

# NO PLACE LIKE HOME: DEFINING HUD'S ROLE IN THE AFFORDABLE HOUSING CRISIS

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Introduction .....	634
I.HUD: An Agency or Writer of Federal Checks? .....	636
A. The Evolution of Rental Housing Assistance: What Worked and What Didn't.....	637
B. A Funnel for Federal Funding .....	639
II.Houston (and San Francisco, D.C., and New York), We Have a Problem .....	640
A. The Rise (and Potential Fall) of San Francisco's Restrictive Zoning .....	641
B. Washington D.C.: Negative Implications of Cookie-Cutter Development .....	643
C. I Heart New York, But Not The Rent .....	646
III.Baby Steps, Tiny Victories, and Their Potential for Impact.....	647
IV.Affirmatively Furthering Affordable Housing: A (Possible) Recipe for Success .....	651
A. Reviving an Obama-Era Ghost in the Name of Efficiency....	652
B. A Bird in the Hand is Worth Two in the Bush .....	654
C. The One, Two (Three) Punch: Clarifying, Quantifying, and Assessing .....	656
D. Passing Out Candy or Cracking the Whip: Incentives v. Enforcement .....	659
Conclusion .....	662

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## INTRODUCTION

What is affordable housing? The United States Department of Housing and Urban Development (HUD) defines it as housing that costs no more than thirty percent of a resident's income.<sup>1</sup> Today, the stark reality is that affordable housing, especially for low-income individuals, is increasingly rare and often times unattainable.<sup>2</sup> As rent increases and wages remain stagnant, millions of low-income Americans now put upwards of seventy percent of their income toward keeping a roof over their heads.<sup>3</sup>

Historically, HUD has been the federal mechanism for crafting affordable housing policies and assembling them at the intersection of political, economic, and social avenues.<sup>4</sup> The agency's earliest iteration sprang from a wave of legislation passed in the 1930s as part of Congress's legislative response to the Great Depression.<sup>5</sup> In 1934, Congress created the Federal Housing Administration to establish mortgage insurance programs and make homeownership affordable for a wider swath of Americans.<sup>6</sup> Three years later, the United States Housing Act of 1937 established a statutory structure for public housing under the newly formed United States Housing Authority.<sup>7</sup> In 1965, Congress passed the Housing and Urban Development Act and consolidated these specialized agencies, among others, under one roof to establish HUD as a Cabinet-level agency.<sup>8</sup>

HUD's policy framework addresses five overarching issues: increasing opportunities for homeownership, creating access to affordable rental housing, contributing to the welfare of America's cities, ending and preventing housing discrimination, and providing housing assistance to homeless persons.<sup>9</sup>

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1. *Resources*, U.S. DEP'T OF HOUS. & URBAN DEV. OFFICE OF POLICY DEV. & RES., [https://web.archive.org/web/20190502144359/https://www.huduser.gov/portal/glossary/glossary\\_a.html](https://web.archive.org/web/20190502144359/https://www.huduser.gov/portal/glossary/glossary_a.html) (last visited July 20, 2019).

2. Glenn Thrush, *As Affordable Housing Crisis Grows, HUD Sits on the Sidelines*, N.Y. TIMES (July 27, 2018), <https://www.nytimes.com/2018/07/27/us/politics/hud-affordable-housing-crisis.html>.

3. *Id.*

4. NAT'L LOW INCOME HOUS. COAL., A BRIEF OVERVIEW OF AFFORDABLE RENTAL HOUSING 5 (2017), [https://nlihc.org/sites/default/files/AG-2017/2017AG\\_Ch01-S03\\_History-Of-Affordable-Housing.pdf](https://nlihc.org/sites/default/files/AG-2017/2017AG_Ch01-S03_History-Of-Affordable-Housing.pdf) [hereinafter AFFORDABLE RENTAL HOUSING].

5. *Id.*

6. *The Federal Housing Administration (FHA)*, U.S. DEP'T OF HOUS. & URBAN DEV., [https://www.hud.gov/program\\_offices/housing/fhahistory](https://www.hud.gov/program_offices/housing/fhahistory) (last visited July 20, 2019).

7. MAGGIE MCCARTY, LIBBY PERL & KATIE JONES, CONG. RESEARCH SERV., RL34591, OVERVIEW OF FEDERAL HOUSING ASSISTANCE PROGRAMS AND POLICY 1–2 (2014).

8. *Id.* at 4; AFFORDABLE RENTAL HOUSING, *supra* note 4, at 5; *see* Housing and Urban Development Act of 1965, Pub. L. No. 89–174, § 2, 79 Stat. 667–71 (1965).

9. LAWRENCE L. THOMPSON, A HISTORY OF HUD 2 (2006), <https://monarchhousing.org>.

Within this framework, HUD creates and sustains affordable housing through federal rental housing assistance programs<sup>10</sup> and grants for state and local housing initiatives from programs including the Low Income Housing Tax Credit (LIHTC), Community Development Block Grant (CDBG), and HOME Investment Partnerships (HOME).<sup>11</sup>

HUD's rental assistance and grant programs largely developed after the agency shifted its approach to governance and oversight in the mid-1970s and early 1980s.<sup>12</sup> Although HUD was not yet a decade old, Congress passed the Housing and Community Development Act in 1974, signaling a strategic, operational change.<sup>13</sup> This legislation jump-started a "devolution of authority" within HUD and the agency began carefully and purposefully advancing policies that largely gave state and local agencies autonomous control over affordable housing development.<sup>14</sup>

Following the shift, HUD's most profound contribution to affordable housing became maintaining a steady stream of federal funding; now when state and local governments received federal dollars for housing, the onus was on them to work out the details.<sup>15</sup> In response, state and local governments established public housing authorities (PHAs) to create, effectuate, and manage housing policies.<sup>16</sup> Today, this basic structure remains mostly unchanged,

org/wp-content/uploads/2007/03/hud-history.pdf.

10. See generally MCCARTY ET AL., *supra* note 7, at 8–12 (describing the Section 8 voucher system, structure of authority for public housing projects, and nonprofit funding for elderly and disabled individual recipients).

11. See generally *Community Development Block Grant Program—CDBG*, U.S. DEP'T OF HOUS. & URBAN DEV., [https://www.hud.gov/program\\_offices/comm\\_planning/communitydevelopment/programs](https://www.hud.gov/program_offices/comm_planning/communitydevelopment/programs) (last visited July 20, 2019) (awarding flexible grants for development projects that address quality of life issues for low income residents); *Home Investment Partnerships Program*, U.S. DEP'T OF HOUS. & URBAN DEV., [https://www.hud.gov/program\\_offices/comm\\_planning/affordablehousing/programs/home/](https://www.hud.gov/program_offices/comm_planning/affordablehousing/programs/home/) (last visited July 20, 2019) (funding state and local agency projects that increase affordable housing supply); *Low-Income Housing Tax Credits*, U.S. DEP'T OF HOUS. & URBAN DEV. OFFICE OF POLICY DEV. & RES., <https://www.huduser.gov/portal/datasets/lihtc.html> (last visited July 20, 2019) (incentivizing affordable housing projects through developer tax credits).

12. MCCARTY ET AL., *supra* note 7, at 29; *accord* AFFORDABLE RENTAL HOUSING, *supra* note 4, at 6.

13. AFFORDABLE RENTAL HOUSING, *supra* note 4, at 6.

14. *Id.*

15. THOMPSON, *supra* note 9, at 11.

16. See MCCARTY ET AL., *supra* note 7, at 7–8 (noting that the Quality Housing and Work Opportunity Reconciliation Act of 1998 further deregulated public housing authorities (PHAs) and provided increased spending flexibility within the United States Department of Housing and Urban Development (HUD)-PHA funding relationship). See generally U.S. DEP'T HOUS. & URBAN DEV., OFFICE OF PUB. & INDIAN HOUS., PUBLIC HOUSING AGENCY (PHA)

although state and local agencies also approach affordable housing via hyper-localized initiatives including public housing trusts, inclusionary zoning, and community land trusts (CLTs).<sup>17</sup> However, despite efforts to utilize federal funding efficiently and supplement it through local dollars, the current structure is woefully outdated and incapable of replenishing or expanding affordable housing stock in a meaningful way to keep up with skyrocketing demand.<sup>18</sup>

This Comment explores how major cities are grappling with the current housing crisis and why current federal, state, and local policies are little more than a band-aid for a national, systemic issue. Furthermore, this Comment demonstrates how HUD can work within an established agency rule to reinvigorate state and local affordable housing initiatives through well-crafted, collaborative partnerships and meaningful oversight. Part I explains how HUD arrived at its contemporary role and breaks down the agency's present contributions to affordable housing. Part II describes what housing disparities and shortages look like across several major cities and how local policy failures contributed to their current housing issues. Part III examines what new and innovative approaches state and local agencies are adopting to increase local housing stock, with or without federal funding. Finally, Part IV encourages HUD to work within its current framework and use agency rule-making power to better equip city and state agencies in addressing a national issue at the local level, thereby positioning the agency to be a driving force behind solutions for the country's affordable housing crisis.

## I. HUD: AN AGENCY OR WRITER OF FEDERAL CHECKS?

In 1965, HUD became a Cabinet-level agency,<sup>19</sup> but just nine years later the agency changed course and moved away from its original strategy.<sup>20</sup> The

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PLAN DESK GUIDE (2001) (defining PHAs as local, regional, and state agencies receiving federal housing funds, regardless of what they are called locally).

17. McCARTY ET AL., *supra* note 7, at 30; *see also* Claire Martin & Steve Raabe, *\$10M Revolving Loan Fund Launched to Boost Denver Affordable Housing*, DENVER POST (Apr. 26, 2016), <https://www.denverpost.com/2015/02/06/10m-revolving-loan-fund-launched-to-boost-denver-affordable-housing/> (discussing Denver's successful housing trust fund); GROUNDED SOLUTIONS NETWORK, COMMUNITY LAND TRUSTS, <https://groundedsolutions.org/strengthening-neighborhoods/community-land-trusts> (last visited July 20, 2019) [hereinafter CLT FAQ] (providing an overview of what community land trusts (CLTs) are and why they benefit local communities and affordable housing).

18. *See* Bryce Covert, *The Deep, Uniquely American Roots of Our Affordable-Housing Crisis*, NATION (May 24, 2018), <https://www.thenation.com/article/give-us-shelter/> (citing data showing there was a 300,000 surplus of affordable rental units in 1970, compared to today's seven-million-unit deficit in affordable rental homes for the country's poorest residents).

19. 42 U.S.C. §§ 3531–3537 (1970).

20. THOMPSON, *supra* note 9, at 11. President Ford rubber stamped the Housing and

agency characterized the shift as a rollback in subsidies for new public housing construction, replacing them with a “tenant-based” approach to rental housing and delegating decisionmaking authority to state and local governments.<sup>21</sup> The fundamental change most significantly affected how HUD spent federal housing dollars; rather than the federal government undertaking physical housing projects, the new approach simply funneled money to state and local governments and let them take on and direct new projects.<sup>22</sup>

*A. The Evolution of Rental Housing Assistance: What Worked and What Didn't*

Perhaps the biggest legacy of the Housing and Community Development Act of 1974 was the creation of Section 8; this reform engulfed former rental assistance policies to create an overarching, comprehensive rental assistance program.<sup>23</sup> At first, the program handed out payments to property owners of new or “substantially rehabilitated” rental units and in exchange, landlords rented these units to low-income families who paid income-based rents.<sup>24</sup> When this model became unsustainable, due to the higher costs associated with new or renovated units, HUD pivoted and began reserving these contracts exclusively for existing properties.<sup>25</sup> Notably, this new, tenant-based system handed off the responsibility of issuing Section 8 vouchers to state and local PHAs.<sup>26</sup>

Theoretically, the vouchers allowed recipients to live in any neighborhood they wanted, with one large caveat: landlords must be willing to accept the vouchers.<sup>27</sup> This behest is the program's greatest detriment;<sup>28</sup> although Section 8 vouchers come with a federally-backed guarantee to cover the market rent, landlords can refuse to accept them and often do.<sup>29</sup> Today, the reality

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Community Development Act of 1974 that altered HUD's fundamental framework.

21. *Id.*

22. *Id.* Additionally, focus shifted from creating new units to house low-income individuals to ensuring this vulnerable population gained housing through rent-assistance programs. *Id.*

23. 42 U.S.C. § 5301 (2012).

24. McCARTY ET AL., *supra* note 7, at 5.

25. *Id.*

26. *Id.* at 5–6.

27. *Id.* at 6.

28. See Tanvi Misra, *When Housing Assistance Fails*, CITYLAB (May 11, 2017), <https://www.citylab.com/equity/2017/05/when-housing-assistance-fails/526020/> (reporting that “Section 8” has become a negative slur).

29. See *id.* (discussing how landlords in “high-opportunity areas” often refuse to accept tenants using vouchers because they are seen as a risk); accord AUSTIN TENANTS' COUNCIL, VOUCHER HOLDERS NEED NOT APPLY: AN AUDIT REPORT ON THE REFUSAL OF HOUSING CHOICE VOUCHERS BY LANDLORDS IN THE AUSTIN MSA 3 (2012) (emphasizing that

is that Section 8 is a dirty word, both to landlords and neighborhood residents.<sup>30</sup> Moreover, the system cannot keep up with increasing demand and amounts to the equivalent of a lottery system, with people languishing for years on waitlists.<sup>31</sup>

Even when landlords or developers want to accept vouchers, communities can rally together to oppose any potential new neighbors and development projects.<sup>32</sup> The LIHTC program provides developers with incentives to set aside affordable units within their newly constructed properties and focuses on adding affordable units to make communities socioeconomically diverse.<sup>33</sup> Yet across the country, residents in affluent and middle class neighborhoods, sometimes in conjunction with their local governments, have vehemently fought against developers intending to utilize the credit, sometimes with ugly results.<sup>34</sup>

landlords' "refusal to accept [subsidies] drastically reduces the effectiveness of the program").

30. Emily Badger, *How Section 8 Became a 'Racial Slur'*, WASH. POST (June 15, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/06/15/how-section-8-became-a-racial-slur/?utm\\_term=.58e349697254](https://www.washingtonpost.com/news/wonk/wp/2015/06/15/how-section-8-became-a-racial-slur/?utm_term=.58e349697254).

31. See NAT'L LOW INCOME HOUS. COAL., HOUSING SPOTLIGHT: THE LONG WAIT FOR A HOME 3 (2016) (reporting that in 2016 the national median wait time on a Section 8 waitlist was one and a half years, 25% of Section 8 waitlists had a wait time over three years, and 53% of waitlists were closed to new applicants); see also Laura Sullivan & Meg Anderson, *Section 8 Vouchers Help the Poor — But Only if Housing is Available*, NAT'L PUB. RADIO (May 10, 2017), <https://www.npr.org/2017/05/10/527660512/section-8-vouchers-help-the-poor-but-only-if-housing-is-available> (citing an example of a single mother who was on the waitlist for six years before receiving a voucher); Alexander Walter, *A Look at the Alarming Long Wait Times for Section 8 Housing in U.S. Cities*, ARCHITECT NEWS (Jan. 4, 2018), <https://archinect.com/news/article/150043421/a-look-at-the-alarming-long-wait-times-for-section-8-housing-in-u-s-cities> (reporting that in 2018 the national average wait time for Section 8 vouchers now exceeds two years and in some cities there is a lottery system for applicants to even apply for a spot on a waitlist). See generally U.S. DEP'T OF HOUS. & URBAN DEV., WAITING IN VAIN ii–iv (1999) (providing an overview on the growing crisis between supply and demand in rental housing assistance at the end of the millennium).

32. See Sullivan, *supra* note 31 (quoting a resident that opposed a development project in her neighborhood with units reserved for voucher recipients as stating "the lifestyle that goes with Section 8 is usually working, single moms or people who are struggling to keep their heads above water[.] [i]t's just not people who are the same class as us").

33. MCCARTY ET AL., *supra* note 7, at 15.

34. See Sullivan, *supra* note 31 (describing a heated public forum where more than 250 residents rallied against a developer who wanted to reserve thirteen units in her apartment building for tenants using Section 8 vouchers); cf. Melkorka Licea, *'Poor Door' Tenants of Luxury Apartment Tower Reveal the Financial Apartheid Within*, N.Y. POST (Jan. 17, 2016), <https://ny-post.com/2016/01/17/poor-door-tenants-reveal-luxury-towers-financial-apartheid/> (describing how a luxury apartment building in Manhattan built a separate entrance and forced tenants

Likewise, low-rent public housing projects developed by PHAs with federal funding face public scorn; state and local governments have not maintained these housing projects and more affluent residents often view them as blight on the neighborhood.<sup>35</sup> PHAs receive federal funding to cover the gap between what residents pay toward rent and what it takes to operate the buildings.<sup>36</sup> Currently, public housing is the second largest direct housing assistance program, after Section 8 housing vouchers.<sup>37</sup> However, the number of remaining public housing units is steadily declining as PHAs can gain HUD's approval to simply demolish their projects, without any requirements that the number of eliminated units be made up elsewhere in the jurisdiction.<sup>38</sup>

### B. *A Funnel for Federal Funding*

The second legacy of the 1974 Act was the CDBG program.<sup>39</sup> This approach created a funnel for federal dollars between HUD and state and local governments, with just a few stipulations built into the plan.<sup>40</sup> The program apportions seventy percent of the program's total funding to "entitlement communities," with the remaining thirty percent pieced out to states to use in non-entitlement communities.<sup>41</sup> Grantees must put a minimum of seventy percent of the money toward initiatives and projects meant to benefit low- and moderate-income households.<sup>42</sup>

In 2017, President Donald Trump drew fire from both sides of the aisle when he proposed ending CDBG.<sup>43</sup> Although the program remains popular

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who were chosen to live in the building's allocated affordable units to use that door, instead of the actual entrance).

35. 42 U.S.C. § 5301 (2012); J. David Goodman, *After Years of Disinvestment, City Public Housing Is Poised to Get U.S. Oversight*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/nyregion/after-years-of-disinvestment-us-to-take-oversight-role-in-city-public-housing.html>.

36. MCCARTY ET AL., *supra* note 7, at 10. An allocation process considers needs relating to management, capital projects, and daily operations when calculating and awarding funding.

37. *Id.*

38. *Id.*

39. *See generally* *Community Development Block Grant Entitlement Program*, HUD EXCHANGE, <https://www.hudexchange.info/programs/cdbg-entitlement/> (last visited July 20, 2019) (providing background on the program).

40. *Id.*

41. *See* MCCARTY, *supra* note 7, at 16 (defining entitlement communities as central cities within metropolitan areas, cities with populations exceeding fifty thousand, and urban counties).

42. *Id.*

43. Jeff Andrews, *Trump Budget Proposal Would Decimate HUD Funding*, CURBED (Feb. 12, 2018), <https://www.curbed.com/2018/2/12/17003900/trump-budget-proposal-hud-low-income-housing>.

and is routinely credited as one of HUD's enduring success stories, it is based on remarkably outdated metrics and formulas that date back to the 1970s.<sup>44</sup> This system protects the status quo, allowing a continuous flow of federal dollars into communities that is not necessarily based on need or directly rewarding the creation of new affordable housing and related programs.<sup>45</sup>

In addition to CDBG, HOME is another valve that state and local governments can tap into for HUD dollars. There are four options for utilizing HOME funding: homebuyer assistance, rehabilitation for owner-occupied housing, development and renovation of rental housing, and supplementing tenant-based rental assistance.<sup>46</sup> HOME is meant to support healthier communities through a more holistic approach that gives local governments a wide breadth of deference when utilizing the funds.<sup>47</sup>

However, as the nation's affordable housing stock rapidly shrinks, HUD's hands-off, open-wallet approach through these programs is no longer viable. Cities and states are left to handle housing on their own, and their solutions are largely unsuccessful.<sup>48</sup> A seven-million-unit deficit exists for rental homes that are affordable to the lowest-income bracket in this country, over half a million Americans are homeless on any given night, and almost half of renters nationwide spend more than thirty percent of their income on housing costs.<sup>49</sup> The time has come for HUD step up to the plate.

## II. HOUSTON (AND SAN FRANCISCO, D.C., AND NEW YORK), WE HAVE A PROBLEM

Framing affordable housing as an urgent, national policy issue is new; for decades, problems with affordability and housing stock remained a "purely local matter"<sup>50</sup> but recent studies paint a different picture.<sup>51</sup> Issues involving

44. Lorraine Woellert, *The Federal Program That Can't Be Killed—or Fixed*, POLITICO (July 8, 2017), <https://www.politico.com/interactives/2017/hud-community-development-block-grants-cant-be-killed-or-fixed/>; accord BRETT THEODOS ET AL., TAKING STOCK OF THE COMMUNITY DEVELOPMENT BLOCK GRANT 6 (Apr. 2017) (stating that the different formulas' ability to accurately allocate funding to real pockets of need has diminished due to a continued reliance on variables such as pre-1940 housing stock numbers).

45. THEODOS, *supra* note 44, at 6.

46. MCCARTY ET AL., *supra* note 7, at 17.

47. See THOMPSON, *supra* note 9, at 17.

48. See *supra* Part I.

49. Bryce Covert, *The Deep, Uniquely American Roots of our Affordable-Housing Crisis*, NATION (May 24, 2018), <https://thenation.com/article/give-us-shelter/>.

50. Teresa Wiltz, *Once Seen as a Local Issue, Affordable Housing is Becoming a State Focus*, TRIBUNE NEWS SERV. (Oct. 16, 2018), <https://www.governing.com/topics/urban/sl-affordable-housing-state-legislation.html>.

51. See, e.g., *Renters and Homeowners in Non-Metro Areas are Increasingly Cost-Burdened*,



pressurized housing markets and diminished affordable housing now affect all types of communities across the country, including smaller cities like Boise, Idaho and Jacksonville, Florida.<sup>52</sup> Cities, suburbs, and rural areas are now in a similar situation; today, not a single state has enough affordable rental stock to accommodate its population of extremely low-income renters.<sup>53</sup> While the housing crisis now affects every state in some way, large cities are the poster child for foundational affordable housing issues like restrictive zoning, unvaried housing stock, and housing shortages.

#### A. *The Rise (and Potential Fall) of San Francisco's Restrictive Zoning*

San Francisco is arguably at the epicenter of America's ongoing debate over affordable housing and why demand continues to rapidly outpace supply.<sup>54</sup> While the Silicon Valley tech boom often takes the lion's share of blame for the Bay Area's housing crisis, this characterization is not entirely accurate.<sup>55</sup> When looking beyond this first layer, the problem is rooted in San Francisco's rigid and archaic zoning.<sup>56</sup>

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HARVARD U. JOINT CTR. FOR HOUSING STUD. (Aug. 2016), <http://harvard-cga.maps.arcgis.com/apps/StorytellingSwipe/index.html?appid=51335f0233e14c3cb35312e9160f82ec>; *Nearly Half of American Renters are Cost-Burdened*, HARVARD U. JOINT CTR. FOR HOUSING STUD. (Dec. 2017), <http://harvard-cga.maps.arcgis.com/apps/MapSeries/index.html?appid=ea1929b8f2bf482dadad173a3f62c27e>.

52. See, e.g., Michael Hobbes, *America's Housing Crisis Is Spreading to Smaller Cities*, HUFF POST (May 5, 2018), [https://www.huffingtonpost.com/entry/housing-crisis-small-cities-boise\\_us\\_5ae878f7e4b055fd7fcfce0](https://www.huffingtonpost.com/entry/housing-crisis-small-cities-boise_us_5ae878f7e4b055fd7fcfce0) (detailing that in 2016 Boise became the "seventh most unequal city in America," rising from 79th place just five years prior); see also *id.* (asserting that renting a two-bedroom unit in Jacksonville requires low-income individuals to earn eight dollars more than the state mandated minimum wage).

53. NAT'L LOW INCOME HOUS. COAL., *The Gap: A Shortage of Affordable Rental Homes*, NLIHC.ORG (Mar. 2018), <http://nlihc.org/gap>.

54. See Timothy B. Lee, *Bad Housing Laws Have Turned San Francisco's Tech Boom Into a Crisis for Oakland*, VOX (Apr. 23, 2016), <https://www.vox.com/2016/4/23/11490758/oakland-housing-crisis> (demonstrating that discussions over the rising housing costs in Silicon Valley, and then San Francisco, began over a decade ago); see also Kriston Clapps, *Blame Zoning, Not Tech, for San Francisco's Housing Crisis*, CITYLAB (Mar. 11, 2016), <https://www.citylab.com/equity/2016/03/are-wealthy-neighborhoods-to-blame-for-gentrification-of-poorer-ones/473349/> (describing that "the lack of adequate housing supply is the consensus culprit in the housing crisis sweeping the country [and the] lack of new housing is tearing San Francisco apart in particular").

55. Clapps, *supra* note 54 (stating the "tech monster" is just a boogeyman and pointing to lack of housing as the real problem).

56. *Id.* (suggesting to take away land-use decisions from neighborhoods and instead give that power to the cities).

More than half of the city's privately-owned land falls in residential zoning districts that have one- or two-unit limits.<sup>57</sup> Further zoning frustrations include minimum parking requirements and height limits.<sup>58</sup> Together, these zoning regulations vastly restricted new, large-scale development and ushered in record-breaking median housing prices for both renters and potential homebuyers.<sup>59</sup> City residents agree that continually climbing rental and home-buying prices have resulted in a negative net impact on the city; however, residents disagree sharply on how to remedy the problem.<sup>60</sup> However, while San Francisco's zoning is development adverse, the city is taking some meaningful steps toward kick starting affordable housing efforts. The city partnered with HUD's Rental Assistance Demonstration (RAD) program<sup>61</sup> and turned over control of the city's entire public housing stock to private

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57. S.F. PLANNING DEP'T, ZONING & COMPLIANCE DIV., SAN FRANCISCO ZONING MAP (2018), [https://sfplanning.org/sites/default/files/resources/2019-02/zoning\\_use\\_districts.pdf](https://sfplanning.org/sites/default/files/resources/2019-02/zoning_use_districts.pdf) (demonstrating that thirty-eight percent of land in San Francisco is zoned RH-1 or RH-1-D (maximum one unit per lot), and sixteen percent is zoned RH-2 (maximum two units per lot); only a combined fourteen percent of this land is zoned for RH-3 (maximum three units per lot), or RM (mixture of houses and apartments)).

58. See Harrison Hohman, *The Not-So-Radical Case for De-Zoning San Francisco*, STAN. DAILY (Oct. 2, 2018), <https://www.stanforddaily.com/2018/10/02/me-asl-the-not-so-radical-case-for-de-zoning-san-francisco/> (citing a height restriction of forty feet for most buildings in San Francisco and limitations on where new buildings can cast a shadow); accord CITY AND CTY. OF SAN FRANCISCO, ZONING MAP – HEIGHT/BULK DISTRICTS (2018).

59. See Leanna Garfield, *The San Francisco Bay Area's Housing Crisis is So Out of Control, a Median-priced Home Costs \$820,000 – Here are 5 Ways to Help Fix the Problem*, BUS. INSIDER (Jun. 6, 2018), <https://www.businessinsider.com/san-francisco-affordable-housing-solutions-2018-6>; see also Hunter Oatman-Stanford, *Demolishing the California Dream: How San Francisco Created Its Own Housing Crisis*, COLLECTORS WKLY. (Sept. 21, 2018), <https://www.collectorsweekly.com/articles/demolishing-the-california-dream/> (describing how “local control” exerted by wealthy San Francisco residents has made new development in many city neighborhoods exceedingly difficult).

60. See Roderick M. Hills Jr., *Why Do So Many Affordable-Housing Advocates Reject the Law of Supply and Demand?*, WASH. POST (Sept. 18, 2018), [https://www.washingtonpost.com/outlook/2018/09/18/why-do-so-many-affordable-housing-advocates-reject-law-supply-demand/?utm\\_term=.8ed5d4e30597](https://www.washingtonpost.com/outlook/2018/09/18/why-do-so-many-affordable-housing-advocates-reject-law-supply-demand/?utm_term=.8ed5d4e30597) (describing the fight between the “Not In My Back Yard” (NIMBY) and “Yes In My Back Yard” (YIMBY) movements; NIMBYism is characterized by homeowners who reject all new development in their neighborhoods, while the YIMBY movement pushes for flexible zoning and supports increasing housing stock through any means).

61. *About RAD Public Housing*, U.S. DEP'T OF HOUS. & URBAN DEV., <https://www.hud.gov/RAD/program-details> (last visited July 20, 2019) (describing the process by which state and local governments hand over control of troubled public housing projects to private companies, which converts a property's basis of federal assistance from direct HUD funding to Section 8 vouchers).

developers and real estate management companies.<sup>62</sup> Through RAD, private operators have stepped in to transform, modernize, and manage San Francisco's public housing properties going forward.<sup>63</sup>

While the city works with HUD to rehabilitate public housing, the debate rages on between allowing new development to counterbalance inflated demand and blocking high rises to preserve the city's history and quaint quality of life.<sup>64</sup> Notably, in 2017 California Governor Jerry Brown signed fifteen pieces of legislation addressing affordable housing issues, including Assembly Bill 73 and Senate Bill 540; both bills provide cities with incentives to rework zoning and allow new housing development.<sup>65</sup>

### B. Washington D.C.: Negative Implications of Cookie-Cutter Development

Where San Francisco falls short in creating new housing, Washington, D.C. has the inverse problem. Over a decade ago, the city launched the "Creative Economy Initiative" (CEI)<sup>66</sup> to transform neighborhoods and mold the District "from a city that need[ed] to be fixed" into a city booming with "economic vibrancy."<sup>67</sup> A "Creative DC Action Agenda" emerged to assess the city's current creative assets and use them as a springboard for the CEI.<sup>68</sup> The city leveraged this plan through collaborations between the District of Columbia Office of Planning (DCOP), Department of Housing and Community Development (DHCD), and the Office of the Deputy Mayor for Planning & Economic Development (DMPD).<sup>69</sup>

62. Ethan Epstein, *How San Francisco Saved Its Public Housing by Getting Rid of It*, POLITICO MAG. (July 20, 2017), <https://www.politico.com/magazine/story/2017/07/20/how-san-francisco-turned-its-tenements-into-treasures-215391>.

63. *See id.*

64. *See id.*

65. A.B. 73, 2017–18 Reg. Sess. (Cal. 2017); S.B. 540, 2017–18, Reg. Sess. (Cal. 2017).

66. Press Release, OFFICE OF THE DEPUTY MAYOR FOR PLANNING AND ECONOMIC DEV., District Launches Creative Econ. Initiative D.C.s Focus on Idea People Can Transform Neighborhoods (Sept. 6, 2007), <https://dmped.dc.gov/release/district-launches-creative-economy-initiative-dcs-focus-idea-people-can-transform>.

67. *Id.*

68. *Id.*; *see also* D.C. OFFICE OF PLANNING, STATUS OF CREATIVE DC ACTION AGENDA: FISCAL YEAR 2016, 1ST QUARTER (2016), [https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/CreativeDCActionAgenda\\_1.pdf](https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/CreativeDCActionAgenda_1.pdf) [hereinafter CREATIVE D.C. REPORT].

69. *See* D.C. GOV'T, CREATIVE ECONOMY STRATEGY FOR THE DISTRICT OF COLUMBIA 92 (2014) (listing D.C. local government agencies involved in expanding the city's "Creative Economy"); *cf.* CREATIVE D.C. REPORT, *supra* note 68, at 3–4 (alluding to "neighborhood revitalization efforts, zoning update[s]," and identifying "specific zoning changes that could be used" to further expand the initiative).

However, the CEI, its agenda, and the wave of development and growth that followed were recently hit with a widely-publicized lawsuit.<sup>70</sup> In April 2018, civil rights attorney and activist Aristotle Theresa filed a class action lawsuit against the District of Columbia, alleging the city carefully crafted land use and zoning policies that discriminated against long-time residents in favor of attracting a new “creative class.”<sup>71</sup> In the complaint, Theresa claims the agencies adapted land use policies and gave developers wide allowances to speed up revitalization projects in an effort to attract a younger “creative class.”<sup>72</sup> Furthermore, the complaint asserts that this concerted effort not only aided and encouraged gentrification in historically African-American neighborhoods but also flatly ignored the growing demand for “family units or true affordable housing.”<sup>73</sup>

The case comes at a critical time, as numbers show that District residents are increasingly affluent and the city’s population will soon surpass 700,000 residents.<sup>74</sup> Yet, as wealthy new residents make the District their home, the city has seen “dramatic changes in its demographic and socioeconomic make-up” that are “pushing low and middle-income families out of the city and increasing economic segregation.”<sup>75</sup> These facts tend to validate mounting concern over the makeup of the District’s housing stock and the types of

70. See, e.g., Paul Schwartzman, *Lawsuit: D.C. Policies to Attract Millennials Discriminated Against Blacks*, WASH. POST (May 25, 2018), [https://www.washingtonpost.com/local/dc-politics/lawsuit-dc-policies-to-attract-affluent-millennials-discriminated-against-blacks/2018/05/24/3549f7fe-5a1e-11e8-858f-12becb4d6067\\_story.html?utm\\_term=.112b2301ac81](https://www.washingtonpost.com/local/dc-politics/lawsuit-dc-policies-to-attract-affluent-millennials-discriminated-against-blacks/2018/05/24/3549f7fe-5a1e-11e8-858f-12becb4d6067_story.html?utm_term=.112b2301ac81) (detailing attorney Aristotle Theresa’s characterization of the city’s new residential development as “ignor[ing] the needs of poor and working-class families” and “break[ing] up long-established [African-American] communities”).

71. Compl. at 1, *Matthews v. D.C. Zoning Comm’n*, No. 18-cv870 (D.D.C. Apr. 17, 2018).

72. *Id.* at 1–2.

73. *Id.* at 2.

74. Michelle Goldchain, *Report: D.C.’s Housing Market is Segregated, Not Varied*, CURBED (Mar. 29, 2018), <https://dc.curbed.com/2018/3/29/17173486/affordable-housing-dc-report>.

75. See YESIM SAYIN TAYLOR, TAKING STOCK OF THE DISTRICT’S HOUSING STOCK: CAPACITY, AFFORDABILITY, AND PRESSURES ON FAMILY HOUSING i (Mar. 2018), [https://www.dcpolicycenter.org/wp-content/uploads/2018/03/DC-Policy-Center-Housing-Report.final\\_March25.pdf](https://www.dcpolicycenter.org/wp-content/uploads/2018/03/DC-Policy-Center-Housing-Report.final_March25.pdf) (reporting that D.C.’s “whiter, less inclusive, and more segregated” population is at least partly to blame on the city’s dwindling number of affordable family units); cf. Ed Lazere, *DC’s Growing Prosperity is not Reaching Black Residents*, *Census Data Show*, DC FISCAL POLICY INST.: BLOG (Sept. 26, 2018), <https://www.dcfpi.org/all/dcs-growing-prosperity-is-not-reaching-black-residents-census-data-show/1> (demonstrating that data from the 2017 American Community Survey shows that between 2007 and 2017, median income among white residents increased from \$116,000 to \$134,000, while the median income for black residents fell from \$43,000 to \$42,000).

available affordable housing. In spite of the city's growth, there are 47,000 families on the public housing waitlist and an estimated 7,500 city residents are homeless.<sup>76</sup>

This need partially springs from the unvaried nature of the city's newly developed housing, which is influenced by an influx of affluent singles and couples flocking to the District.<sup>77</sup> While the city's CEI encouraged new development, it was the city zoning board's liberally-granted variances, not actual policy changes, that spurred new development.<sup>78</sup> Developers did not build family-friendly affordable housing; instead, they focused on building small units, or luxury units.<sup>79</sup> Accordingly, over the last decade, a bulk of the District's new development catered to new, affluent residents, keeping the housing pool unvaried and further compounding the growing need for affordable family units.<sup>80</sup>

To its credit, the District operates the Housing Protection Trust Fund, the second largest city housing trust in the country, providing loan financing for a wide range of projects aimed at positively impacting affordable housing.<sup>81</sup> Through the program, the city also partners with HUD and helps developers who qualify to fill in any remaining funding needs with LIHTC grants,

76. Jonathan Franklin, *Affordable Housing Crisis Plagues D.C. Residents*, WASH. INFORMER (May 9, 2018), <http://washingtoninformer.com/affordable-housing-crisis-plagues-d-c-residents/>.

77. Cf. TAYLOR, *supra* note 75, at xiv (suggesting that market forces, including increasing demand, led to developers buying land and only building the type of housing units they could easily sell or rent).

78. See Lukas P. Kohler & Jim Arkedis, *Why Are Zoning Variances So Easy to Get in D.C.?*, WASH. POST (Sept. 13, 2013), [https://www.washingtonpost.com/opinions/why-are-zoning-variances-so-easy-to-get-in-dc/2013/09/13/50bcf968-1b22-11e3-8685-5021e0c41964\\_story.html?utm\\_term=.ca1ac590edfe](https://www.washingtonpost.com/opinions/why-are-zoning-variances-so-easy-to-get-in-dc/2013/09/13/50bcf968-1b22-11e3-8685-5021e0c41964_story.html?utm_term=.ca1ac590edfe) (lamenting that the D.C. Board of Zoning Adjustment amounts to a loophole for developers and drives up housing prices because developers will outbid other buyers knowing they can easily receive a zoning variance, increase the number of units, and sell more units at top dollar prices).

79. Cf. TAYLOR, *supra* note 75, at ix (estimating that nearly fifty-one percent of D.C.'s housing stock can only accommodate one or two people, demonstrating a "great discrepancy between household structure and the housing inventory in the District of Columbia").

80. See *id.* at xiii (pointing out that along with more competition from new, affluent D.C. residents, restrictive land-use policies have also contributed to an unvaried housing stock "largely composed of single-family homes"); cf. Emily Badger, Quoctrung Bui & Robert Gebeloff, *The Neighborhood Is Mostly Black. The Home Buyers Are Mostly White*, N.Y. TIMES (Apr. 27, 2019), <https://www.nytimes.com/interactive/2019/04/27/upshot/diversity-housing-maps-raleigh-gentrification.html> (demonstrating how white homebuyers acquiring property in city neighborhoods historically populated by people of color eventually drives up rental prices and emphasizes developers' desire to sell to white newcomers).

81. *Housing Protection Trust Fund*, DC.GOV, <https://dhcd.dc.gov/page/housing-production-trust-fund> (last visited July 20, 2019) [hereinafter *Trust Fund*].

ensuring those who qualify for a loan through the city's fund are not precluded from building if that loan is not enough to cover a project's costs.<sup>82</sup>

### C. *I Heart New York, But Not The Rent*

Washington, D.C.'s recently-developed magnetism is nothing new to New York City—an onslaught of newcomers has perpetually assailed the city's housing stock since before Ellis Island opened. For each wave of newcomers, the city adopted sweeping housing policies and programs to accommodate the influx, including tenement housing and reforms,<sup>83</sup> rent stabilization,<sup>84</sup> and public housing projects.<sup>85</sup> Today, New York is still home to the nation's largest rent-regulation scheme, and this type of affordable units make up the city's largest portion of affordable housing.<sup>86</sup>

However, this regulatory scheme is rapidly failing, and the disparity between available affordable housing units and households seeking housing is growing. Currently, there are only 424,949 affordable units available for households in the “extremely low/very low income brackets.”<sup>87</sup> Compare that number to the 979,142 “low- and very-low” households that actually

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82. *Id.*

83. *E.g.*, 1901 N.Y. LAWS 334, amended by 1902 N.Y. LAWS 352, sec. 47; see also Carmen Nigro, *Tenement Homes: The Outsized Legacy of New York's Notoriously Cramped Apartments*, N.Y. PUB. LIBRARY: NYPL BLOGS (June 7, 2018), <https://www.nypl.org/blog/2018/06/07/tenement-homes-new-york-history-cramped-apartments> (explaining how New York's Tenement House Act of 1901 was a catalyst for new state regulations on affordable housing).

84. *E.g.*, N.Y.C. Admin. Code §§ 26-501-26-520 (1969) (allowing formerly rent controlled units to be converted to rent stabilized units, ensuring continuing protection for tenants against price-gouging landlords); see also Jake Blumgart, *In Defense of Rent Control*, PAC. STANDARD (Apr. 1, 2015), <https://psmag.com/economics/in-defense-of-rent-control> (arguing that rent regulation may be worth a second look after it was historically abandoned in New York City and other major cities).

85. See generally Luis Ferre-Sadurni, *The Rise and Fall of New York Public Housing: An Oral History*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/interactive/2018/06/25/ny-region/new-york-city-public-housing-history.html?mtrref=www.google.com> (describing the progression of public housing in New York City and its eventual fall into disrepair and disenfranchisement).

86. Michael Greenburg, *Tenants Under Siege: Inside New York City's Housing Crisis*, N.Y. REV. OF BOOKS (Aug. 17, 2017), <https://www.nybooks.com/articles/2017/08/17/tenants-under-siege-inside-new-york-city-housing-crisis> (detailing when the New York state legislature passed rent stabilization legislation and that today, approximately one million regulated apartments remain).

87. *Our Current Affordable Housing Crisis: Affordable Housing for Every New Yorker*, NYC HOUSING, <https://www1.nyc.gov/site/housing/problem/problem.page> (last visited July 20, 2019).

call the city home.<sup>88</sup> One major factor contributing to rent-regulation's slow demise is large-scale landlords who game the system by exploiting gaps in city housing enforcement.<sup>89</sup> These landlords slowly convert rent-regulated buildings by creating high turnover amongst tenants and then renovating the units, placing them above the eligible rental prices that fall under rent-regulation.<sup>90</sup> Furthermore, regulation and enforcement within the rent-regulation system is split between three city and state agencies, resulting in splintered enforcement efforts.<sup>91</sup> Due to siloed and uncoordinated enforcement, 172,000 rent-stabilized units became deregulated in the past decade.<sup>92</sup> New York's outdated, ineffective policies and failure to respond legislatively demonstrate yet another way major cities are falling behind and allowing the gap between affordable housing supply and demand to widen.

### III. BABY STEPS, TINY VICTORIES, AND THEIR POTENTIAL FOR IMPACT

As the affordable housing problem has grown beyond a big-city problem and transformed from a local issue to a national one, there are some small victories. Nearly three years ago, Denver established a housing fund aimed at injecting new life into the city's struggle to create affordable housing.<sup>93</sup> The Revolving Housing Loan Fund (RHLF) is a partnership between several state and local agencies and originally pulled ten million dollars together from the city, Denver County, the Colorado Department of Local Affairs,

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88. *Id.*

89. Greenburg, *supra* note 86.

90. *Id.* When landlords "convert" a unit, they generally do so by thoroughly renovating and modernizing the unit to make sure it qualifies for a higher market rent. *Id.* Once new amenities and updates increase the unit's value, it often falls outside the pricing categories covered by New York City's rent-regulation scheme. *Id.*

91. Kim Barker, *Behind New York's Housing Crisis: Weakened Laws and Fragmented Regulation*, N.Y. Times (May 20, 2018), <https://www.nytimes.com/interactive/2018/05/20/nyregion/affordable-housing-nyc.html> (describing how the mechanisms meant to enforce rent-regulation policies often fall through the cracks; agency investigators rely on outdated technology, fail to coordinate across agencies to monitor large-scale landlords, and fail to follow up on or investigate filed complaints); *see also* Abigail Savitch-Lew, *Call for Crackdown on 'Rent Fraud' in Rezoning Neighborhoods*, CITYLIMITS.ORG (Apr. 9, 2018), <https://citylimits.org/2018/04/09/call-for-crackdown-on-rent-fraud-in-rezoning-neighborhoods/> (detailing how the New York City Department of Buildings and Department of Finance and the New York Department of Housing and Community Renewal continually fail to coordinate enforcement efforts regarding landlord rent fraud in destabilizing units).

92. Greenburg, *supra* note 86. For example, twenty-five percent of stabilized units in Manhattan's Upper West Side neighborhoods were deregulated between 2007 and 2014. *Id.*

93. Martin, *supra* note 17.

and the Colorado Housing and Finance Authority (CHFA).<sup>94</sup> Due to the fund's success, the initial buy-in has expanded and Denver now has a healthy pipeline of new affordable housing development projects.<sup>95</sup>

Denver is not alone; both Minneapolis and Philadelphia are approaching expansion to local affordable housing with fresh eyes. An eighteen million dollar project recently completed in Minneapolis boasts energy-efficient, mixed-income housing with prominently "green" amenities, such as solar panels and natural-lighting focused design that require minimal maintenance over the long term, potentially saving the city money and resources.<sup>96</sup> In Philadelphia, a forty-eight million dollar affordable housing LEED apartment building was purposefully constructed near a SEPTA transit hub and incorporated a health clinic, pharmacy, and several community group offices.<sup>97</sup>

These approaches reflect several avenues that city and state governments are testing out as they search for solutions. Local governments are increasingly turning to small-scale strategies that include approaches such as rezoning communities to be more inclusive, establishing variety in housing stock through CLTs, and furthering tenants-rights policies through local legislation.<sup>98</sup>

An increasingly common, localized approach to increasing affordable housing stock is overhauling local zoning laws as part of a push for

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94. Jessica L. Webster, *Success in Affordable Housing: The Metro Denver Experience* 10 (2005), <https://www.bpichicago.org/wp-content/uploads/2014/01/Success-in-Affordable-Housing.pdf> (explaining that the fund specifically targets projects that are right on the cusp of eligibility for Colorado Housing and Finance Authority (CHFA) funding but are not likely to receive low-income housing credits).

95. See Patrick Sisson, *Solving Affordable Housing: Creative Solutions Around the U.S.*, CURBED (July 25, 2017), <https://www.curbed.com/2017/7/25/16020648/affordable-housing-apartment-urban-development> (reporting that the Revolving Housing Loan Fund's (RHLF's) increased funding will come from new property taxes and development impact fees); see also Capps, *supra* note 54 (comparing Denver's thirty percent increase in available housing units between 2005 and 2015 with cities like Washington, D.C., where there was only a twelve percent increase over the same time period); cf. Emily Nonko, *Getting Everyone on Board with New Affordable Housing Standards in Denver*, NEXT CITY (Nov. 21, 2018), <https://nextcity.org/daily/entry/getting-everyone-on-board-with-new-affordable-housing-standards-in-denver> (discussing a new city council measure that extended the minimum affordability period for new rental units to sixty years).

96. Shannon Prather, *EcoVillage Provides Infusion of Affordable, Green Housing in North Minneapolis*, STAR TRIB. (Mar. 16, 2018), <http://www.startribune.com/ecovillage-provides-infusion-of-affordable-green-housing-in-north-minneapolis/477137363/>.

97. Sisson, *supra* note 95 (discussing the former gas-station parking lot's transformation to a sustainable building).

98. See Rose Hackman, *'Here Until They Take Me Out': DC Tenants Use the Law to Fight Gentrification*, GUARDIAN (Jan. 3, 2017), <https://www.theguardian.com/us-news/2017/jan/03/gentrification-washington-dc-housing-topa-right-to-buy>.



“inclusionary zoning.”<sup>99</sup> This option gives local jurisdictions control over how they develop affordable housing and allows for adaptation to each area’s unique characteristics and housing market.<sup>100</sup> One option focuses on reconfiguring zoning regulations to accommodate high-density housing near transit hubs.<sup>101</sup> State and local agencies can ease density restrictions near public transportation, including height restrictions within a certain walking distance of transportation centers or in areas that will be in close proximity of approved public transportation expansions.<sup>102</sup> Encouraging new, affordable development around transportation centers allows jobs in urban areas to remain accessible to those displaced from city centers while simultaneously providing a small incentive for city residents to move outside of crowded urban neighborhoods feeling the squeeze.<sup>103</sup>

Another line of attack focuses on increasing variety within a region’s housing stock. CLTs have proven a valuable tool for state and local governments as they partner with local nonprofit housing organizations.<sup>104</sup> The process begins when a local nonprofit organization buys a property, often one with

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99. LISA A. STURTEVANT, CTR. FOR HOUS. POLICY, SEPARATING FACT FROM FICTION TO DESIGN EFFECTIVE INCLUSIONARY HOUSING PROGRAMS 1–2 (2016), [http://media.wix.com/ugd/19cfbe\\_9a68f933ed6c45bfb5f8b7d2ef49dda0.pdf](http://media.wix.com/ugd/19cfbe_9a68f933ed6c45bfb5f8b7d2ef49dda0.pdf).

100. *But see id.* at 11 (admitting that inclusionary rezoning is still largely dependent on federal funding through Low Income Housing Tax Credit (LIHTC) and Section 8 vouchers provided by HUD).

101. David Roberts, *The Future of Housing Policy is Being Decided in California*, VOX (Apr. 4, 2018), <https://www.vox.com/cities-and-urbanism/2018/2/23/17011154/sb827-california-housing-crisis> (laying out transportation-centric zoning proposals in a new crop of California state legislation, including proposals allowing state and local agencies to strictly enforce affordable unit or unit density requirements to prevent developers from reducing density if the project is eventually built further away from public transportation).

102. *Id.*

103. *Id.*

104. *See* CLT FAQ, *supra* note 17 (explaining that CLTs are a type of collective housing and property ownership that offer a public-private partnership between local government agencies and nonprofit organizations that support affordable housing in a particular neighborhood, community, town, or city); accord Michelle Chen, *The Solution to Our Housing Crisis Is to Let Communities Own Property*, NATION (Aug. 29, 2017), <https://www.thenation.com/article/the-solution-to-our-housing-crisis-is-to-let-communities-own-property/> (reporting that the NYC Department of Housing Preservation and Development launched a new grant program with \$1.6 million in seed funding to grow new CLTs); Stephenson, *Anacostia is Using a Land Trust to Maintain Affordable Housing*, GREATER WASH. (May 7, 2018), <https://ggwash.org/view/67224/anacostia-is-using-a-land-trust-to-maintain-affordable-housing> (reporting that the D.C. Douglass Land Trust in Anacostia is working ahead of the Eleventh Street Bridge Project to prevent displacement in a historically African-American neighborhood; the CLT’s advocates are committed to keeping rent affordable, especially for family units).

apartment buildings or affordable housing units on it, and establishes a CLT that retains control of the land while leasing out the buildings.<sup>105</sup> This model keeps rental costs down because tenants simply lease the building, not the land.<sup>106</sup> In this way, CLTs make it easier for low- and middle-income residents to stay in their communities, rather than be priced out by gentrification from “revitalization efforts” and new, upscale developments.<sup>107</sup> The trusts have built-in oversight from an advisory committee, typically comprised of community members and leaders and technical experts.<sup>108</sup>

Finally, local legislation has proven a useful tool in preserving the number of available affordable units. Washington, D.C. is one such city that successfully used legislation to prevent long-time resident displacement in favor of new housing development that would ultimately cater to wealthier income brackets.<sup>109</sup> Under the Tenants Opportunity to Purchase Act (TOPA), building owners in D.C. must inform tenants of the owner’s intent to sell and give them the first right of refusal at the building’s market rate.<sup>110</sup> If tenants do not have money to pool, they can bring in third-party developers through a tenants’ association and cede their right of first refusal if such a developer is willing to partner with the tenants.<sup>111</sup>

While these localized and largely locally-funded efforts are a good start, they barely make a dent in the mounting need for affordable housing. State and local governments are in the best position to inform decisions on how to sustain and create affordable housing in different regions with varying factors and influences. However, federal funding is the springboard that can help this regionally-focused knowledge get off the ground and closer toward crafting and implementing meaningful solutions.<sup>112</sup> Today, HUD maintains its

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105. See Hudson, *supra* note 104.

106. *Id.* As property value appreciates, the CLT can use profits to improve the buildings, reinvest in the community, or buy more land locally. *Id.* Either option ensures that the low-income or affordable housing remains in the region’s housing supply. *Id.*

107. Chen, *supra* note 104.

108. See *id.* (making decisions about land-use transparent and allowing residents to identify the community’s needs and make decisions based on meaningful input).

109. See Hackman, *supra* note 98 (reporting on low-income tenants in a Chinatown apartment building that utilized local legislation to prevent its sale and demolition).

110. D.C. Code § 42-3404.02(a) (2016).

111. A developer partnering with the tenants then buys the building on behalf of the tenants’ associations; Tenants Opportunity to Purchase Act (TOPA) also provides tenants with the option to convert their building into a co-op or continue renting. Hackman, *supra* note 98.

112. *Cf. Trust Fund, supra* note 81 (describing how federal funding aids D.C. trust fund applicants in covering funding gaps so applicants can ultimately utilize a loan from D.C. and capitalize on tax incentives provided by HUD).

hands-off approach,<sup>113</sup> but the agency can no longer ignore the fever pitch mounting within the affordable housing crisis. The issue's severity shows no signs of easing, and with demand climbing onward and upward, it is time HUD took a different approach.

#### IV. AFFIRMATIVELY FURTHERING AFFORDABLE HOUSING: A (POSSIBLE) RECIPE FOR SUCCESS

The national conversation around affordable housing has escalated such that several members of Congress have finally taken notice. Recently members have introduced a slew of new housing legislation, including the Economic Mobility, Prosperity, and Opportunity with Waivers that Enable Reforms for States (EMPOWERS) Act of 2017,<sup>114</sup> the HUD Inspection Process and Enforcement Reform Act of 2017,<sup>115</sup> the Task Force on the Impact of the Affordable Housing Crisis Act of 2018,<sup>116</sup> and the American Housing and Economic Mobility Act of 2018.<sup>117</sup> The most expansive of these proposals is S. 3503, the American Housing and Economic Mobility Act of 2018, introduced by Senator Elizabeth Warren, which lays out a multifaceted approach to combatting the affordable housing crisis through the country.<sup>118</sup> However,

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113. Glenn Thrush, *As Affordable Housing Crisis Grows, HUD Sits on the Sidelines*, N.Y. TIMES (July 27, 2018), <https://www.nytimes.com/2018/07/27/us/politics/hud-affordable-housing-crisis.html> (explaining that the Trump Administration's focal policy response to the escalating national housing crisis is a "plan to triple rents for about 712,000 of the poorest tenants receiving federal housing aid and . . . loosen the cap on rents on 4.5 million households enrolled in federal voucher and public housing programs nationwide").

114. Economic Mobility, Prosperity, and Opportunity with Waivers that Enable Reforms for States (EMPOWERS) Act of 2017, S. 1427, 115th Cong. (1st Sess. 2017) (establishing the Interagency Board for Empowering Low-Income Families and enabling governors to apply for waivers from federal assistance program requirements).

115. HUD Inspection Process and Enforcement Reform Act of 2017, S. 160, 115th Cong. (1st Sess. 2017) (allowing HUD to remove employees from their positions based on proven misconduct or poor performance, including landlords receiving Section 8 payments who fail to maintain safe living conditions for their voucher tenants).

116. Task Force on the Impact of the Affordable Housing Crisis Act of 2018, S. 3231, 115th Cong. (2d Sess. 2018) (establishing a Congressional task force to examine potential legislative solutions to the affordable housing crisis).

117. American Housing and Economic Mobility Act of 2018, S. 3503, 115th Cong. (2d Sess. 2018) (revising the Community Reinvestment Reform Act to include greater penalties against discriminatory lenders and raising the estate tax to fund new federal housing subsidy programs).

118. *See id.*; *see also* Madeleine Carlisle, *Elizabeth Warren's Ambitious Fix for America's Housing Crisis*, ATLANTIC (Sept. 25, 2018), [https://www.theatlantic.com/politics/archive/2018/09/elizabeth-warrens-fix-americas-housing-crisis/571210/?utm\\_campaign=atlantic-politics-and](https://www.theatlantic.com/politics/archive/2018/09/elizabeth-warrens-fix-americas-housing-crisis/571210/?utm_campaign=atlantic-politics-and)

in the current political climate, new legislation is not likely to be either an efficient or pragmatic approach to creating solutions.<sup>119</sup> Fortunately, HUD is already armed with a mechanism that can encourage state and local agencies to carefully examine their affordable housing stock and come up with solutions tailored to their individual housing markets.

### A. *Reviving an Obama-Era Ghost in the Name of Efficiency*

In 2015, the Obama Administration and HUD unveiled the Affirmatively Furthering Fair Housing (AFFH) rule as means of following through with an underutilized portion of the Fair Housing Act (FHA) of 1968.<sup>120</sup> The FHA, also known as Title VIII of the Civil Rights Act of 1968,<sup>121</sup> made it illegal to refuse to sell or rent a unit to any person on the basis of race, color, disability, religion, sex, disability, familial status, or national origin.<sup>122</sup> As necessary as the FHA remains, the law's ultimate implementation has been dismal.<sup>123</sup>

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-policy&utm\_medium=social&utm\_content=edit-promo&utm\_source=facebook&utm\_term=2018-09-25T10%3A00%3A27 (reporting that the bill's two key approaches include raising the estate tax back to Bush-era levels to pump additional billions into subsidy programs for developers and creating a generous block-grant program to incentivize repealing strict zoning laws in wealthier communities).

119. See Carlisle, *supra* note 118 (explaining that the estate tax proposal in the bill has “no chance of passing” if Republican’s control Congress and there is no guarantee either the House or the Senate will flip after the 2018 mid-term elections); cf. Pete Haviland-Eduah, *Housing Policy in American: Where Are Elected Officials Taking Action in Congress?*, APARTMENT LIST: RENTONOMICS, (Sept. 19, 2019), <https://www.apartmentlist.com/rentonomics/housing-policy-in-america-where-are-elected-officials-taking-action-in-congress/> (stating that not one of the eighty-three housing-related bills introduced between 2017 and 2019 made it to President Trump’s desk).

120. Affirmatively Furthering Fair Housing, 24 C.F.R. §§ 5.150–5.180 (2016); Emily Badger, *Obama Administration to Unveil Major New Rule Targeting Segregation Across U.S.*, WASH. POST (July 8, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/07/08/obama-administration-to-unveil-major-new-rules-targeting-segregation-across-u-s/?noredirect=on&utm\\_term=.cf72d97fbd64](https://www.washingtonpost.com/news/wonk/wp/2015/07/08/obama-administration-to-unveil-major-new-rules-targeting-segregation-across-u-s/?noredirect=on&utm_term=.cf72d97fbd64) (heralding the 2015 rule as the Obama administration’s attempt to “repair the law’s unfulfilled promise and promote the kind of racially integrated neighborhoods that have long eluded deeply segregated cities”).

121. Fair Housing Act, Pub. L. No. 90-284, § 800, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601–3633 (1988 & Supp. II 1990)).

122. *Id.* § 804, 82 Stat. 83.

123. See Janell Ross, *A Rundown of Just How Badly the Fair Housing Act Has Failed*, WASH. POST (July 10, 2015), [https://www.washingtonpost.com/news/the-fix/wp/2015/07/10/a-look-at-just-how-badly-the-fair-housing-act-has-failed/?noredirect=on&utm\\_term=.6e20a8fc9b4a](https://www.washingtonpost.com/news/the-fix/wp/2015/07/10/a-look-at-just-how-badly-the-fair-housing-act-has-failed/?noredirect=on&utm_term=.6e20a8fc9b4a) (maintaining that since the Fair Housing Act (FHA) was passed, only a small number of black and Hispanic Americans now live in middle-class or affluent neighborhoods and “the

HUD promulgated the AFFH to clarify the existing fair housing obligations under the FHA, provide HUD grantees with localized data so they could analyze their fair housing landscape and work toward complying with those obligations, and ultimately wield the rule as an enforcement mechanism.<sup>124</sup> This meaningfully-constructed path toward utilizing the oft-ignored Title VIII mandates included revamping state and local reporting structures and establishing metrics for housing integration that local governments must meet in order to keep their federal funding.<sup>125</sup>

At present, HUD Secretary Ben Carson and the Trump Administration have taken an opposing stance.<sup>126</sup> In August 2018, HUD issued a public notice for comments on amending the AFFH,<sup>127</sup> stating the rule's implementation over the past three years was "not fulfilling its purpose to be an efficient means for guiding meaningful action by program participants."<sup>128</sup> The notice took particular aim at the "ineffectiveness of assessment tools," specifically questioning the requirement that state and local agencies submit an Assessment of Fair Housing (AFH) to HUD.<sup>129</sup> The notice breaks down the

vast majority of the nation's neighborhoods remain deeply segregated").

124. *See id.* (citing former HUD Secretary Julian Castro's concession that the rule was for the "long haul" and required "enforcement"); *see also* Badger, *supra* note 120 (laying out how the rule requires cities and towns receiving HUD funding to publicly report the results of local housing segregation assessments). *See generally* Affirmatively Furthering Fair Housing Rule, 24 C.F.R. §§ 5.150–5.180 (2016) (providing the text of the regulation).

125. *Accord* Athena Jones, *Obama Administration Announces New Fair Housing Rules*, CNN.COM (July 8, 2015), <https://www.cnn.com/2015/07/08/politics/fair-housing-rules-obama-administration/index.html> (stating that the rule affects both the Community Development Block Grant and HOME Investment Partnership programs and targets housing practices that have a disparate impact on fair housing).

126. *See* Ben Lane, *HUD Kills Key Tool Used to Enforce Obama Fair Housing Rule*, HOUSINGWIRE (May 18, 2018), <https://www.housingwire.com/articles/43415-hud-kills-key-tool-used-to-enforce-obama-fair-housing-rule> (reporting that HUD first postponed a reporting deadline for local governments, making the Local Government Assessment Tool essentially meaningless, before the agency scrapped the rule altogether); *see also* Jeremiah Jensen, *HUD Secretary Ben Carson Lays Out His Plans For Affordable Housing and Regulatory Reform*, HOUSINGWIRE (Sept. 14, 2018), <https://www.housingwire.com/articles/46839-hud-secretary-ben-carson-lays-out-his-plans-for-affordable-housing-and-regulatory-reform> ("What we want to do in pursuing new rulemaking . . . is to lessen regulatory burdens, while at the same time, help local officials meet their obligations.").

127. *See generally* 5 U.S.C. § 553 (2012) (outlining the process by which federal agencies must provide notice of a proposed rule, allow the public to participate by submitting comments, and consider these comments when making changes to the final rule).

128. *Affirmatively Furthering Fair Housing: Streamlining and Enhancements*, 83 Fed. Reg. 40,713 (Aug. 16, 2018).

129. *See id.* at 40,714.

three assessment tools developed under the rule: State and Insular Area Assessment Tool, PHA Assessment Tool, and Local Government Assessment Tool.<sup>130</sup> Furthermore, HUD claims the State and Insular Area tool was never actually developed, the PHA tool was made unavailable because necessary data to make it workable was not available, and the Local Government tool had “significant deficiencies.”<sup>131</sup>

While the rule was originally intended to dismantle stubbornly persistent segregation across the country, today HUD should use the rule, or a similar rule-based framework, to address another systematically pressing issue: the affordable housing crisis. The Trump Administration has made large chunks of the AFFH moot,<sup>132</sup> but if the basic framework is adapted and rebuilt efficiently, the AFFH could serve as HUD’s most cost-effective tool for creating, protecting, and ensuring access to affordable housing.

### B. *A Bird in the Hand is Worth Two in the Bush*

This year, Secretary Carson stated that the AFFH “dictated unworkable requirements and actually impeded the development and rehabilitation of affordable housing.”<sup>133</sup> However, refocusing the AFFH, rather than erasing it, is precisely the right approach that HUD can take in addressing the affordable housing crisis.<sup>134</sup> While the Obama Administration originally developed and implemented the AFFH to dismantle systemic segregation and prevent housing discrimination, restructuring the rule’s ultimate

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130. *Id.*

131. *Id.*

132. See Lane, *supra* note 126 (detailing how HUD decided to nullify reporting deadlines for state and local PHAs and expressed doubts that threatening to pull federal funding was an appropriate enforcement tool); see also Emily Badger & John Eligon, *Trump Administration Postpones an Obama Fair-Housing Rule*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/upshot/trump-delays-hud-fair-housing-obama-rule.html> (reporting on HUD’s decision to suspend the Affirmatively Furthering Fair Housing (AFFH) rule’s deadlines); Suzy Khimm, *Ben Carson Moves to Roll Back Obama-Era Fair Housing Rule*, NBC NEWS (Aug. 13, 2018), <https://www.nbcnews.com/politics/white-house/ben-carson-moves-roll-back-obama-era-fair-housing-rule-n900366> (reporting on Secretary Carson’s plan to completely roll back the AFFH rule’s requirements).

133. Press Release, U.S. DEPT’H HOUS. & URBAN DEV., HUD Seeks to Streamline and Enhance ‘Affirmatively Furthering Fair Housing’ Rule (Aug. 13, 2018), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_18\\_079](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_079).

134. Cf. Kriston Capps, *Ben Carson is a YIMBY Now and Everything’s Confusing*, CITYLAB (Aug. 14, 2018), <https://www.citylab.com/equity/2018/08/ben-carsons-new-argument-against-fair-housing-rules-its-about-nimbys/567449/> (surmising that Secretary Carson’s support for the “Yes In My Back Yard” movement and HUD’s attempt to “streamline and enhance” the AFFH demonstrate the rule’s potential future use in addressing affordable housing).

purpose toward affordable housing could potentially still be two-fold and address both issues.<sup>135</sup>

As of 2017, minorities made up sixty-four percent of HUD's beneficiaries; that is, of all the people benefiting in some way from a federal, state, and local programs funded by HUD, nearly two-thirds of that population was a person of color.<sup>136</sup> The overwhelming overlap between people of color and people benefiting from HUD-funded programs suggests that the results of enforcing a reworked or reimagined AFFH would reap positive results across both affordable housing initiatives and efforts to dismantle deeply-ingrained housing segregation.<sup>137</sup>

At its inception, the AFFH emphasized three key components: providing data to HUD grantees regarding patterns of segregation; clarifying and simplifying existing fair housing obligations; and enabling local governments, PHAs, and state and insular areas to set locally-determined fair housing goals and report back to HUD via an AFH.<sup>138</sup> By shifting the focus of these core

135. Henry Grabar, *Ben Carson Ends Obama-Era Efforts to Reduce Housing Segregation*, SLATE (Aug. 13, 2018), <https://slate.com/business/2018/08/ben-carson-ends-obama-era-efforts-to-reduce-housing-segregation.html> (pointing out that the FHA is meant to “attack segregation, not scarcity [of affordable housing],” but quoting Secretary Carson as stating that changes to the AFFH would “bolster housing production across the board”); cf. Haviland-Eduah, *supra* note 119 (finding that seventy percent of housing-related bills introduced from 2017–2019 were sponsored or co-sponsored by members of the Congressional Black Caucus, Hispanic Caucus, and Asian Pacific American Caucus).

136. *Dataset: Assisted Housing: National and Local*, U.S. DEP'T OF HOUS. & URBAN DEV. OFFICE OF POLICY DEV. & RESEARCH, [https://www.huduser.gov/portal/datasets/asstshg.html#2009-2017\\_query](https://www.huduser.gov/portal/datasets/asstshg.html#2009-2017_query) (follow “Dataset” hyperlink; then search using the “2009-2018” category and select the “Query Tool” tab, “2017” under Select a Year, “U.S. Total” under Select a Summary Level, “Summary of All HUD Programs” under Select a Program, and “% Minority,” “%Black Non-Hispanic,” “% Asian or Pacific Islander Non-Hispanic,” and “% Hispanic”; then click “Get Results” button). This number is further broken down into forty-two percent black non-Hispanic, four percent Asian or Pacific Islander Non-Hispanic, and seventeen percent Hispanic. *Id.*

137. Focusing on the real source of the affordable housing shortage requires that the federal government utilize administrative rule-making powers to engage state and local agencies and establish a collaborative plan of attack regarding the affordable housing crisis. Cf. 42 U.S.C. § 3535(d) (2012) (“The Secretary . . . may make such rules and regulations as may be necessary to carry out his functions, powers, and duties.”); THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 2 (Sept. 2016), [https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing\\_Development\\_Toolkit%20f.2.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf) (suggesting that state and local agencies can address the “growing severity of undersupplied housing markets” by eliminating local barriers to housing development, including zoning restrictions, unnecessarily slow permitting processes, and land use restrictions).

138. U.S. DEP'T OF HOUS. & URBAN DEV., HUD RULE ON AFFIRMATIVELY

elements from fair housing to affordable housing, HUD could utilize the AFFH's basic structure to create a federal support system for state and local agencies as they each work to address the effects of the affordable housing crisis in their communities.

Taking this well-rounded approach to repurposing the AFFH will demonstrate the agency's commitment to ensuring state and local agencies take diligent, meaningful steps toward increasing their affordable housing stock. Perhaps most importantly, readjusting the rule does not compromise or dramatically alter HUD's long-standing "delegation of authority" framework. Furthermore, considering the mounting pressure to find workable solutions,<sup>139</sup> HUD should implement incentive and enforcement mechanisms within the rule.

### *C. The One, Two (Three) Punch: Clarifying, Quantifying, and Assessing*

Pragmatic awareness was foundational to the AFFH; communities could not realistically dismantle and remedy housing segregation if they did not fully understand their HUD-prescribed fair housing obligations, identify local problem areas, and utilize this data to set goals and track progress.<sup>140</sup> In shifting the rule's spotlight away from fair housing and toward an affordable housing context, HUD can leave this overarching framework virtually unchanged.

When adapting the AFFH's first arm in understanding their HUD-prescribed fair housing obligations, HUD must clarify existing grantee obligations and requirements that accompany the agency's various avenues of funding for affordable housing.<sup>141</sup> For example, the LIHTC program would require disclosures regarding what percentage of a building's total units developers must reserve for households with incomes less than, or equal to, fifty percent of the region's median income.<sup>142</sup> In the CDBG program, a disclosure would explain that grant recipients must use seventy percent of their

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FURTHERING FAIR HOUSING: EXECUTIVE SUMMARY (2015) [hereinafter SUMMARY].

139. See, e.g., Kriston Capps, *Mayors Take the Fight for Affordable Housing to Capitol Hill*, CITYLAB (Jan. 29, 2018), <https://www.citylab.com/equity/2018/01/mayors-take-the-fight-for-affordable-housing-to-capitol-hill/551618/> (detailing a new public-private coalition's demand for more investment in affordable housing).

140. See SUMMARY, *supra* note 138.

141. One such obligation under the AFFH was that all HUD grantees "certify that they will affirmatively further fair housing as a condition of receiving Federal funds." U.S. DEP'T OF HOUS. & URBAN DEV., AFFH RULE GUIDEBOOK 4 (2015) (citing Congressional acts in 42 U.S.C. §§ 5304(B)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16) intended to reinforce the mandate) [hereinafter RULE GUIDEBOOK].

142. See McCARTY ET AL., *supra* note 7, at 15 (stating that twenty percent of a development's units is the threshold for developers hoping to qualify for a LIHTC).



funding to benefit low- and moderate-income individuals.<sup>143</sup>

Furthermore, HUD is perfectly positioned to educate communities about the state of their local housing stock by utilizing a formidable AFFH data tool.<sup>144</sup> The AFFH's lofty goals all lived and died according to data; to fully educate and inform communities regarding locally entrenched segregation, HUD built a database of demographic, economic, education, health, employment, and transportation data.<sup>145</sup> The database enabled HUD to isolate data subsets for a region, layer multiple subsets on top of each other to create localized maps, and pinpoint problem areas.<sup>146</sup> The mapping was a key component of the AFFH because it revealed previously unseen, unknown, or ignored patterns of segregation within communities.<sup>147</sup>

Under the AFFH, the most crucial data layer was the "Racially/Ethnicity Concentrated Areas of Poverty" (R/ECAP) that tracked pockets where more than fifty percent of the residents were non-White and forty percent, or more, lived in poverty.<sup>148</sup> However, because the database is largely built on wide-ranging census data, utilizing this tool to identify localized affordable housing deficits requires only simple modifications.<sup>149</sup> Rather than pulling data on race or ethnicity, HUD can isolate and layer data subsets concerning poverty rates and new development and economic growth, or lack thereof. Within eighteen months of the AFFH's implementation, state and local grantees utilized the database to identify problem areas and develop desegregation remedies.<sup>150</sup> Likewise, grantees could similarly access the database to identify

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143. See *id.* at 16 (citing that eligible community projects include crime prevention services, addiction and housing counseling, beautification, and localized economic development).

144. See Badger, *supra* note 120 (characterizing the AFFH's centerpiece as "a vast trove of geographic data covering every community in the country" that includes local poverty rates, concentrations of Section 8 vouchers, public school quality, and public transportation options and efficiency).

145. Joshua Davidson, *Affirmatively Furthering Fair Housing*, POLICYMAP: MAPCHATS BLOG (Dec. 14, 2016), <https://www.policymap.com/2016/12/affirmatively-furthering-fair-housing/>.

146. *Id.* For instance, HUD could pull numbers for neighborhood poverty rates and access to public transportation and determine if there was clear overlap that might support an inference of causation or correlation. *Id.*

147. See *id.*; accord Badger, *supra* note 120 (explaining how the mapping was intended to unveil previously invisible barriers, theoretically making them harder to ignore).

148. Davidson, *supra* note 145. The "Racially/Ethnicity Concentrated Areas of Poverty" (R/ECAP) layer also encapsulated smaller areas where the poverty rate was more than three times greater than general region's average rate. *Id.*

149. *Cf.* Badger, *supra* note 120 (describing how HUD originally hoped communities would utilize the tool to see where systemic segregation and deficits in affordable housing coexisted and further identify which neighborhoods had no affordable housing available).

150. See Grabar, *supra* note 135 (discussing how Chester County, Pennsylvania promised

local affordable housing issues and craft solutions specific to the region, down to individualized plans for each neighborhood throughout a region.

Finally, once the database helps grantees identify problems, establish goals, and chart a course forward, a mandated reporting system will ensure grantees make a good faith effort to comply. The AFFH established such a system through the AFH tool; the AFH had three slightly different assessment and reporting methods for the varying types of grantees, local governments, PHAs, and states and insular areas.<sup>151</sup> Although Secretary Carson claims the AFFH fell flat and ultimately decided to scrap it,<sup>152</sup> the agency's renewed reliance on the old "analysis of impediments" assessment tool is misguided.<sup>153</sup> The intensive reporting requirements stipulated by the AFFH were not implemented to burden grantees, but rather to keep them accountable.<sup>154</sup> Researchers at Massachusetts Institute of Technology (MIT) evaluated the AFFH after implementation and summarily concluded that the reporting process was not unduly burdensome on communities.<sup>155</sup>

While debate over the AFH's workability continues,<sup>156</sup> the three subcategories for reporting—local government, PHA, and state and insular areas—should remain untouched. Furthermore, the MIT researchers stressed that, although a majority of the first assessments submitted were rejected, the AFH forced HUD to have a close working relationship with grantees that produced measurable results, ultimately chipping away at small pockets of

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to lower the number of Section 8 voucher recipients living in poverty-stricken areas from forty-four to thirty-nine percent after reviewing the area's data and constructing a plan for reducing the number).

151. Affirmatively Furthering Fair Housing: Streamlining and Enhancements, 83 Fed. Reg. 40,714.

152. See Grabar, *supra* note 135 (reporting that Secretary Carson labeled the AFFH assessment tool for local governments as "unworkable" after noting that thirty-one out of forty-nine submitted assessments were rejected); see also Affirmatively Furthering Fair Housing: Streamlining and Enhancements, 83 Fed. Reg. at 40,714 (Aug. 16, 2018).

153. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS (2010) (reporting to Congress on HUD's lack of oversight into grantees' due diligence regarding the FHA requirements) [hereinafter ACCOUNTABILITY REPORT].

154. Grabar, *supra* note 135.

155. *Id.*

156. See *id.* (quoting Assessment of Fair Housing (AFH) supporters and academic contributors as extolling the assessment method's positive impact and results). *But see* Letter from Matt Josephs et al., Senior Vice President for Policy, Local Initiatives Support Corp., to the Off. Gen. Couns., U.S. Dep't of Hous. & Urban Dev. (May 23, 2016) (warning HUD that the AFH may be too complicated and place an undue strain on grantees submitting responses).

systemic local segregation.<sup>157</sup> The AFH's high assessment standards might have created a tedious back-and-forth between HUD and grantees, but within the affordable housing context this volley would strengthen HUD's relationship with recipients and facilitate greater collaboration between the two.<sup>158</sup> Rather than remain detached, HUD would be clued into a community's progress and, in the event of a report's rejection, provide suggestions on how to meet the assessment criteria.<sup>159</sup> In this way, grantees would mostly retain autonomous decisionmaking power and leave HUD's delegation of authority framework intact. Advancing this model of collaboration through assessment tools and reporting guidelines is crucial for identifying if and how grantees are expanding their affordable housing stock.

#### D. *Passing Out Candy or Cracking the Whip: Incentives v. Enforcement*

Since 1974, HUD has acted more like a funnel of federal funding rather than an agency with a clear stake in creating affordable housing. Reconfiguring and utilizing the AFH assessment tool for affordable housing would counteract fears that HUD could continue serving as "a meaningless rubber-stamp for local officials" in the midst of the nation's housing crisis.<sup>160</sup> Even further, an assessment and reporting structure can inform HUD's decision-making regarding doling out incentives or enforcement actions.

The goal of adding an additional incentive/enforcement layer to the amended AFFH is not to unduly, or detrimentally, punish state and local governments by withholding funding the moment an assessment does not meet reporting standards.<sup>161</sup> Rather, HUD's central approach should rally

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157. Grabar, *supra* note 135.

158. *Cf.* ACCOUNTABILITY REPORT, *supra* note 153, at 9–10 (finding that the previous analysis of impediments (AI) reporting structure allowed HUD grantees to continue receiving federal funding despite failing to follow FHA guidelines and that nearly thirty percent of grantees did not even have updated AI evaluations for HUD to review).

159. *Cf. id.*

160. Grabar, *supra* note 135.

161. *Cf.* Julian E. Zelizer, *How Education Policy Went Astray*, THE ATLANTIC (Apr. 10, 2015), <https://www.theatlantic.com/education/archive/2015/04/how-education-policy-went-astray/390210/> (describing how the No Child Left Behind (NCLB) Act shuttered schools that did not meet testing standards and pulled funding from schools already under the strain of minimal funding). Relying on an incentive and enforcement system similar to the one implemented as part of the NCLB would similarly impose unrealistic standards and punish regions that fail to meet those standards by yanking funding, precisely when a region desperately needs resources. *Id.* An additional distinction between NCLB's reporting structure and the one proposed here is NCLB's misguided reliance on a standardized metrics of success. *Id.* In contrast, HUD should amend the three reporting assessments within the AFH tool to address different standards, depending on what type of entity is reporting, and further develop

around incentivizing the creation of new affordable housing. There is no one-size-fits-all approach to measuring when and how grantees are successful in improving their affordable housing stock.<sup>162</sup> Instead, the revised AFH assessment and reporting system would rely on localized data from the extensive AFFH database and build collaborative relationships between HUD and grantees.<sup>163</sup>

HUD already has a mechanism for reviewing deficiencies in the program plans PHAs submit to keep their funding.<sup>164</sup> The review process not only provides that when a plan is rejected it is returned with detailed reasoning for that rejection but also allows PHAs to resubmit their plans “as many times as necessary” until it is approved.<sup>165</sup> This review model already has striking similarities to the AFFH’s reporting structure; therefore applying it within the adapted rule would be straightforward.<sup>166</sup> The feedback and back and forth of resubmission only serves to build the relationship between HUD and a grantee as they work to determine regionally-sensitive metrics of success.<sup>167</sup> The combination of an open working relationship between HUD and grantees and a concentrated focus on regional influences allows HUD to develop incentives for small victories in categories such as inclusionary zoning, increased variety in housing stock, and updated local housing policies.

For example, to encourage San Francisco grantees to ease rigid zoning regulations, HUD could offer additional grants with little-to-no strings attached in exchange for each development project granted a height variance.<sup>168</sup> For areas like Washington D.C., where land-use restrictions and a dwindling supply of available space are concerns, instead of simply counting new units added to housing supply as a victory, HUD could reward developers with tax breaks when they commit to reserving higher percentages of affordable units in their projects. For state and local governments struggling to amend or overhaul local legislation or housing policies, HUD could

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regionally-specific timelines for reporting and progress. *Id.*

162. Alissa Walker, *7 Smart New Affordable Housing Projects Making Cities Stronger*, GIZMODO (Dec. 30, 2013), <https://gizmodo.com/7-smart-new-affordable-housing-projects-making-cities-s-1488019323>.

163. *Cf. HUD Review Process – PHA Plans*, U.S. DEP’T OF HOUSING & URBAN DEV., [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/pha/review/](https://www.hud.gov/program_offices/public_indian_housing/pha/review/) (last visited July 20, 2019).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *See* Carlisle, *supra* note 118 (detailing an incentive in Senator Warren’s proposed legislation that specifically appeals to areas with restrictive zoning and provides them access to new flexible grant money only if they ease zoning regulations).

provide matching grants for local government or landlords who renovated units but kept them affordable.

By working closely with grantees to use updated data, review areas that need improvement, and formulate a plan moving forward, HUD would set a precedent that it does more than write checks; the agency can also advise and guide within its delegation of authority framework.<sup>169</sup> This collaboration and “phased in approach” is directly applicable to improving affordable housing numbers locally and allows state and local agencies, governments, and PHAs to retain a high level of autonomy and decision-making.<sup>170</sup> While HUD should work closely with each grantee to create an individualized timeline for improvement, grantees would ultimately determine how to utilize their area’s available resources, to address severity in shortage of affordable units, and to determine how to handle any local housing efforts not reliant on federal funding to determine what a small victory looks like and what incentives they want.

While the possibility of enforcement through funding cuts should very much feel tangible, the bar should remain high.<sup>171</sup> Similar to the grantee certification under the AFFH, the amended rule could require that recipients certify their good faith effort to adhere to the assessment and reporting process, establish solid timelines and goals for creating housing, and accurately report current housing numbers, need, and outside funding, all backing their overarching commitment to double down on finding localized solution for their affordable housing needs.<sup>172</sup> But while the threshold should remain high, enforcement action cannot merely be theoretical. Having palpable standards that trigger enforcement and real avenues for action serves not only to ensure compliance but would also reinforce HUD’s commitment to the new framework and finding workable solutions to reverse the crisis.<sup>173</sup>

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169. Cf. Badger, *supra* note 120 (describing how reporting under the AFFH applied more pressure on jurisdictions to show results and “require[d] cities and towns all over the country to scrutinize their housing patterns for racial bias and to publicly report, every three to five years, the results”).

170. Cf. SUMMARY, *supra* note 138, at 2 (detailing the “phased-in approach” that “provides for additional time for communities to adopt this improved process for setting local fair housing priorities . . .”).

171. *But see* Henry Grabar, *Trump’s Rumored Housing Secretary is Best Known for Keeping His County Segregated*, SLATE (Nov. 14, 2016), <https://slate.com/business/2016/11/donald-trump-could-undo-obamas-big-hud-initiative-in-desegregation.html> (detailing how Westchester County, New York ultimately refused federal funding rather than comply with the AFFH’s fair housing obligations; such a flagrant dismissal of the HUD standards would meet the bar for enforcement measures and pulled funding).

172. *See* RULE GUIDEBOOK, *supra* note 141, at 4.

173. Cf. Press Release, U.S. DEP’T OF HOUS. & URBAN DEV., HUD & Associated Bank

While states, counties, and cities across the country are going through a housing crisis seemingly en masse, each area's housing market is unique and affected by a set of characteristics and factors specific to that region. Implementing the amended AFFH rule requires a new level of HUD involvement, investment, and action; however, this does not mean HUD will be in the trenches micromanaging state and local beneficiaries, a move directly contrary to the agency's entrenched delegation-of-authority framework. Establishing working relationships within the amended rule allows HUD to build partnerships with state and local grantees, leaving the responsibility of proposing regionally-specific solutions and developing what success looks like with grantees while rewarding any and all small victories in the fight to protect and create affordable housing.

### CONCLUSION

The current affordable housing crisis demands more of HUD, despite the agency's decades long, hands-off approach. It is no longer enough that HUD writes checks and state and local agencies cash them. This structure advantageously allows communities to make more informed decisions regarding how they should specifically tackle a deficit in affordable units. However, the lack of oversight, collaboration, and enforcement from HUD does nothing to incentivize innovation or any diligent efforts to provide residents with an affordable place to live. Reviving the basic structure of the AFFH rule and making targeted adjustments to measure and quantify success within a context of affordable housing, enables HUD to address the nationwide crisis while the onus for creating and maintaining affordable housing stock remains in the hands of state and local governments. Overhauling what is left of the AFFH is how HUD can take an affirmative first step toward ensuring the agency's stake in addressing America's affordable housing crisis, an investment belayed by its very name, the Department of Housing and Urban Development.

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Reach Historic \$200 Million Settlement of Red-Lining Claim (May 26, 2015), <https://archives.hud.gov/news/2015/pr15-064b.cfm> (announcing a settlement following complaints filed by HUD against a housing lender that engaged in blatantly discriminatory housing lending practices).