Housing Act allows challenges to systemic and institutional racism, the result of facially racially neutral laws and policies. *Inclusive Communities* does create some limitations on the remedies courts can fashion in successful disparate impact claims. It instructs lower courts that remedies should adopt “race-neutral” means, with an admonition to avoid racial targets and quotas, although “the mere awareness of race” is not problematic. *Id.* at 2524-2525.

^{clxxiii} *Id.* at 2522

^{clxxiv} In 2013, the Department of Housing and Urban Development adopted regulations essentially memorializing four decades of federal court opinions that accepted the disparate impact theory, clarified the burden-shifting scheme, and defined the burden of proof each party needed to meet. 24 C.F.R. § 100.500, Morgan Williams and Stacy Seicshnaydre, *The Legacy and the Promise of Disparate Impact*, in THE FIGHT FOR FAIR HOUSING, *supra* note 6, at 175. *Inclusive Communities* alongside the HUD regulation create the roadmap for disparate impact claims. Williams and Seicshnaydre at 181. It should be noted that *Inclusive Communities* clarifies the evidentiary standard for plaintiffs to bring a disparate impact claim. Importantly, the showing of a statistical disparity is not enough to establish liability. Statistics can be used — but they need to establish a “robust causal link” between the complained of policy and the disparity. Williams and Seichnaydre at 179-180. In a recent turn of events, however, the Trump administration is considering a rule that would make it more difficult for plaintiffs to bring disparate impact claims, drastically altering the pleading standard, and making it harder to meet. Katy O’Donnell, *HUD to propose more hurdles to prove housing discrimination*, POLITICO, July 31, 2019,

<https://www.politico.com/story/2019/07/31/hud-prove-housing-discrimination-1629826>. (The Politico article also links to the text of the proposed rule).

^{clxxv} See e.g. *Town of Huntington, New York v. Huntington Branch of NAACP*, 844 F.2d 926 (2d. Cir. 1988) where the town zoned multi-family housing solely to an urban renewal district that was majority people of color. The town refused to rezone a parcel outside this area for multi-family housing, where the developer sought to build low-income housing in an all-white neighborhood. Significantly, the Court found disparate impact by itself was enough to bring the case, and the claimants did not have to show the town’s decision was motivated by racial animus: “The Act’s stated purpose to end discrimination requires a discriminatory effect standard; an intent requirement would strip the statute of all impact on de facto segregation.” *Id.* at 934. It is this understanding of disparate impact liability under the Fair Housing Act that *Inclusive Communities* upholds.

^{clxxvi} 711 F.2d 421 (1st Cir.1983).

^{clxxvii} *Id.* at 427.

^{clxxviii} *Id.* at 428. The court ruled the South End residents had standing to bring the suit, but the Asian-American plaintiff in South Cove/Chinatown did not, and remanded the case to determine the substantive issues for those plaintiffs with standing, including whether HUD needed to conduct a housing impact study. *Id.* at 423.

^{clxxix} “According to the most recent census figures provided by the parties, the population of the Chinatown-South Cove area is 80 percent Asian and Pacific Islander and only 14.5 percent Caucasian. As a result, any foreseeable displacement of poorer residents by rent increases is likely to make the two neighborhoods more, rather than less, racially integrated. That is not to say that Mrs. Lee, and their neighborhoods will suffer no harm; the character of their neighborhood may change, as they believe, for the worse. But this harm is not the special legal harm of residential segregation that the Supreme Court held sufficient to confer standing.” *Id.* at 428.

^{clxxx} 697 F.Supp. 113 (E.D.N.Y. 1988). The first lawsuit dealt with whether the residents had standing to bring the suit --and it ruled that they did. However, the Court ruled that plaintiffs needed to bring their claims under the Administrative Procedures Act (APA). After amending the complaint, the district court determined that under the APA, HUD acted “arbitrarily and capriciously” when it approved the project without conducting an analysis of the development’s potential effects on the racial composition of the surrounding neighborhoods. *Pleune v. Pierce*, 765 F.Supp. 43, 47 (E.D.N.Y. 1991).

^{cxxxii} 658 F.3d 375 (3rd Cir. 2011) (finding that the plaintiffs had made an adequate *prima facie* showing that the redevelopment plan had a discriminatory effect, and that a genuine issue of material fact did exist as to whether a less discriminatory alternative was available to the Township). Ultimately, the parties settled out of court.

^{cxxxiii} *Id.*

^{cxxxiv} *Id.* at 384.

^{cxxxv} *Id.* at 383. The court goes on to say, “The Township may be correct that a disparate impact analysis will often allow plaintiffs to make out a *prima facie* case when a segregated neighborhood is redeveloped in circumstances where there is a shortage of alternative affordable housing. But this is a feature of the FHA’s programming, not a bug.” *Id.* at 384-385.

^{cxxxvi} Bethany Y. Li, *Now is the Time: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 Fordham L. Rev. 1189 (2016). Yi analogizes the town’s decision in *Mount Holly* to zoning decisions that lead to gentrification and displacement, even though the result might be a more integrated neighborhood: “...the FHA does not embrace dispersing one “ghetto” to add to another. Further, sustaining a vibrant community of color should not violate the FHA.... Arguments used in *Mount Holly* to combat the redevelopment plan to tear down housing and displace residents can be similarly applied to zoning plans that gentrify with similar effects.” *Id.* at 1218-1219.

^{cxxxvii} FURMAN CENTER FOR REAL ESTATE AND URBAN POLICY, HOW HAVE RECENT REZONINGS AFFECTED THE CITY’S ABILITY TO GROW? (March 2010).

https://furmancenter.org/files/publications/Rezonings_Furman_Center_Policy_Brief_March_2010.pdf

^{cxxxviii} *Id.* at 9-12.

^{cxxxix} “Allowing the land to be developed more intensely, the logic goes, will bring new investment to the area. The benefits of such investment may include new housing stock, businesses, jobs, and retail services, all of which could improve the quality of life for existing residents. Of course, new housing and new businesses also may bring increased traffic and congestion—potential burdens for residents. In addition, if such improvements make an area more desirable, rents and housing prices may increase, and the neighborhood may become less affordable for the current residents. *Id.* at 7. However, it is important to note that neighborhoods are not homogenous in their feelings about zoning. There was disagreement in communities of color that were the subjects of rezoning about whether or not more building would be beneficial or burdensome: “In the rezoning proposals for Harlem and Jamaica, Queens — which both involved plans for significant new housing and office space — many local groups called for the rezoning changes, prevailing over local opposition.” Kareem Fahim, Despite Much Rezoning, Scant Change in Residential Capacity, N.Y. TIMES, March 21, 2010,

<https://www.nytimes.com/2010/03/22/nyregion/22zoning.html>.

^{cxxi} “Limiting future development can be seen as a benefit because it preserves the existing character of the neighborhood, and prevents new uses that may be undesirable or tax a neighborhood’s existing infrastructure. For the same reasons, however, preservation can be seen as a burden because it limits the growth of new housing or businesses and may limit owners’ ability to capitalize on the development capacity of their lots.” FURMAN CENTER BRIEF at 7.

A former New York City planning commissioner, when asked about the Furman Center’s analysis, said downzoning white neighborhoods reduces housing options for low-income and communities of color. Fahim, *supra*.

^{cxc} CITY OF NEW YORK, HOUSING NEW YORK: A FIVE-BOROUGH, TEN YEAR PLAN 30-31 (May 2014).

http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf.

^{cxi} Sade Ali Kully, *Should NYC Evaluate its Housing Policies for Their Racial Impact?*, CITYLIMITS, June 25, 2019,

<https://citylimits.org/2018/12/13/lawsuit-cites-flaws-in-environmental-review-seeks-annulment-of-inwood-rezoning/>

^{cxcii} Sade Ali Kully, *Lawsuit Cites Flaws in Environmental Review, Seeks Annulment of Inwood Rezoning*, CITYLIMITS, Dec. 13, 2018, <https://citylimits.org/2018/12/13/lawsuit-cites-flaws-in-environmental-review-seeks-annulment-of-inwood-rezoning/>.

^{cxciii} *Id.*

^{cxciv} There are five proposed actions (four bills and one resolution) pending in the New York City Council to amend the environmental review process, known as CEQR (City Environmental Quality Review). Three bills require a

“retrospective analysis of land use decisions” to assess whether the environmental impact statement “accurately projected the adverse environmental impacts with respect to secondary residential displacement, transportation, and school capacity and overcrowding.” The results of these analysis would be used to update the CEQR, if the current methodology is proving to be an inaccurate predictor of actual adverse outcomes. The Resolution calls on the relevant City departments to update the CEQR procedures so that environmental impact statements would always have to assess the socioeconomic impact of a proposed project, and “consistently seek mitigation to avoid displacement of long-time residents and businesses through the provision of permanently affordable housing and commercial space.” NEW YORK CITY COUNCIL, COMMITTEE REPORT OF THE LAND USE DIVISION 4, 10 (May 7, 2019). <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3903477&GUID=DA1C11C6-8B55-4E0A-B7F9-10C9A6888BAD&Options=&Search=>.

^{cxcv} Duncan Kennedy, *Legal Economics of U.S. Low Income Housing Markets in Light of Informality Analysis*, 4 J. L. Society 71 (2002). Kennedy writes that macro factors — a housing shortage, for example — plays out differently in different neighborhoods because macro factors are mediated by neighborhood actors, such as landlords, tenants, commercial developers, property owners, nonprofits and city actors. The theory of neighborhood dynamics helps to explain why neighborhoods react differently to similar changes: “We use this concept to account for the fact that more or less identical neighborhoods react radically differently to the macro factors as mediated by the local actors. The changes in a given neighborhood that seem to have been provoked by exogenous changes at the macro level are often either far greater or far smaller than we would expect if all that counted was the macro level.” *Id.* at 75.

^{cxcvi} Kennedy articulated the background rules thesis, which argues that the relationship between neighborhood actors is determined based on the kinds of legal “cards” — in terms of the regulatory framework and the private rights — the players hold, and their knowledge of how they can play them. It recognizes the imbalances in power and knowledge between neighborhood actors, and how this imbalance results in different kinds of neighborhood changes: “Neighborhood change is definitely not the product of a large legal plan enacted and enforced from the center (Washington or the state capital or City Hall). But when neighborhood actors decide how to react within the process of neighborhood change, they constantly factor in their legal cards, legal entitlements, legal liberties, legal resources, legal vulnerabilities, and so forth. The value of each card depends on how the player thinks that other players will react if it is played, and on what cards the other players hold.” *Id.* at 81.

^{cxcvii} MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 307 (2016).