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Jan P. Mensz
University of Michigan Law School

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CITIZEN POLICE: USING THE *QUI TAM* PROVISION OF THE FALSE CLAIMS ACT TO PROMOTE RACIAL AND ECONOMIC INTEGRATION IN HOUSING

Jan P. Mensz*

Economic and racial integration in housing remains elusive more than forty years after the passage of the Fair Housing Act. Recalcitrant municipal governments and exclusionary zoning ordinances have played a large role in maintaining and exacerbating segregated housing patterns. After discussing some of the persistent causes of segregated housing patterns, this Note presents a novel approach to enforcing the Fair Housing Act and the "affirmatively furthering fair housing" requirement on recipients of federal housing grants. This Note presents a citizen suit that emerged from the Southern District of New York in Anti-Discrimination Center v. Westchester County, *where a private plaintiff successfully used the False Claims Act to enforce the Westchester County's obligations to overcome impediments to racial integration. This Note concludes by arguing for specific reforms, regional coordination, and inclusionary zoning policies that recipients of federal funds should adopt as part of a truly integrated fair housing policy.*

INTRODUCTION

Since the 1950s and 1960s, major progress has been made to combat de jure racial segregation in our schools, neighborhoods, and workplaces. In seminal cases like *Shelley v. Kraemer*[1] and *Brown v. Board of Education*[2], the United States Supreme Court struck down the major legal impediments to integration. President Lyndon Johnson's Great Society marked a commitment by the government to take affirmative steps to provide fair and affordable housing throughout America. Yet after decades of white flight, crumbling housing projects, and a growing gap between the rich and the poor, neighborhoods in America are more segregated than ever.

The disastrous effects of concentrated poverty coupled with entrenched racial segregation are well documented. Poverty is a

* University of Michigan Law School, J.D. expected 2010; Georgetown University, B.A., 2005. I would like to thank Professors Judith Levy and Saul Green, whose course on fair housing prompted my interest in this subject, Professor Rachel Croskery-Roberts for nurturing my legal research and writing skills, and the members of the *University of Michigan Journal of Law Reform* for their helpful edits. I would also like to thank my loving wife, Jean, and my family for supporting me in writing this Note and in all my life endeavors.

1. 334 U.S. 1 (1948).
2. 347 U.S. 483 (1954).

self-perpetuating phenomenon, as the net wealth of a child's parents is an important factor for predicting academic success, which in turn correlates strongly with future wealth.[3] Opportunities for upward mobility are often tied to the informal social networks in one's community, making isolated poverty difficult to overcome.[4] Concentrated poverty leads to increased pressures on law enforcement, infrastructure, schools, and families.[5] Concentrated and isolated poverty is also felt disproportionately by blacks, which leads to racial animosity, despair, and, in some cases, violent riots.[6]

More than forty years after the passage of the Fair Housing Act of 1968,[7] racial and economic integration has remained, for the most part, an ideal. Despite the statutory and regulatory language that requires the U.S. Department of Housing and Urban Development (HUD) to take affirmative steps to truly integrate neighborhoods through its housing programs,[8] HUD has shown a lack of political will to fulfill this part of its mandate. One of the major impediments to a national policy of racial integration in housing is municipal opposition, both through political pressure[9] and zoning laws that keep low- and moderate-income housing from being built in wealthy communities.[10] In many cases, municipalities will resist racial and economic integration while simultaneously accepting federal money that requires them to take affirmative steps towards greater integration.[11]

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3. *See* Dalton Conley, *Capital for College: Parental Assets and Postsecondary Schooling*, 74 SOC. EDUC. 59, 68 (2001).

4. *See* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1851–52 (1994). "All other things being equal, employers would hire people they know and like . . . ." *Id.* This process of accumulating "social capital" begins in churches, schools, PTAs, Little Leagues, and other community-based associations that "open the doors of opportunity in the business world" for parents and their children later in life. *Id. See also* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 150 (1993) (documenting the close connection between social and spatial mobility).

5. *See* MASSEY & DENTON, *supra* note 4, at 136–42.

6. *Id.* at 58.

7. 42 U.S.C. §§ 3601–31 (2006).

8. *See* 42 U.S.C. § 5304(b)(2) (2006).

9. *See, e.g.*, United States v. Yonkers Bd. Of Educ., 837 F.2d 1181, 1205 (2d Cir. 1987) (describing community opposition to housing integration plans); Ford, *supra* note 4, at 1864 (describing political resistance to diversifying communities through annexation).

10. James J. Hartnett, Note, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 96–98.

11. *See, e.g.*, NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987); Anderson v. City of Alpharetta, 737 F.2d 1530, 1537 (11th Cir. 1984); Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1133 (2d Cir. 1973); Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 73, 75 (D. Mass. 2002).

This Note will examine how the Federal False Claims Act (FCA),[12] in conjunction with the Federal Fair Housing Act (FHA) and its implementing regulations,[13] can be used as an effective enforcement mechanism of racial and economic integration policy by penalizing local municipalities that shirk their obligations while accepting federal funds. Part I begins by examining some of the historic causes of housing segregation and why it persists today. Part II presents a novel enforcement approach that has emerged in the Federal District Court for the Southern District of New York. This approach could have national ramifications in forcing all local municipalities that receive federal housing grants to take aggressive steps in furthering fair housing. Finally, Part III proposes affirmative measures that courts and HUD should mandate on state and local actors to ensure that all municipalities provide their fair share of affordable housing. Specifically, Congress should make regional coordination of housing policy and inclusionary zoning a precondition for receiving HUD funds. Only by taking affirmative, local measures to undo decades of segregated housing policies will we have a realistic opportunity for economic and racial integration in America.

I. HISTORIC AND CURRENT IMPEDIMENTS TO RACIAL INTEGRATION

Where one chooses to live is a complex and personal decision. Often, people who consider themselves progressive and inclusive when it comes to issues of race give in to "more visceral personal needs of comfort and security" when making housing decisions.[14] Many find racial homogeneity to be more comfortable[15] and stereotypes about minorities often lead people to believe that white neighborhoods are safer.[16] In other cases, pure racial animosity

12. 31 U.S.C. § 3729 (2006).

13. 42 U.S.C. §§ 3601–31.

14. SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 3 (2004); *see also* Peter Applebome, *Integration Faces a New Test in the Suburbs*, N.Y. TIMES, Aug. 23, 2009, at WK3 (on file with the University of Michigan Journal of Law Reform), *available at* http://www.nytimes.com/2009/08/23/weekinreview/23applebome.html.

15. *See* CASHIN, *supra* note 14, at 10 ("Studies show that whites are willing to pay a 13 percent premium to live in all-white neighborhoods.").

16. *See* Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167, 182 (2003) (finding white perceptions of "joblessness, welfare dependence, [and] proclivity to criminal behavior" as motivating aversion to black neighbors).

drives individuals to live in communities of their own race.[17] Personal preferences and prejudice are certainly impediments to integrating our neighborhoods, but they are not the only factors at play. Historically, government action, and inaction, have served to institutionalize racial segregation and inflame personal prejudices that have further divided our communities.

A. Historic Causes of Racial Segregation

One of the earliest legal impediments to racial integration to emerge after the Civil War was the use of restrictive covenants to keep minorities from purchasing houses in all-white neighborhoods. The practice involved a legal contract, signed by a number of neighbors, that prohibited owners from conveying their property to minorities.[18] The agreement, or covenant, was restrictive on current and future owners of the property and enforceable in court.[19] In *Shelley v. Kraemer*, the United States Supreme Court found the enforcement of such agreements to be in violation of the Fourteenth Amendment.[20]

Another way that municipalities have historically acted to institutionalize segregation is through the placement of affordable housing in traditionally black neighborhoods, thus perpetuating the myths and realities of the black ghetto.[21] In *Gautreaux v. Chicago Housing Authority*,[22] city council members in Chicago sought to block the construction of affordable housing in their precincts after their constituents voiced opposition.[23] As a result, affordable housing that was disproportionately inhabited by African-Americans continued to be concentrated in historically black neighborhoods and contributed to the continued segregation of the city.[24] After twenty-five years of litigation, affordable and racially mixed housing finally began to spread to predominantly white sec-

17. While few respondents to social surveys will admit to harboring racial prejudice, available data is highly suggestive. *Id.* at 185–91 (compiling the findings of four different studies on individual racial preferences in housing). For example, in one study, when asked what would be the racial composition of their ideal neighborhood, 25 percent of white respondents preferred no blacks. *Id.* at 186 tbl.2. A preference for racial homogeneity among whites was also highly correlated with high degrees of unfavorable racial stereotypes for blacks. *Id.* at 188.

18. Shelley v. Kraemer, 334 U.S. 1, 10 (1948).

19. *See id.* at 4–5.

20. *Id.* at 20.

21. MASSEY & DENTON, *supra* note 4, at 56.

22. 296 F. Supp. 907 (N.D. Ill. 1969).

23. *Id.* at 910.

24. *Id.* at 910–11.

tions of the city.[25] In a similar case, *United States v. Yonkers Board of Education*,[26] the city of Yonkers, and certain community members, fought for years to prevent public housing from being built in white neighborhoods and actively obstructed court-ordered remedies for over fifteen years.[27] Both *Gautreaux* and *Yonkers* demonstrate how the placement of affordable housing and the parochial interests and prejudices of local municipalities combine to perpetuate racial segregation. The cases also display the extent to which localities will fight both economic and racial "outsiders" from entering their communities and the difficulties in enforcing fair housing laws.

B. Modern Impediments to Integration in Housing

Although restrictive covenants based on race are no longer enforceable, exclusionary zoning practices are in many ways the modern equivalent. Zoning ordinances that restrict development to single-family dwellings with characteristics that make average prices higher (e.g., lot size, distance from the street, density restrictions), limit housing options in neighborhoods—and sometimes entire towns—to the wealthy.[28] While federal law does not prohibit economic discrimination, often lurking beneath the surface of these ordinances is racial discrimination. For example, in *Anderson Group, LLC v. City of Saratoga Springs*,[29] the City denied a developer's request for a special use permit to build a development that included sixty units of affordable housing.[30] The court found that discriminatory remarks made at public hearings and statistics showing a disparate impact on minorities were sufficient evidence to conclude that the City of Saratoga Springs was in part motivated by

25. *See generally*, James E. Rosenbaum & Stefanie DeLuca, *What Kinds of Neighborhoods Change Lives? The Chicago* Gautreaux *Housing Program and Recent Mobility Programs*, 41 IND. L. REV. 653 (2008) (surveying experiences of low-income black families who moved to predominately white neighborhoods as a result of the *Gautreaux* decision).

26. 624 F. Supp. 1276 (S.D.N.Y. 1985).

27. United States v. Sec'y of Hous. & Urban Dev., 239 F.3d 211, 219–20 (2d Cir. 2001).

28. *See, e.g.*, S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 719–20 (N.J. 1975) (finding residential zones were designated exclusively for single-family homes that effectively limits housing in Mount Laurel to "persons of at least middle income"); *see also* James L. Mitchell, *Will Empowering Developers to Challenge Exclusionary Zoning Increase Suburban Housing Choice?*, 23 J. POL'Y ANALYSIS & MGMT. 119, 119 (2004); James J. Hartnett, Note, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 96–98 (detailing how exclusionary zoning practices maintain enclaves of affluence or of homogeneity).

29. 557 F. Supp. 2d 332 (N.D.N.Y. 2008).

30. *Id.* at 335–36.

a discriminatory animus.[31] Courts may also find state action discriminatory, absent overt animus, based solely on a disparate impact theory by producing statistical evidence of a disproportionately negative effect on racial minorities resulting from state zoning decisions.[32]

Even where there is no explicit racial hostility, exclusionary zoning can have the effect of perpetuating segregation in much the same way as restrictive covenants. The connection between racial and economic segregation is not hard to see. Because of historic attempts to marginalize African-Americans through housing, education, and professional opportunities, they are less likely to be able to afford a house in a wealthy neighborhood. In a country with such a recent history of legalized racial segregation and racism, even a "race-neutral policy [of housing opportunity] could be expected to entrench segregation and socio-economic stratification."[33] In this sense, adopting a race-neutral policy towards housing that fails to assess the inherent socio-economic disparity tied to race is unlikely to significantly dismantle racial segregation.

Conceptually, restrictive covenants and zoning ordinances are also similar in that they both attempt to artificially restrict entry into neighborhoods by contracting and legislating the preferences of the current population for future generations, thus ensuring that the economic and racial make-up of the community will not change. Despite popular belief, there is nothing natural or inevitable about how we set municipal boundaries, whether in terms of "geography . . ., commitment to self-government or private property."[34] Rather, municipal boundaries are the manifestation of the initial inhabitants' values and preferences as demonstrated through ordinances, exclusive zoning policies, and restrictive covenants.[35] By defining the terms of membership in a community through zoning restrictions, it becomes unlikely that there will be any challenge to these preferences that would accommodate change.[36] As a result, restrictive covenants and exclusionary zoning make mobility between political spaces less likely and ensure that historic housing patterns based on explicit racial animosity will remain unchanged.

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31. *Id.* at 340–41.

32. *See* Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 937 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

33. Ford, *supra* note 4, at 1852.

34. *Id.* at 1857.

35. *See id.* at 1871.

36. *See id.*

This brief overview of some of the historic and modern impediments to integration shows that exclusionary zoning and the placement of affordable housing, as determined at the local level, serves to perpetuate racial segregation, even when these decisions are not motivated by racism. So long as zoning powers are controlled by local governments and decisions regarding the placement of affordable housing are controlled by localities, segregation is unlikely to be eliminated. *Gautreux* and *Yonkers* also demonstrate the extent of community opposition to affordable housing placement and the difficulties of enforcing fair housing laws through traditional court action. New enforcement mechanisms and incentives must be developed to force municipalities to take racial segregation seriously and to consider the interests of those living outside their borders.

C. The Promise and Failures of the Fair Housing Act of 1968 and Subsequent Enforcement

The Fair Housing Act (FHA) of 1968 promised to begin a new era of racial and economic opportunity in housing.[37] Senator Walter Mondale, the chief sponsor of the FHA, asserted that the purpose of the law was "to replace the ghettos 'by [sic] truly integrated and balanced living patterns.'"[38] Senator William Proxmire, a co-sponsor of the FHA on the Senate Banking and Currency Committee, stated rather loftily that Title VIII of the Civil Rights Act of 1968 will establish a "policy of dispersal through open housing . . . look[ing] to the eventual dissolution of the ghetto and the construction of low and moderate income housing in the suburbs."[39] While the FHA "was designed primarily to prohibit discrimination in the sale, rental, financing, or brokerage of *private* housing, and to provide federal enforcement procedures for remedying such discrimination,"[40] the Act also charged the Secretary of HUD, and through him other agencies administering federally assisted housing programs, with considering "the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built."[41]

37. *See* 114 CONG. REC. 3421–22 (1968) (statement of Sen. Mondale).

38. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale)).

39. 114 CONG. REC. 2985 (1968) (statement of Sen. Proxmire).

40. Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1133 (2d Cir. 1973).

41. *Id.* at 1134.

HUD's obligations under the FHA, however, go beyond administering housing programs in a non-discriminatory fashion.[42] The statute instructs HUD to administer its grant programs so as "affirmatively to further" the Act's goals of true integration.[43] In *Shannon v. U.S. Department of Housing and Urban Development*, the Third Circuit Court of Appeals traced the evolution of Congress' housing policy from one that was neutral on race to one that sought to promote racial integration in housing, with the goal of undoing the effects of decades of segregation.[44] The court explained that the 1949 Housing Act was neutral on race and did nothing to address the private and government actions that contributed to racial segregation.[45] The passage of the Civil Rights Act of 1964 went one step further by prohibiting public housing programs that had discriminatory effects, but did not explicitly embrace an active policy of housing integration.[46] Finally, the FHA charged the Secretary of HUD with affirmatively promoting fair housing.[47] As expressed by a supporting Senator, the purpose of the FHA was to remedy the "weak intentions" that have led to the federal government "sanctioning discrimination in housing throughout this Nation."[48] Provisions of the FHA offered the promise of widespread integration, both by policing the private housing market and by affirmatively administering programs that would undo years of government-sanctioned racial segregation.

Since the beginning of the fair housing movement and the civil rights movement, there has been tension between the twin goals of increasing the stock of affordable housing and increasing racial integration in housing. Arguably, building massive high-rises on cheap land will produce the greatest number of housing units per dollar. However, cheap land is often found in already economically depressed minority neighborhoods, and adding hundreds of affordable housing units leads to further economic and racial isolation. The tension between increasing the number of units of

42. *See* NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 154 (1st Cir. 1987) (citing 42 U.S.C. § 3608(e)(5) (2006)).

43. *Id.*

44. Shannon v. U.S. Dep't of Hous. & Urban Dev., 436 F.2d 809, 816 (3d. Cir. 1970).

45. *See id.*

46. *See id.*

47. *Id.*

48. Michael Allen, Strong Enforcement is Required to Promote Integration on the Basis of Race and Disability, Testimony at the Public Hearing at the National Commission on Fair Housing and Equal Opportunity 1 (Sept. 22, 2008) [hereinafter Michael Allen, Testimony] (quoting 114 CONG. REC. 2281 (1968) (statement of Sen. Brooke)) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.prrac.org/projects/fair_housing_commission/boston/allen.pdf.

affordable housing and increasing racial integration was exemplified in *Otero v. New York City Housing Authority*,[49] where the defendant Housing Authority alleged that it was faced with the choice of preferring white tenants in a new housing development (effectively establishing a quota) or risk tipping the racial composition of the neighborhood towards further non-white "ghettoization."[50] Ultimately, the court found that considerations of racial integration could justify limiting the number of units available to blacks, though the burden on the defendants to show a genuine need for such quotas is a "heavy one."[51] The FHA offers no guidance for balancing these competing concerns but both must be given due weight in promulgating an effective fair housing program.

Although HUD and its local affiliates have been empowered to tackle the difficult problem of persistent racial segregation, they have not always had the political will to do so. Over the course of the last half-century, the goal of increasing the stock of affordable housing has won out, often to the detriment of racial integration. Affordable housing, as typified by the housing projects in *Gautreaux*, is frequently built in large apartment buildings on the cheapest available land, in the least politically resistant neighborhoods.[52] Given finite government resources, such a policy makes sense if the only goal is to create as much affordable housing as possible. Unfortunately, as discussed above, the result of concentrating affordable housing in poor neighborhoods is increased segregation and the perpetuation of poverty among minorities. Any comprehensive fair housing policy will need to include an enforcement mechanism to ensure that HUD and local authorities take the politically difficult steps necessary to address racial and economic segregation. The next section discusses a novel approach to private enforcement of the FHA, brought by the Anti-Discrimination Center of New York, that promises to have widespread impact on how municipalities use HUD grants to promote fair housing.

49. 484 F.2d 1122 (2d Cir. 1973).
50. *Id.* at 1124, 1136.
51. *Id.* at 1136.
52. MASSEY & DENTON, *supra* note 4, at 56.

II. *Anti-Discrimination Center v. Westchester County*: USING THE FALSE CLAIMS ACT TO PROMOTE RACIAL AND ECONOMIC INTEGRATION

Private citizens, and the non-profit organizations that represent them, provide an alternative to HUD in the legal battle against racial segregation. Whether it has been by suing HUD to comply with its own enabling statutes, or by suing local municipalities to comply with HUD regulations, private citizens and non-profit organizations, including the NAACP, the ACLU, and fair housing centers, have waged painstaking battles to ensure that the promise of the FHA and Civil Rights legislation has a chance to become a reality.[53] This section presents one such case in the U.S. District Court for the Southern District of New York, *Anti-Discrimination Center v. Westchester County*, which uses the False Claims Act to promote racial and economic integration.[54]

A. Background

Anti-Discrimination Center v. Westchester County involves a dispute over the administration of a popular HUD grant program by municipalities in the County of Westchester, New York.[55] Westchester, a suburb of New York City, is one of the wealthiest counties in America.[56] The New York metropolitan area and its surrounding suburbs is also one of the most segregated regions in America.[57] According to data from the 2000 U.S. Census and data provided by the County itself, more than half of the municipalities in Westchester

53. *See, e.g.*, NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149 (1st Cir. 1987); Shannon v. U.S. Dep't of Hous. & Urban Dev., 436 F.2d 809 (3d Cir. 1970); Gautreaux v. Chi. Hous. Auth., 296 F. Supp. 907 (N.D. Ill. 1969).

54. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 495 F. Supp. 2d 375, 376 (S.D.N.Y. 2007).

55. *Id.* at 376.

56. According to data provided by the Bureau of Economic Statistics of the U.S. Department of Commerce, Westchester County's per capita income ranked seventh among counties in the United States. BUREAU OF ECONOMIC ANALYSIS, REGIONAL ECONOMIC ACCOUNTS: PER CAPITA INCOME BY COUNTY FOR 2007 (2007) http://www.bea.gov/regional/reis/crius.cfm (on file with the University of Michigan Journal of Law Reform).

57. John Iceland, Daniel H. Weinberg & Erika Steinmetz, Racial and Ethnic Residential Segregation in the United States: 1980–2000 5, tbl. A1 (unpublished paper, on file with the University of Michigan Journal of Law Reform), *available at* http://www.census.gov/hhes/www/housing/housing_patterns/working_papers.html. New York ranks third on the study's dissimilarity index, which measures the amount of movement that would be necessary to achieve perfectly integrated neighborhoods according to the racial makeup of the region, and first on the isolation index, which measures the extent to which minority members are exposed only to one another. *Id.*

have a population of less than three percent black citizens, despite a large population of black residents in pockets of the county.[58] The average non-Hispanic white neighborhood is 92.4 percent white (considering only non-Hispanic blacks and whites) and the average non-Hispanic black neighborhood is 65.8 percent non-Hispanic black.[59] Despite an apparent end to de jure segregation in the 1950s and 60s, measures of racial isolation and concentration among blacks more than doubled in Westchester County between 1950 and 2000.[60]

Westchester County was also the setting for *United States v. Yonkers Board of Education*, a fifteen-year desegregation battle in which white residents and their city council representatives fought to keep affordable housing from being built in predominantly white neighborhoods.[61] Not surprisingly, many of the municipalities in Westchester continue to resist efforts to build affordable housing within their borders.[62] Westchester acknowledged local resistance to affordable housing,[63] but maintained that a cooperative approach was the "most prudent, realistic, and productive approach."[64] Rather than withhold funding from municipalities for failing to affirmatively further fair housing, the County acquiesced to local resistance and continued to build affordable housing in predominantly black municipalities.[65] Despite the long history of racial tensions in Westchester County and the stark data that revealed racial isolation among blacks, Westchester failed to consider race as an impediment to fair housing during the six-year period it participated in the HUD-funded program.[66]

The plaintiff Anti-Discrimination Center claimed that Westchester County defrauded the federal government by accepting more than $52 million in federal funds over a six-year period and certifying that it would affirmatively further fair housing, even though it ignored race as an impediment to achieving the goals of

58. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, No. 06-CV-2860, 2008 WL 6802246, at *10 (S.D.N.Y. Sept. 30, 2008).

59. Expert Report of Andrew Beveridge ¶ 21, United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, No. 06-CV-02860 (S.D.N.Y. Sept. 30, 2008) (Document 81-6).

60. *Id.* ¶ 27.

61. 624 F. Supp. 1276 (S.D.N.Y. 1985).

62. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, No. 06-CV-2860, 2009 WL 455269, at *7 (S.D.N.Y. Feb. 24, 2009) (summary judgment opinion).

63. *Id.*

64. *Id.* at *16.

65. *Id.* at *10, *16.

66. *Id.* at *13.

the program.[67] Although Westchester County vigorously fought the lawsuit, the court ultimately accepted the Anti-Discrimination Center's argument and granted summary judgment on most of its claims.[68] Faced with roughly $180 million in penalties (due to treble damages as well as statutory damages) and the prospect of losing another $30 million in HUD funding, the County finally settled, agreeing to pay a $52 million fine and, among other things, begin building affordable housing units in the affluent white suburban towns across the county.[69]

B. False Claims Act

The Anti-Discrimination Center's legal argument focused on three major statutes and their implementing regulations:[70] (1) the False Claims Act,[71] (2) the Fair Housing Act,[72] and (3) the Housing and Community Development Act of 1974.[73] The remainder of this section carefully examines the False Claims Act and analyzes how the Anti-Discrimination Center used the Act to enforce the fair housing provisions of the Fair Housing Act and the Housing and Community Development Act.

1. History and Overview

The False Claims Act (FCA), also known as the "Lincoln Law," was enacted in 1863 in response to Union Army contractors who engaged in fraud, price-gouging, and supplying the army with defective weapons and supplies.[74] The FCA gave the government new tools and more stringent penalties that went beyond common law fraud to fight crooked contractors. In its original form, the FCA

67. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, No. 06-CV-2860, 2008 WL 6802246, at *4 (S.D.N.Y. Sept. 30, 2008).

68. *See id.*

69. Sam Roberts, *Housing Accord in Westchester*, N.Y. TIMES, Aug. 11, 2009, at A1. The Westchester County Board of Legislators approved the settlement in a 12-5 vote on September 23, 2009. Mike Jaccarino, *Westchester Oks Affordable Housing Push in Posh Nabes*, N.Y. DAILY NEWS, Sept. 24, 2009, at 49.

70. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 668 F. Supp. 2d 548, 551 (S.D.N.Y. 2009).

71. 31 U.S.C. §§ 3729–33 (2006).

72. 42 U.S.C. §§ 3608–19 (2006).

73. 42 U.S.C. § 5304(b)(2) (2006).

74. 1 JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1–3 (3d ed. Supp. 2010–1); *see also* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 781 (2000).

offered double damages, as well as $2,000, for each false claim made by a contractor.[75]

The truly unique provision in the FCA, however, was the *qui tam*[76] cause of action, which gave standing to any individual to bring a suit on behalf of the government for a false claim made by a contractor. *Qui tam* actions have been around since the thirteenth century in England,[77] when private parties used them as a means of gaining access to the royal courts because the king's interests could be adjudicated only in this setting.[78] In modern times, granting private citizens with prosecutorial-type power has been used to combat the lack of an effective governmental enforcement body or a corrupt police force.[79] The *qui tam* provision of the FCA was directed at whistleblowers and disenchanted employees who were often the only means for uncovering evidence of malfeasance by government contractors.[80] Often these "informers" did not themselves have clean hands, and one Senator who sponsored the FCA described the purpose of the *qui tam* action as "setting a rogue to catch a rogue."[81]

Enforcement by private citizens, referred to as relators,[82] was a key element of the Act. Providing private citizens with an incentive to enforce the FCA brought the potential for a more dynamic enforcement of government interests and an extra level of protection to the public treasury. Courts viewed the role of the citizen as countering the "slow-going public vessel" of government enforcement and moving quickly and effectively to protect government policy and funds.[83]

Despite its promise for wide use and ample damages, the FCA fell into relative obscurity until World War II, when government spending and the use of private contractors exploded.[84] With the growth of government assistance programs in the post-World War II period, the FCA "began to be used by the government against

75. 1 BOESE, *supra* note 74, at 1–10.

76. *Qui tam* is short for the Latin phrase: "qui tam pro domino rege quam pro se ipso," which translates roughly to "he who acts on the King's behalf as well as his own." 1 BOESE, *supra* note 74, at 1–7.

77. *Id.*

78. *Id.*

79. *Id.* at 1–9.

80. *Id.*

81. *Id.* at 1–9 & n.28 (quoting CONG. GLOBE, 37th Cong., 3d Sess. 955–56 (1863) (remarks of Sen. Howard)).

82. The term "relator" describes the party who brings a suit on behalf of the government. *See* BLACK'S LAW DICTIONARY 621 (8th ed. 2004) (defining "ex rel.").

83. 1 BOESE, *supra* note 74, at 1–11 (quoting United States v. Griswold, 24 F. 361, 366 (D. Or. 1885)).

84. *Id.* at 1–13.

persons and corporations other than government contractors."[85] For example, programs including agriculture and housing subsidies, Medicare, and Food Stamps all expanded the context of the FCA.[86] Enforcement of the Act changed from focusing primarily on military spending to encompassing numerous social welfare policies, touching on almost every area involving government spending.[87] At the same time the FCA was being revived, the *qui tam* provision of the FCA was significantly curtailed in amendments to the Act in 1943.[88] Congress feared private plaintiffs, who had done little to expose fraud or contribute to the prosecution, would simply re-file government claims and collect a large portion of the government's damages.[89] For the next forty years, the FCA became primarily a government tool.[90]

In 1986, however, Congress revived the dual purpose of the FCA as both a strong anti-fraud measure to deter recipients of government funds as well as a check on lax government enforcement. The 1986 amendments bolstered the *qui tam* provision and increased the monetary penalties to potential defrauders.[91] One of the provisions of the 1986 amendments lowered the intent/knowledge requirement from specific intent to defraud the government to something akin to gross negligence.[92] The amendments also increased damages from double to treble damages and updated the penalty from $2,000 per false claim to between $5,000 and $10,000 per false claim.[93] It also expanded the role of *qui tam* relators by repealing the government's veto power over claims[94] and by increasing the percentage of damages recoverable under

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. 89 CONG. REC. 7570–71 (1943) (statement of Sen. Van Nuys). *See, e.g.*, United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943). In *Hess*, the *qui tam* relator made a direct copy of the government's criminal indictment against Hess, re-filed it as a civil action under the FCA, and was awarded half of the damages. *Id.* at 545–46.

90. 1 BOESE, *supra* note 74, at 1–13.

91. *Id.* at 1–21 to 22.

92. 31 U.S.C. § 3729(b) (2006) ("[T]he terms 'knowing' and 'knowingly' mean that a person, with respect to information[,] (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information; and no proof of specific intent to defraud is required."); *see also*, United States v. Entin, 750 F. Supp. 512, 518 (S.D. Fla. 1990).

93. 31 U.S.C. § 3729(a) (2006).

94. *Id.* § 3729(d). It is precisely this problem of federal agencies becoming too cozy with contractors that calls for allowing private citizens to independently bring an FCA action. As this Note later discusses, HUD's inability to stand strong against local municipalities that violate the Fair Housing Act is evidence of the propriety of applying the FCA to cases such as *Anti-Discrimination Center.*

the Act by relators.[95] The modern FCA signals a strong public policy commitment to combating "rampant fraud and governmental acquiescence."[96]

The types of parties that are found liable under the FCA have also changed since its inception at the height of the Civil War. Although fraud perpetrated by military contractors still commands a sizeable share of FCA actions,[97] in the last decade, healthcare fraud cases have significantly outpaced military fraud cases.[98] One recent *qui tam* action under the FCA resulted in a $325 million judgment against a clinical medical laboratory for overbilling.[99] The Act is increasingly being applied to nontraditional areas such as environmental compliance, financial services involved in the sale of government bonds, the use of government land for oil, gas, and mining extraction, and federal grants for scientific research.[100]

As the nature of government spending evolves, so does the applicable contexts for FCA enforcement. Although the FCA is commonly thought of as an anti-fraud measure, it is often used to enforce compliance with government procedures and mandates. For example, courts have found liability under the FCA in cases involving non-disclosure of information in contracting,[101] substandard testing of products provided to the government,[102] and false representation of compliance with government regulations.[103] With the growth of federal regulations, the federal government increasingly attaches regulatory strings when allocating funds, making a failure to comply with government policy and procedures—and to accurately certify compliance—as egregious a violation as failing to provide the service or product at all. It is these types of regulatory

95. *Id.*

96. 1 BOESE, *supra* note 74, at 1-17.

97. *See* John T. Boese, *Fundamentals of the Civil False Claims Act and Qui Tam Enforcement*, *in* THE 7TH ANNUAL NATIONAL INSTITUTE ON CIVIL FALSE CLAIMS ACT AND *Qui Tam* ENFORCEMENT A-47 (2008). *Qui tam* and non-*qui tam* actions at the Department of Defense totaled over $3.8 billion from 1987–2007. *Id.*

98. From 1987–2007, *qui tam* and non-*qui tam* actions at the Department of Health and Human Services totaled over $13 billion. *Id.* at A-46.

99. 1 BOESE, *supra* note 74, at 1-37 (Supp. 2007-2)

100. CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT §§ 2:12–2:19 (Andrea G. Nadel et al. eds., 2004).

101. *See, e.g.*, United States *ex rel.* Atkinson v. Pennsylvania Shipbuilding Co., 2000 WL 1207162 (E.D. Pa. 2000) (alleging shipbuilding contract knowingly omitted significant costs in contractor's final proposal to government).

102. *See, e.g.*, United States *ex rel.* Compton v. Midwest Specialties, Inc., 142 F.3d 296 (6th Cir. 1998) (contractor supplying brake-shoe kits for Army Jeeps failed to periodically test the products in conformity with government regulation).

103. *See, e.g.*, United States *ex rel.* Fallon v. Accudyne Corp., 880 F.Supp. 636 (W.D. Wis. 1995) (military contractor's knowing failure to comply with environmental regulations even though it certified that it would, constitutes a false claim under the FCA).

compliance cases that formed the basis of Anti-Discrimination Center's claim against Westchester County.

2. Mechanics of the False Claims Act

The elements of an FCA claim are detailed and complex and differ based on the type of claim at issue. This section discusses the elements that are relevant to an FCA action under the fair housing laws and that pose the most difficulty for a *qui tam* plaintiff. Several treatises are available for a fuller discussion of the mechanics of the FCA.[104]

a. Liability

The most common source of liability under the FCA is making "direct" false claims to the government.[105] Section 3729(a)(1) of the FCA provides that any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval . . . is liable to the United States Government . . . ."[106] The second source of liability is when a person "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid . . . ."[107] Liability for producing false records or making false statements necessarily requires that a false claim be made.[108] Where government contracts and grants require certification of compliance with government regulations and conditions, verification of actual compliance may require costly oversight and extra layers of bureaucracy. The risk of false compliance certifications is perhaps the greatest justification for a *qui tam* action and treble damages, since it provides incentive for whistleblowers and private investigators to uncover deception that might otherwise go undiscovered.[109] Where the government lacks the re-

104. *See generally* 1 BOESE, *supra* note 74, at 1–3; SYLVIA, *supra* note 100; AMERICAN BAR ASSOCIATION, THE 7TH ANNUAL NATIONAL INSTITUTE ON CIVIL FALSE CLAIMS ACT AND *Qui Tam* ENFORCEMENT (2008).

105. Boese, *supra* note 74, at § 2.01[A]; Boese, *supra* note 97, at A-3.

106. 31 U.S.C. § 3729(a)(1) (2006).

107. *Id.* § 3729(a)(2).

108. Boese, *supra* note 97, at A-4.

109. *See* S. REP. No. 99-345, at 13 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5279 (enhancing the *qui tam* provisions is necessary to "break[] the current 'conspiracy of silence' among Government contractor employees." (quoting John Phillips, testifying for the Center for Law in the Public Interest)).

sources to audit every claim, such an enforcement mechanism allows for efficient oversight.[110]

b. Qualified "Persons" Under the False Claims Act

Virtually any individual or corporate entity that makes a claim for federal payment qualifies as a "person" for the purposes of the FCA.[111] The statute is less clear, however, when it comes to public entities. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[112] the U.S. Supreme Court resolved a long-running circuit split over the ability of a *qui tam* plaintiff to bring suit against a State. In *Stevens*, the Supreme Court held that "the False Claims Act does not subject a State (or state agency) to liability" in *qui tam* actions.[113] The Court's reasoning was based on a historical and textual analysis of the Act, and from the punitive nature of damages, which the Court found did not typically apply to States.[114]

The Supreme Court, however, *has* found that municipalities and county governments are "persons" subject to liability under the FCA, in claims brought either by the federal government or a private relator.[115] Municipal governments are treated differently because, historically, municipal corporations have been deemed to be "persons" that "may sue and be sued."[116] Because a substantial amount of federal aid goes directly to town, city, and county governments, ensuring compliance with federal policies that form the basis for allocating such funds is an important use of the FCA.

c. Qui Tam *Provision*

As previously discussed, the *qui tam* provision allows any individual or organization to bring suit in the name of the United States government so long as they meet certain procedural and

110. *See id.* at 14 ("The bill adds no new layers of bureaucracy, new regulations, or new Federal police powers. Instead, the bill takes the sensible approach of increasing penalties for wrongdoing, and rewarding those private individuals who take significant personal risks to bring such wrongdoing to light." (quoting D. Wayne Silby, representative of the Business Executives for National Security)).

111. Boese, *supra* note 97, at A-7.

112. 529 U.S. 765 (2000).

113. *Id.* at 787–88. The U.S. Department of Justice, however, contends that it can still sue a State for false claims under the *Stevens* decision. *See* Boese, *supra* note 97, at A-7.

114. *Stevens*, 529 U.S. at 780–88.

115. Cook County, Ill. v. United States *ex rel.* Chandler, 538 U.S. 119, 132–34 (2003).

116. Boese, *supra* note 97, at A-8.

jurisdictional requirements.[117] The mechanics of the *qui tam* provision are complex, but a major concern for the court on the motion to dismiss in *Anti-Discrimination Center* was the "public disclosure" jurisdictional bar.[118] Although the 1986 amendments to the FCA generally expanded the viability of the *qui tam* actions, drafters were still concerned about "parasitic suits"[119] coming on the heels of government investigations or publicly available reports.[120] As a result, Congress attached a new jurisdictional bar that denied a court subject-matter jurisdiction where the *qui tam* claim is

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[121]

"Original source" is defined as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action . . . ."[122]

In *Anti-Discrimination Center*, the plaintiff's claim was based on information requests under the New York Freedom of Information Law (FOIL),[123] which is the state equivalent of the federal Freedom of Information Act.[124] One of the main questions that arose in the motion to dismiss was whether the FOIL request qualifies as a "public disclosure" for the purposes of the FCA, and if it does, whether the plaintiff was the "original source" of the information.[125] Once a court determines that a claim is based on a public

117. *See* 31 U.S.C. § 3730(b) (2006).

118. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 495 F. Supp. 2d 375, 379–83 (S.D.N.Y. 2007).

119. Boese, *supra* note 97, at A-17. "Parasitic suits" refer to complaints stating allegations or information readily available to the public, for example, from government prosecution or publicly disclosed investigations. *Id.*

120. United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943). *Hess* is a prototypical case of a parasitic suit, in which the *qui tam* plaintiff copied a criminal indictment of electrical contractors and incorporated it into a civil action under the FCA, essentially adding no new facts to the case but requesting half of any subsequent civil damages.

121. 31 U.S.C. § 3730(e)(4)(A)(2006).

122. *Id.* § 3730(e)(4)(B).

123. N.Y. PUB. OFF., art. 6, §§ 84–90 (2006).

124. 5 U.S.C. § 552 (2006); United States *ex rel.* Anti-Discrimination Ctr. Of Metro N.Y., Inc. v. Westchester County, 495 F. Supp. 2d 375, 380, 383 (S.D.N.Y. 2007).

125. *Anti-Discrimination Ctr.*, 495 F. Supp. 2d at 379–80.

disclosure, the plaintiff faces a high burden to show that he was the original source of the information in the disclosure.[126]

A circuit split has emerged with regard to whether administrative reports produced by state and local governments qualify as public disclosures that trigger the jurisdictional bar against *qui tam* actions under the FCA. Although most circuit courts agree that administrative reports produced by the federal government—such as those produced through government audits or investigations—do trigger the jurisdictional bar, they differ on whether the same standard applies to state and local government reports. For example, in *United States ex. rel. Dunleavy v. County of Delaware*, a local government entity produced reports that contained the fraudulent claims and thus formed the basis for the FCA allegations, and the reports may have been the only way for a private citizen to discover that a claim was made at all.[127] In *Dunleavy*, the Third Circuit Court of Appeals interpreted the jurisdictional bar narrowly to allow for *qui tam* actions based on administrative reports produced by local government actors.[128] Although the court based this conclusion on a textual analysis, it also reached its conclusion on policy grounds.[129] First, the government reports may have been the only way for a private citizen to discover that a claim was made at all. Secondly, the court found that applying the jurisdictional bar would be a contradiction of the FCA's intent if the very reports that were fraudulently submitted to the federal government would also have the effect of immunizing the defrauder from prosecution by a private citizen.[130] Such a reading of the statute would contradict the fundamental purpose of the 1986 amendments, which sought to make it easier to uncover fraud when the defrauding party is the only source of the information that would reveal the wrongdoing.[131] The fact that the defrauding party in the case was a government entity should not entitle it to greater protection than would be afforded a private contractor.[132]

The Eighth Circuit Court of Appeals took a slightly different approach in *Hays v. Hoffman*,[133] finding that audit reports produced by a state agency triggered the jurisdictional bar.[134] Although the

126. *See generally* Rockwell Int'l Corp. v. United States *ex rel.* Stone, 549 U.S. 457 (2007) (describing the Supreme Court's test for meeting the "original source" requirement).

127. United States *ex rel.* Dunleavy v. County of Del., 123 F.3d 734 (3d Cir. 1997).

128. *Id.* at 745–46.

129. *Id.*

130. *Id.* at 745.

131. *Id.* at 746.

132. *Id.* at 745–46.

133. 325 F.3d 982 (8th Cir. 2003).

134. *Id.* at 989.

court distinguished the facts in its case from the facts in *Dunleavy*, it found that in certain situations where the state agent is acting as an auditor at the request of the federal government (as is required to receive Medicaid payments), state reports would trigger the jurisdictional bar in much the same way as federal audits.[135]

Although the Second Circuit Court of Appeals has yet to weigh in on the matter of interpreting the jurisdictional bar of the FCA, in *Anti-Discrimination Center*, the U.S. District Court for the Southern District of New York followed the Third Circuit's reading of the FCA and found that information gleaned from a FOIL request made by a private citizen could form the basis of an action under the FCA.[136] As was the case in *Dunleavy*, the district court reasoned that there was value in citizens investigating state files and bringing evidence of fraud to the federal government's attention, and that construing the jurisdictional bar narrowly was fully consistent with the legislative purpose of the Act.[137]

d. Scienter Requirement

To maintain liability under the FCA, the party making a claim must knowingly make a false record or statement and must knowingly present a false claim to the government in order to receive approval for a fraudulent claim.[138] A person acts "knowingly" under the FCA with respect to information where the person: "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information."[139] Although showing knowledge of falsity requires more than mere negligence, the passage of the 1986 amendments made it clear that the FCA did not require specific intent to defraud the government.[140] By explicitly defining knowledge, Congress intended to avoid "ostrich-like" conduct by corporations that would make recovering false claims increasingly difficult.[141]

Difficulties in proving knowledge are especially pronounced in cases that involve ambiguous regulations. Defendants often argue that a reasonable interpretation of a regulation (that later turns

135. *Id.* at 988.

136. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 495 F. Supp. 2d 375, 383 (S.D.N.Y. 2007).

137. *Id.*

138. 31 U.S.C. § 3729(a)(1) & (2) (2006).

139. 31 U.S.C. § 3729(b) (2006).

140. *See* SYLVIA, *supra* note 100, § 4:45.

141. *Id.*

out to be incorrect) proves a lack of knowledge that the defendant made false statements or claims.[142] Although courts have approved of this defense strategy,[143] a plaintiff or relator may still offer evidence of knowledge of falsity that would contradict defendant's ex post interpretation of the regulation and show that it is merely a pretext.

C. Applying the False Claims Act to the Fair Housing Act Context

The case of *Anti-Discrimination Center v. Westchester County* successfully demonstrates how the False Claims Act can be applied to the fair housing context to promote greater housing integration.[144] The Civil Rights Act of 1964,[145] the Fair Housing Act of 1968,[146] the Housing and Community Development Act of 1974,[147] and their implementing regulations form the basis for the certification requirements of municipalities that receive Community Development Block Grants from the federal government.

1. Community Development Block Grants

One of the most popular Housing and Community Development programs administered by HUD is the Community Development Block Grant (CDBG). The purpose of the CDBG program is to "develop viable communities by promoting integrated approaches that provide decent housing, a suitable living environment, and expanded economic opportunities for low and moderate income persons."[148] HUD defines community development broadly to include activities such as providing housing and community centers, rehabilitating public and private buildings, acquiring property for public use, and other projects that serve the

142. *Id.* § 4:38.

143. *See, e.g.*, United States *ex rel.* Oliver v. Parsons Co., 195 F.3d 457, 463 (9th Cir. 1999) (finding that the reasonableness of defendant contractor's interpretation of applicable accounting standards may be relevant to whether it knowingly submitted false claims).

144. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 495 F. Supp. 2d 375 (S.D.N.Y. 2007).

145. 42 U.S.C. § 2000a–2000a-6 (2006).

146. 42 U.S.C. § 3601 (2006).

147. 42 U.S.C. § 5301 (2006).

148. Office of Community Planning and Development of U.S. Department of Housing and Urban Development Home Page, http://portal.hud.gov/portal/page/portal/HUD/program_offices/comm_planning (on file with the University of Michigan Journal of Law Reform).

general community interest.[149] The program was established by President Gerald Ford's Administration in 1974 and has since administered nearly $120 billion to state and local governments.[150] In 2008, the program gave over $3.8 billion in regularly allocated funds.[151] Currently, over 1,200 municipalities and counties in forty-nine states and Puerto Rico receive CDBG funds.[152] Grants range in value from $72,000 for a small island off the coast of Florida to $180 million for New York City.[153] Because of their widespread and sometimes substantial impact on municipal budgets, states and local municipalities have come to rely on CDBG grants as part of their efforts to combat urban blight.[154]

2. Affirmatively Furthering Fair Housing under the Civil Rights Act and Fair Housing Act

As a requirement of receiving CDBG funds, grantees must submit certifications to HUD that they have "conducted and administered [development programs] in conformity with the Civil Rights Act of 1964 . . . and the Fair Housing Act . . . , and . . . will affirmatively further fair housing . . . so as to give maximum feasible priority to activities which will benefit low- and moderate-income families . . . ."[155]

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149. Dep't of Hous. & Urban Dev., Description of State-Administered Community Development Block Grant Program, http://www.hud.gov/offices/cpd/communitydevelopment/programs/stateadmin/index.cfm (on file with the University of Michigan Journal of Law Reform).

150. DEP'T OF HOUS. & URBAN DEV., FISCAL YEAR 2009 BUDGET SUMMARY 8 (2008) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.hud.gov/about/budget/fy09/fy09budget.pdf

151. *Id.* at 12.

152. Excel Spreadsheet Detailing Individual Municipal Grants (on file with the University of Michigan Journal of Law Reform), *available at* http://www.hud.gov/offices/cpd/about/budget/budget09/ (click "All Grants – Excel" hyperlink to download the file).

153. *Id.*

154. *See, e.g.*, *Community Development Block Grants: The Impact of CDBG on Our Communities: Field Hearing Before the Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Services*, 109th Cong. 33–36 (2006) (statement of Clifford W. Graves) (on file with the University of Michigan Journal of Law Reform), *available at* http://financialservices.house.gov/media/pdf/109-85.pdf; Press Release, Office of Governor Deval Patrick, Governor Patrick Announces $40.4 Million in Statewide Community Development Grants (Aug. 13, 2009) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.mass.gov/?pageID=gov3pressrelease&L=1&L0=Home&sid=Agov3&b=pressrelease&f=081309_community_development_grants&csid=Agov3 (quoting various members of the Massachusetts congressional delegation as to the impact of CDBG funds on local communities).

155. 42 U.S.C. § 5304(b)(2)-(3) (2006) (internal citations omitted). The affirmatively further fair housing ("AFFH") requirement is set forth in the Fair Housing Act, 42 U.S.C. § 3608(d) and (e)(5), and is incorporated into the certification requirement of DCBG fund-

The implementing regulations clearly set forth the condition that grantees must "affirmatively further fair housing" (AFFH).[156] Grantees satisfy this condition by (1) conducting an analysis to identify impediments to fair housing choice, (2) taking appropriate actions to overcome any impediments identified, and (3) maintaining records reflecting the analysis and actions taken.[157]

The court in *Anti-Discrimination Center* had to first determine the scope of the AFFH requirement and then conduct a factual analysis to determine whether defendant Westchester County had falsely certified compliance. In ruling against Westchester County on its motion to dismiss, the court found that the AFFH certification requirement mandated that CDBG fund recipients analyze race as an impediment to fair housing.[158] The court came to this conclusion by looking to the history of the passage of the Civil Rights Act of 1964, the FHA, and the subsequent case law interpreting the statutes.[159] The Civil Rights Act provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."[160] Under the FHA, "the Secretary is required to 'administer the programs and activities relating to housing and urban development in a manner *affirmatively to further the policies* of' the statute."[161] The FHA was "designed primarily to prohibit discrimination in the sale, rental, financing, or brokerage of *private* housing and to provide federal enforcement procedures for remedying discrimination so that members of minority races would not be condemned to remain in urban ghettos."[162]

Given the clear legislative purpose of the FHA to combat racial segregation and discrimination in housing, the court found that

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ing by 42 U.S.C. § 5304(b)(2) and 24 C.F.R. § 91.225(a)(1) (2009) (incorporating AFFH requirement into CDBG consortium certifications), 24 C.F.R. § 570.602 (2009) (incorporating non-discrimination requirements of the Housing and Community Development Act of 1975), and 24 C.F.R. § 570.601(a)(2) (2009) (incorporating AFFH into the administration of CDBG programs).

156. 24 C.F.R. §§ 91.225 (grantees must actually conduct an analysis, take affirmative steps to overcome impediments, and keep appropriate records), 570.601 (grantees must certify that they have taken the required action).

157. *Id.*

158. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 495 F. Supp. 2d 375, 387–89 (S.D.N.Y. 2007).

159. *Id.* at 385–88.

160. 42 U.S.C. § 2000a(a) (2006).

161. *Anti-Discrimination Ctr.*, 495 F. Supp. 2d at 385 (quoting 42 U.S.C. § 3608(e)(5)).

162. *Id.* (quoting Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1133–34 (2d Cir. 1973) (emphasis added)).

HUD was required to be particularly cognizant of race when administering public housing.[163] Specifically, HUD must consider how its housing programs might result in greater racial and socioeconomic isolation.[164] Furthermore, the court found that HUD grants were not intended as a passive prohibition against further discrimination in housing, but as a tool to promote further racially and economically integrated housing patterns.[165] In sum, the court took the soaring language of the FHA and its drafters literally in imposing positive requirements on HUD.

The obligations imposed on HUD by the Civil Rights Act and the Fair Housing Act apply equally to CDBG fund recipients. Specifically, the grantee must "analyze the impact of race on housing opportunities and choice in its jurisdiction . . . [and] must take appropriate action to overcome the effects of those impediments."[166] The court found that given the history of racial discrimination and segregation in Westchester County, the explicit statutory and regulatory framework described above, and HUD's written guidelines, analyzing race as part of the mandatory impediments analysis is not a question of ambiguous statutory interpretation but an obvious requirement.[167] To interpret the AFFH requirement in a way that excludes consideration of race "would be an absurd result."[168]

Westchester County argued that its obligation to analyze race under the AFFH requirement was ambiguous at best, and therefore the County could not be held liable for making false statements.[169] The court, however, found that the lack of explicit guidance on conducting an impediments analysis in the statutes and regulations did not contravene the County's responsibility to

163. *See id.* at 387–88.

164. *See id.* at 385 (quoting *Otero*, 484 F.2d at 1133–34) (The FHA requires the Secretary to "consider 'the impact of proposed *public* housing programs on the racial concentration' in the area in which the public housing will be built.' "); *id.* (quoting NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 156 (1st Cir. 1987)) (In administering its grant programs, "HUD must 'consider the effect of a HUD grant on the racial and socio-economic composition of the surrounding area.' ").

165. *See id.* at 385.

166. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 668 F. Supp. 2d 548, 552 (S.D.N.Y. 2009)

167. *Anti-Discrimination Ctr.*, 495 F. Supp. 2d at 387–88 (motion to dismiss).

168. *Id.* at 388. Specifically, Westchester County argued that nowhere on the face of the Fair Housing Act or the implementing regulations is race mentioned as an impediment to fair housing. Requiring the consideration of race in the analysis of impediments was a "matter of policy difference" and, therefore, Westchester County's alleged false statements were the result of inadequate guidance in the relevant statutes and regulations. *Id.* The legal interpretation of "affirmatively further fair housing" was an unsettled legal question that could not attach liability under the False Claims Act. *Id.* (quoting Troll Co. v. Uneeda Doll Co., 483 F.3d 150, 160 (2d Cir. 2007)).

169. *Id.*

analyze racial discrimination—"the core concern behind the passage of the Fair Housing Act"—as an impediment to fair housing.[170] The "knowingly" requirement, however, poses a significant roadblock to future litigation. Given the broad mandate imposed by the FHA and its implementing regulations, coupled with the self-regulating nature of the certification process and treble damages under the FCA, future courts may find that the regulatory framework lacks the clarity necessary to find a defendant liable.

Although the court in *Anti-Discrimination Center* ruled on summary judgment that defendant Westchester County submitted false claims, the court ultimately held that there was sufficient evidence on both sides to proceed to trial on the existence of knowledge.[171] On the one hand, HUD repeatedly warned Westchester County of its obligation to analyze race and provided it with written guidance as to how to meet its obligation.[172] On the other, HUD regularly accepted Westchester County's impediments analysis that did not analyze race, arguably leading the County to believe it was in compliance with the law.[173] The government's knowledge of the falsity of the claim did not necessarily bar FCA liability, but it was "relevant to the issue of the County's knowledge or reckless disregard."[174]

With the aid of the U.S. Department of Justice, the parties in *Anti-Discrimination Center* ultimately reached a settlement,[175] leaving unanswered the question as to whether Westchester County knowingly submitted false claims. However, the court's summary judgment decision puts other municipalities on notice of their obligation to analyze and address race as an impediment to fair housing. In an announcement of the Westchester County settlement, the U.S. Department of Justice underscored the "serious commitment and responsibility to affirmatively further fair

170. *Anti-Discrimination Ctr.*, 668 F.Supp.2d at 554 (quoting U.S. Dep't of Hous. & Urban Dev., Fair Housing Planning Guide) (summary judgment opinion). The court also noted that HUD had provided guidance through its communications with Westchester County on its impediments analysis and explicitly advised Westchester County that the purpose of the impediments analysis was to "[a]nalyze and eliminate housing discrimination in the jurisdiction" and to "[p]rovide opportunities for inclusive patterns of housing occupancy regardless of race, color, religion, sex, familial status, disability and national origin." *Id.* at 554.

171. *Id.* at 567–68.

172. *Id.*

173. *Id.* at 568.

174. *Id.*

175. Press Release, U.S. Department of Justice, Westchester County Agrees to Develop Hundreds of Units of Fair and Affordable Housing in Settlement of Federal Lawsuit (Aug. 10, 2009) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.usdoj.gov/crt/housing/documents/westchester_pr.pdf.

housing" that comes with accepting HUD funds, and the Department's intention to enforce these obligations.[176] As the effects of the *Anti-Discrimination Center* legal findings begin to influence future cases and policymakers begin to enforce the AFFH requirement, defendants will be less able to plead ignorance, making the FCA a more attractive tool for private enforcement of the fair housing laws.

Despite the progress *Anti-Discrimination Center* achieved in the enforcement of fair housing laws, it leaves open the policy question of what steps a municipality must take to overcome the impediments to fair housing posed by racial segregation and discrimination. The next section will examine "fair-share" and inclusionary zoning policy as two methods that municipalities should adopt to meet their obligations in administering fair housing programs.

III. LOCAL AND REGIONAL ZONING REFORMS THAT AFFIRMATIVELY FURTHER FAIR HOUSING

This section proposes certain measures—specifically regional coordination and inclusionary zoning policies—that are likely to achieve greater racial and economic integration in housing. To give greater force to the AFFH requirement discussed in Section II, Congress should make regional coordination and inclusionary zoning policies a precondition to receiving HUD funds. Although such measures could be mandated by the courts, based on a progressive interpretation of existing HUD regulations, states and municipalities would be better served by making these obligations clear in new federal legislation. Inclusionary zoning has already been implemented by many states, but a federal mandate tied to HUD funding would make integration a national priority with greater uniformity and enforcement.

A. Mount Laurel and "Fair Share" Housing Obligations

The argument proposed in *Anti-Discrimination Center* that recipients of HUD grants must take affirmative steps to overcome racial segregation and discrimination is by no means novel. One of the primary purposes of the FHA and the establishment of HUD was to "remedy the 'weak intentions' that have led to the federal govern-

176. *Id.* at 3.

ment's sanctioning discrimination in housing through this Nation."[177] In cases like *NAACP v. Secretary of Housing and Urban Development*[178] and *Shannon v. U.S. Department of Housing and Urban Development*,[179] federal courts have held that Section 3608 of the FHA reflects Congress' intent that HUD use its grant programs to assist in ending discrimination and segregation[180] and "do more than simply refrain from discriminating."[181] Since local governments actually put the HUD grants to work, the onus is passed to them to implement these lofty goals, often with little guidance or oversight from HUD.

One of the preconditions for states receiving HUD grants should be the dismantling of exclusionary zoning practices and the adoption of affirmative measures to produce affordable housing in all local jurisdictions. In *Southern Burlington County NAACP v. Township of Mount Laurel*, the New Jersey Supreme Court established the seminal legal doctrine on inclusionary zoning practices and regional responsibility for affordable housing.[182] Although the Court in *Mount Laurel I* chose to consider the case from the standpoint of economic segregation, the case concerns racial segregation as well, at least if one accepts that racial minorities are disproportionately represented among the economically disadvantaged class.[183]

When the case began in 1974, Mount Laurel was a rapidly developing suburb of Camden, New Jersey.[184] Because residents of Mount Laurel wanted the community to develop into a low-density suburb, the municipal government enacted zoning ordinances that essentially restricted new residential development to single-family detached dwellings with sizeable lots.[185] Although a few developments for rental units were approved under zoning variance procedures, these projects were intentionally targeted toward middle class and wealthy individuals with few or no children.[186] The few "pockets of poverty" that existed in Mount Laurel were "deteriorating or dilapidated," and would naturally be replaced by more

177. Michael Allen, Testimony, *supra* note 48, at 1.

178. 817 F.2d 149, 155 (1st Cir. 1987).

179. 436 F.3d 809, 821 (3d Cir. 1970).

180. Michael Allen, Testimony, *supra* note 48, at 1.

181. *Id.* at 2 (quoting NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987)).

182. S. Burlington County NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 336 A.2d 713 (1975).

183. *Id.* at 717.

184. *Id.* at 718.

185. *Id.* at 719.

186. *Id.* at 722. The town specifically wanted to limit the number of families with children because adding more children without significantly increasing tax revenue would increase education costs and eventually lead to higher property taxes. *Id.*

expensive dwellings as development expanded.[187] Such zoning restrictions were pervasive in the fastest growing communities across the state.[188]

The NAACP brought a claim on behalf of poor black and Hispanic residents who were effectively being excluded from new housing in Mount Laurel developments.[189] The NAACP argued that the ordinances violated plaintiff's due process and equal protection rights.[190] Mount Laurel agreed that its zoning ordinances excluded lower income individuals, but that the ordinances were meant to protect low property taxes for existing residents.[191] The court found that Mount Laurel could not "foreclose the opportunity" for the development of low- and moderate-income housing under New Jersey's Constitution, and that it must "affirmatively afford [the] opportunity" to produce the municipality's "fair share of the present and prospective regional need" for such housing.[192]

In striking down Mount Laurel's zoning ordinances, the court adopted a new interpretation of the underlying police powers from which municipalities derive their zoning authority. Eight years after *Mount Laurel I*, the court summarized the constitutional basis for the decision in the follow-up case, *Mount Laurel II*:

> The constitutional power to zone, delegated to the municipalities subject to legislation, is but one portion of the police power and as such, must be exercised for the general welfare. When the exercise of that power by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare—in this case housing needs—of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality. Municipal land use regulations that

187. *Id.* at 718, 722.

188. *Id.* at 717.

189. *Id.*; *see also* Norman Williams & Anya Yates, *The Background of* Mount Laurel I, 20 VT. L. REV. 687, 695–96 (1996). Although the NAACP's basis for its claim was racial discrimination, the court considered Mount Laurel's zoning ordinances from the broader perspective of all low- and middle-income residents in New Jersey. *Mount Laurel I*, 336 A.2d at 717.

190. *See* Williams & Yates, *supra* note 189, at 696.

191. *Mount Laurel I*, 336 A.2d at 730–31.

192. *Id.* at 732.

conflict with the general welfare thus defined abuse the police power and are unconstitutional.[193]

Mount Laurel I is best known for broadening the interpretation of the General Welfare Clause to include regional housing needs beyond the borders of the municipality defining the zoning ordinances. The court left it to the State legislature and the municipalities to calculate their "fair-share" obligation for affordable housing and what measures to take to promote those ends.[194] However, after eight years of legal confusion in the lower courts' results, the New Jersey Supreme Court in *Mount Laurel II* explicitly laid out some of the obligations municipalities had in making their zoning practices more inclusionary and in promoting the development of affordable housing.[195] These practices can broadly be described as regional coordination and inclusionary zoning.

B. Regional Coordination Measures

Traditionally, zoning policies are established through a comprehensive land use plan and then implemented at a local level. Although a municipality's zoning decisions may have effects beyond its borders, planning usually only accounts for the "parochial concerns of the zoning locality."[196] Several states including California, Florida, Oregon, and Washington have led the way in adopting legislation that require localities to adopt comprehensive land use plans that account for affordable housing needs.[197] Such regulations require municipalities to analyze housing needs in terms of the "locality's existing and projected population, current housing supply, and available buildable land."[198] Many of these states provide various levels of regulatory oversight of local implementation of their land use plans and, at least in Oregon, the State may withhold certain grant funds if the municipality is not implementing its zoning laws consistently with regional housing goals.[199] Though these legislative efforts are laudable, they lack the regional

193. S. Burlington County NAACP v. Twp of Mount Laurel (*Mount Laurel II*), 456 A.2d 390, 415 (1983).

194. *Mount Laurel I*, 336 A.2d at 733–34.

195. *Mount Laurel II*, 456 A.2d at 415.

196. Jennifer M. Morgan, Comment, *Zoning For All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 372 (1995).

197. *Id.* at 372–73.

198. *Id.* at 373.

199. *Id.* at 373–74.

coordination and strong enforcement mechanisms that are likely to bring about real change.

In response to *Mount Laurel I*, the New Jersey State legislature enacted the Municipal Land Use Law,[200] which recognizes the role of regional coordination in ensuring that individual municipalities live up to their *Mount Laurel* obligations.[201] New Jersey's approach went one step further than states like Oregon by passing the New Jersey Fair Housing Act[202] and creating the Council on Affordable Housing that "supervise[s] the allocation of fair-share housing burdens under the Act."[203] Under the Act, municipalities voluntarily submit themselves to review in exchange for protection from lawsuits resulting from their potentially exclusionary zoning practices.[204] The State coordinates localities by defining "growth areas" through the State Development Guide Plan.[205] The Plan allocates housing obligations based on remedial, current, and future regional needs, as well as by providing the time frame for implementing development plans.[206] Through legislative and administrative means, New Jersey both ensures proper coordination of affordable housing needs and enforcement of each municipality's "fair-share" obligations.

Regional coordination, much like the regulations implemented in New Jersey, should be a mandatory precondition for a recipient of HUD funding. Any meaningful analysis of impediments to racial integration will find that parochial control of zoning measures effectively maintains our segregated towns. Before any municipality can make a good faith effort toward affirmatively furthering fair housing, it must understand the current and future regional needs for housing in its relevant area, not just the needs of its current constituents.

This shift away from parochialism in housing policy was the spirit behind the *Gautreux* and *Yonkers* decisions.[207] Regional coor-

200. N.J. STAT. ANN. § 40:55D-28(d) (West 2009).

201. *Mount Laurel II*, 456 A.2d at 417.

202. N.J. STAT. ANN. §§ 52:27D-301 to -307 (West 2008).

203. Ford, *supra* note 4, at 1852.

204. Jason McCann, *Pushing Growth Share: Can Inclusionary Zoning Fix What is Broken with New Jersey's* Mount Laurel *Doctrine?*, 59 RUTGERS L. REV. 191, 205 (2006).

205. *Mount Laurel II*, 456 A.2d at 418.

206. *Id.*

207. *See* United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985); Gautreaux v. Chi. Hous. Auth., 296 F. Supp. 907 (N.D. Ill. 1969). *Gautreaux*, in particular, used the entire Chicago metropolitan area, including surrounding suburbs, in defining the geographic scope of the court's remedy. Hills v. Gautreaux, 425 U.S. 284, 306 (1976). In *Anti-Discrimination Center*, the plaintiff alleged that Westchester's failure to look beyond the housing needs of its existing residents is a failure in its impediments analysis. Complaint

dination and enforcement is particularly important when it comes to fighting racial segregation because of the phenomenon of "white flight," where fear of the changing racial makeup of a community causes white residents to flee to neighboring all-white communities. The New Jersey Supreme Court recognized this danger in *Mount Laurel II* when it emphasized the "fair-share" remedy:

> No one community need be concerned that it will be radically transformed by a deluge of low and moderate income developments. Nor should any community conclude that its residents will move to other suburbs as a result of this decision, for those 'other suburbs' may very well be required to do their part to provide the same housing.[208]

Drastic changes in existing property values and a mass exodus of current residents are legitimate concerns that illustrate the need for regional coordination in implementing housing policy. That is why Congress should mandate that municipalities engage in regional coordination as a precondition to receiving HUD funds. Regional coordination in zoning will ameliorate the fears that exacerbate white flight by ensuring that no single community serves as an exclusive haven for wealth and privilege while another becomes a concentrated center of poverty. Regional coordination in zoning decisions is not only fair, but it is the only effective way to meaningfully and permanently address racial segregation.

C. Inclusionary Zoning

In some cases, simply relaxing zoning restrictions will attract developers to build a more diverse range of housing options in a community that had been exclusively zoned for single-family dwellings. In other cases, however, incentives may be necessary to promote the development of affordable housing in communities where it does not traditionally exist. All municipalities that face substantial economic and racial segregation should implement inclusionary zoning policies. The federal government in particular should mandate inclusionary zoning in municipalities that receive federal funds through HUD, as was the case in the CDBG program in dispute in *Anti-Discrimination Center.*

¶¶ 48–52, United States *ex rel.* Anti-Discrimination Ctr. v. Westchester County, 495 F. Supp. 2d 375 (S.D.N.Y. 2007) (No. 06 Civ. 2860), 2006 WL 6348390.

208. *Mount Laurel II*, 456 A.2d at 420–21.

"Inclusionary zoning" is the label given to a range of development tools used by municipalities to promote the development of low- and moderate-income housing.[209] Typically, inclusionary zoning either mandates or encourages developers to provide "some minimum percentage (often 10–20 percent)" of low- to moderate-income housing in new residential projects.[210] Municipalities often provide incentives to developers including density bonuses,[211] reduced development standards, expedited processing, fee deferrals, or loans and grants.[212] Often municipalities will simply mandate that a certain portion of the development be set aside for affordable housing, or require the developer to pay a fee to fund affordable housing programs.[213] Affordable housing fees may also be imposed on non-residential developers, such as factories or offices, that might increase the need for low-income housing due to low-income jobs that the business attracts.[214]

Inclusionary zoning programs have caught on in recent years and can be found in states across the nation including California, Colorado, Florida, Hawaii, Maryland, Massachusetts, New Jersey, New Mexico, New York, South Carolina, Texas, and Virginia.[215] Inclusionary zoning measures are attractive in that they cost little or nothing to implement and have some success in actually producing affordable housing. For example, five years after the implementation of the Council on Affordable Housing in New Jersey, which mandated the use of several methods of inclusionary zoning, 22,703 additional units of affordable housing were built in the state.[216]

One of the criticisms of inclusionary zoning is that it makes the availability of housing more remote for everyone "by raising prices for market-rate buyers and discouraging builders."[217] Discouraging builders from building market-rate housing ultimately decreases

209. Morgan, *supra* note 196, at 369–84 (detailing the various techniques that have been used to promote affordable housing development). *See also* Andrew Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 45–46 (1996) (listing three regimes that fall under the rubric of inclusionary zoning).

210. Cecily T. Talbert, Nadia L. Costa & Kiran C. Jain, *American Bar Association Section of State and Local Government Law 2007 Report of the Inclusionary Zoning Subcommittee of the Land Use Committee Current Issues in Inclusionary Zoning*, SN005 A.L.I.-A.B.A. 1537, 1539 (2007).

211. A density bonus allows a developer to build more housing units than authorized by zoning regulations without acquiring more land. *Id.* at 1545.

212. *Id.* at 1539, 1545.

213. *Id.* at 1540.

214. Morgan, *supra* note 196, at 381–82.

215. Talbert, Costa & Jain, *supra* note 210, at 1539.

216. Morgan, *supra* note 196, at 369.

217. J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 560 (2007).

the supply of affordable housing, which is tied by inclusionary zoning to new market-rate development.[218] In addition, the comparatively high cost of building low-income housing on expensive land in affluent communities can be viewed as a lost opportunity to build a greater quantity of affordable housing elsewhere.[219] Certain states' lawmakers have felt the need to balance the competing interests of providing economically integrated housing and increasing the aggregate quantity of affordable housing. For example, New Jersey tempered its *Mount Laurel* mandates by allowing "municipalities to transfer up to fifty percent of their affordable housing obligations to other municipalities."[220] This controversial provision "shifted the rationale of the *Mount Laurel* doctrine from the broad goal of ending geographic segregation surrounding inner-city minorities and toward the raw provision of low-income housing."[221] In one instance, "four affluent towns paid New Brunswick[, New Jersey] $7.65 million to accept their obligation to provide 406 units" of affordable housing.[222]

Some municipalities have sought to limit the exchange provision's effect on the goal of integrating housing. For example, in Montgomery County, Maryland, faced with a similar provision that allows municipalities to exchange affordable housing obligations, the County requires officials to first find that "the public benefit of additional affordable housing outweighs the value of locating MPDUs [Moderately Priced Dwelling Units] in each subdivision throughout the County" before authorizing an exchange.[223] Finding the right balance between the dual fair housing goals of integrating and increasing the supply of affordable housing is a policy decision that must be made in light of the economic and political realities of a particular municipality.

Relaxing zoning restrictions is the first step toward racial and economic integration in affluent communities, but it alone is not enough to achieve those goals. Inclusionary zoning measures such as those mandated in *Mount Laurel II* are the types of affirmative measures envisioned in the statutes and regulations that established HUD,[224] and should be a mandatory precondition to receiving HUD grants. Given the discriminatory nature of

218. *Id. But see* Dietderich, *supra* note 209, at 84–102 (explaining how in a market with inelastic demand and where the developer can price-discriminate among purchasers, the developer can still make a profit and the supply of affordable housing will still increase).

219. Byrne & Diamond, *supra* note 217, at 561.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 562.

224. 42 U.S.C. § 5304(b)(2) (2006).

traditional zoning policies and the widespread usage of inclusionary zoning to combat economic and racial segregation, a progressive interpretation of the requirement that HUD grantees "affirmatively further fair housing" should put municipalities on notice that they are required adopt such measures. Policymakers should not wait for the courts to mandate such measures, however, but should realize that it is in the collective interest of the state to produce integrated affordable housing options.

One law professor, Charles Daye, has proposed a federal statute that would explicitly mandate inclusionary zoning for any locality that receives any sort of federal funding.[225] In the spirit of the *Gautreaux* and *Mount Laurel* decisions, the proposed statute defines a municipality's affordable housing obligations in terms of regional housing needs.[226] It both prohibits the practice of exclusionary zoning as well as mandates "inclusionary policies and practices."[227] Such a statute would make explicit what HUD regulations already imply in "affirmatively further[ing] fair housing."[228] Citizen and government suits under the FCA, as illustrated in *Anti-Discrimination Center*, ensure that such a statute would be enforced and that meaningful results could be achieved. Although extending such mandates beyond the scope of federal housing grants—as Professor Daye envisions—might meet constitutional challenges under the Spending or Commerce Clauses,[229] such mandates should be a necessary part of any comprehensive affordable housing program.

D. Criticisms of Inclusionary Zoning

The classic economic critique of inclusionary zoning is found in Robert Ellickson's article entitled "The Irony of 'Inclusionary' Zoning."[230] Ellickson argues that there are inefficiencies inherent in inclusionary zoning policies and that the policies end up hurting

225. Charles E. Daye, Commentary, *Toward "One America": A Proposed Federal Statute Prohibiting Exclusionary Land-Use Practices and Mandating Inclusionary Policies*, LAND USE L. & ZONING DIG., May 2001, at 3–4.

226. *See id.* at 5.

227. *Id.* at 5.

228. *See supra* Part II.C.2.

229. Daye, *supra* note 225, at 4.

230. Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981). Sixteen years after Ellickson's influential critique was first published, Andrew Dietderich offered a response using updated economic theories in support of inclusionary zoning. Dietderich, *supra* note 209.

the very people they intend to help.[231] First, because inclusionary zoning acts as a tax on developers, developers bear this cost either by losing profits, passing the cost onto consumers through increased market-rate housing prices, or by ceasing to build altogether, thus further aggravating the affordable housing crisis.[232] However, Ellickson mischaracterizes inclusionary zoning as a tax by failing to distinguish mandatory set-asides that are not offset by cost-saving density bonuses and other incentives from voluntary policies that empower developers to bypass certain exclusionary zoning requirements.[233] Far from being a tax, in most cases developers actively seek inclusionary zoning to build a more profitable and diverse stock of housing.[234]

Second, Ellickson argues that exclusionary zoning policies are inherently efficient since they are a manifestation of the net social preferences of consumers.[235] Housing developers seek to maximize their profits by building housing patterns demanded by their customers.[236] If those customers valued economic and racial integration more than stratification, then they would pay more for integrated housing patterns and developers would build in conformity with consumer preferences. Ellickson argues that "the fact that market forces tend to produce economically stratified neighborhoods creates a prima facie case that this stratification is efficient."[237] Ellickson's argument is flawed because it assumes that market forces in housing are freely exercised.[238] Although some zoning measures can be efficient,[239] zoning typically promotes cartel behavior among existing homeowners,[240] acts as a subsidy for single-family homes by giving such development exclusive rights to land,[241] and unfairly pushes negative externalities onto those outside the boundaries of the municipality.[242] Even when inclusionary zoning is mandated on developers, it does not necessarily lead to

231. Ellickson, *supra* note 230, at 1215.
232. *Id.* at 1187–88.
233. *See* Dietderich, *supra* note 209, at 40–41.
234. *Id.* at 40.
235. Ellickson, *supra* note 230, at 1200.
236. *Id.*
237. *Id.* Efficiency, in this case, means that, assuming hypothetically that property is sold in a perfectly free market, a rich person will pay more for the right to live in a neighborhood of rich people than a poor person will pay to live in the same neighborhood; the property is allocated to the person who values it most. *Id.*
238. Dietderich, *supra* note 209, at 31.
239. *Id.* at 33–34.
240. *Id.* at 35.
241. *Id.* at 31–32.
242. *Id.* at 34.

developer losses, especially when coupled with valuable incentives for developers.[243]

Third, Ellickson argues that in the long-run, the perceived benefits to the poor—namely an increased stock of affordable housing—are at least partially off-set by the loss in filtering.[244] Filtering is the process by which expensive homes eventually trickle down to low-income buyers through depreciation and new housing construction.[245] The filtering theory is criticized in part because it is based on the assumption that the housing market is unitary (i.e., it does not distinguish between a market for apartments and a market for single-family homes) and ignores the economic costs of converting mansions into multiple homes for low-income residents.[246] Housing policies based on a filter theory have been blamed for "abandonment, gentrification, the concentration of poverty, and the perpetuation of racial segregation."[247]

Some of the criticisms of inclusionary zoning by Ellickson and others, especially regarding how such policies have been implemented today, are more persuasive. For example, voluntary inclusionary zoning that is left to developers to implement, as is the predominant practice in California, has resulted in the construction of housing for mostly middle-income groups, leaving those most in need no better off.[248] In this sense, New Jersey has been more successful than California by using mandatory quotas to target the program to those it is intended to help.[249] In both New Jersey and California, the preference for selling below-market priced units, rather than renting, negates some of the long-term benefits of inclusionary zoning, as beneficiaries can simply turn around and sell their property at the market rate and thus deplete the new stock of affordable housing.[250]

More crucial to the thesis of this Note, inclusionary zoning has also largely failed to integrate racial minorities and urban populations into wealthier communities.[251] Although inclusionary units typically go to those who legitimately need affordable housing, they

243. *Id.* at 68–69.

244. Ellickson, *supra* note 230, at 1186–87.

245. *Id.* at 1184–85.

246. Dietderich, *supra* note 209, at 43.

247. *Id.*

248. Nico Calavita, Kenneth Grimes & Alan Mallach, *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 HOUSING POL'Y DEBATE 109, 125 (1997) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.knowledgeplex.org/programs/hpd/pdf/hpd_0801_calavita.pdf.

249. *Id.* at 125.

250. *Id.* at 127.

251. *Id.* at 129.

have overwhelmingly served those from the suburban communities where they are built.[252] These include "blue-collar workers, needy young couples, and divorced mothers with small children, many of whom had been doubling up with their more affluent suburban parents."[253] Although inclusionary zoning creates the opportunity for further integration, these programs have to be coupled with marketing and other informational campaigns to reach out across the region to minorities and urban residents who might benefit from such programs.[254] Like all new public benefit programs, the targeted groups must be informed about the program before they can take advantage of it.

The lessons gained from the history of inclusionary zoning in various jurisdictions and in modern economic analysis reveal that inclusionary zoning policies must be developed with the specific characteristics of the locality in mind and with clear policy objectives. A system must be developed that emphasizes the importance of racial and economic integration as well as ensures that the measures are both effective and sustainable.

CONCLUSION

This Note presents a new approach to promoting racial and economic integration in housing. *Anti-Discrimination Center v. Westchester County* provides a blueprint for an effective enforcement mechanism of civil rights and fair housing laws at the local level. By defining the municipal obligation to analyze and address impediments to fair housing posed by race, the federal court in *Anti-Discrimination Center* signaled to the over 1,200 municipalities across the country that receive CDBG funding that they must finally take seriously their obligation to encourage a truly integrated pattern of housing. The court also legitimized the use of the FCA by a private citizen or non-profit organization to sue a municipality on behalf of the federal government when the municipality accepts HUD funding but shirks the attached obligations. A citizen enforcement action ensures that true integration policy will not be hampered by an administration that lacks the political will to enforce the original intent of the fair housing laws.

The enforcement mechanism illustrated in *Anti-Discrimination Center* is but one important piece to providing an effective

252. *Id.*
253. *Id.*
254. *See id.* at 128.

integration policy. State and local governments must take a close look at how their zoning policies contribute to the perpetuation of racially and economically segregated housing patterns. Regional coordination in the shape of fair-share housing obligations and inclusionary zoning programs are essential to providing the opportunity for truly integrated housing. Although a progressive interpretation of existing legislation might already mandate the need for inclusionary zoning, federal legislation, such as the statute suggested by Professor Daye, would provide greater guidance and uniformity to local municipalities, resulting in a more effective integration policy. Ultimately, true integration will depend on the preferences of existing and potential residents of affluent communities, but by providing the proper incentives and opportunities, inclusionary zoning and fair-share legislation can go a long way in fulfilling the promise of the Fair Housing Act passed nearly forty years ago.