

# The Starting Point: Structuring Newark's Land Use Laws at the Outset of Redevelopment to Promote Integration Without Displacement

MALINA WELMAN\*

*Housing is an outward expression of the inner human nature; no society can be fully understood apart from the residences of its members.<sup>1</sup>*

*In 2017, New Jersey's largest municipality, Newark, made history when its city council passed an inclusionary zoning ordinance requiring, in part, that at least twenty percent of new residential projects be set aside for moderate- and low-income households. Acknowledging the surge of development moving down along New Jersey's Gold Coast, policymakers brought forth this legislation to ensure that, as Newark inevitably redevelops into a more economically prosperous urban center, the city concurrently provide a realistic opportunity to generate affordable housing. By placing affordability at the forefront of its concerns, Newark has thus demonstrated its commitment to equitable growth, but this Note principally argues that in isolation, the inclusionary zoning ordinance is more symbolic than it is effective upon analyzing its terms. Therefore, while a mandatory, city-wide inclusionary zoning program is a necessary first step, true integration in redeveloping cities can only be realized by enacting a combination of anti-displacement and equitable growth regulations tailored to the particular needs of its residents.*

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\* Editor-in-Chief, *Colum. J.L. & Soc. Probs.*, 2019–2020. J.D. Candidate 2020, Columbia Law School. The author thanks Professor Lance Liebman for his thoughtful insight and guidance, the staff of the *Columbia Journal of Law and Social Problems* for all their hard work and care, and her family for their love and support. This Note is dedicated to the author's father, Marek Welman, a Newark native, for instilling a profound interest in understanding society in relation to its surrounding space and place.

1. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 3 (1985).

*Part II of this Note begins by briefly tracing the post-World War II shift in housing preferences from cities to emerging suburbs before discussing the use of so-called exclusionary zoning to keep out the urban poor. It is within this context that Part II also discusses the progressive Mount Laurel doctrine, calling attention to the New Jersey Supreme Court's limited success in dismantling socioeconomic segregation in its suburbs. Mindful of these limitations, Part III then analyzes the efficacy of land use regulations as implemented within the context of urban revitalization. This analysis is conducted through the lens of Newark's inclusionary zoning ordinance, and argues that although such a tool is necessary at the outset of redevelopment, as presently constructed, the law will not be able to sufficiently protect its most at-risk residents or meaningfully add to the city's shrinking affordable housing inventory. This Note concludes in Part IV by highlighting other equitable growth policies, land use regulations, and legislative reform that can act in conjunction with inclusionary zoning ordinances to better address the affordability crisis and promote dynamic and diverse interactions between both present and future city residents.*

## I. INTRODUCTION

On June 21, 2017, the City Council of Newark, New Jersey voted to move and adopt on first reading Ordinance 17-0842.<sup>2</sup> The ordinance, titled “Inclusionary Zoning<sup>3</sup> for Affordable Housing,” sought to amend Title 41 of the City’s Municipal Code to require that at least twenty percent of new residential projects be set aside for moderate- and low-income households.<sup>4</sup>

Mayor Ras Baraka first introduced the proposal in February of 2017 when the boom in the real estate market along New Jersey’s Hudson River “Gold Coast”<sup>5</sup> finally began to push a new surge of

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2. *Meeting of Municipal Council on 6/21/2017 at 6:30 PM*, CITY OF NEWARK, <https://newark.legistar.com/MeetingDetail.aspx?ID=552947&GUID=057194B3-5597-4575-B441-3AC2EA1D3E92&Options=info&Search=17-0842> [<https://perma.cc/KX8V-M2TB>].

3. The term “inclusionary zoning” broadly refers to planning ordinances that require or encourage developers to set aside a certain percentage of housing units in new or rehabilitated properties to be affordable for people with low to moderate incomes. This Note is principally concerned with the nuances of Newark’s mandatory inclusionary zoning ordinance, but also makes reference to the structure of other programs across the United States in order to emphasize the relative strengths and weaknesses of the Newark program. See, e.g., *Inclusionary Zoning and Mixed-Income Communities*, U.S. DEPT OF HOUS. & URB. DEV. (2013), <https://www.huduser.gov/portal/periodicals/em/spring13/highlight3.html> [<https://perma.cc/V53V-GXLX>].

4. Newark, N.J., Ordinance 17-0842 (July 12, 2017), <https://newark.legistar.com/LegislationDetail.aspx?ID=3075783&GUID=DE75F6FC-1FBF-46E3-BC9A-5ABFD94280D3&Options=ID|Text|&Search=17-0842> [<https://perma.cc/4RRL-9FPX>].

5. See Lorna Pappas, *The Hudson River Gold Coast: Leasing Velocity and Rental Rates at All-Time Highs as Millennials Flock to 24/7 Waterfront Communities with Stunning NYC Views ... and Corporations Follow*, N.J. BUS. (Nov. 28, 2016),

development into Newark, which lies just a bit further south along the coastal commuter route to New York City.<sup>6</sup> Recognizing that the state's largest municipality had become "for the first time in more than a century . . . a growing city," policymakers brought forth this legislation to ensure that, as Newark inevitably redevelops into a more economically prosperous urban center, the city concurrently provide a realistic opportunity to generate affordable housing.<sup>7</sup> However, when councilmembers met on July 12, 2017, for a final vote, the efforts of housing advocates to curb gentrification and displacement fell short and the bill failed.<sup>8</sup>

Undeterred and in a fit of urgency, Mayor Baraka continued to press city officials to pass an inclusionary measure in order to avoid the mistakes of similarly-situated waterfront cities that developed with affordability as an afterthought.<sup>9</sup> It took months of prolonged debate, but on October 4, 2017, Newark City Council adopted Ordinance 17-1457 (substantively identical to failed Ordinance 17-0842), effectively becoming the second municipality in New Jersey known to pass a city-wide mandatory plan and the first to do so at the early stages of its redevelopment-era.<sup>10</sup> Alt-

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<https://njbmagazine.com/monthly-articles/udson-river-gold-coast> [<https://perma.cc/P5EN-AMUT>].

6. Steve Strunksy, *Newark to Vote on Big Push to Avoid Gentrification with Affordable Housing*, NJ.COM (June 21, 2017), [https://www.nj.com/essex/index.ssf/2017/06/newark\\_could\\_require\\_20\\_of\\_apartments\\_to\\_be\\_afford.html](https://www.nj.com/essex/index.ssf/2017/06/newark_could_require_20_of_apartments_to_be_afford.html) [<https://perma.cc/TDY7-BTKF>].

7. Ordinance 17-0842, *supra* note 4, Recitals. Before Ordinance 17-0842, some projects in Newark's downtown were voluntarily including affordable units, albeit at varying allotments; in one mixed-use redevelopment, forty percent of apartments were affordable, whereas only ten percent of units in a nearby apartment tower were made affordable. See Strunksy, *supra* note 6.

8. See Karen Yi, *Newark Law Intended to Curb Gentrification Fails*, NJ.COM (July 12, 2017), [https://www.nj.com/essex/index.ssf/2017/07/affordable\\_housing\\_law\\_fails\\_in\\_newark\\_on\\_annivers.html](https://www.nj.com/essex/index.ssf/2017/07/affordable_housing_law_fails_in_newark_on_annivers.html) [<https://perma.cc/XMY9-JC4C>]. The July 12, 2017, vote fell on fiftieth anniversary of the 1967 Newark riots that left twenty-six people dead and caused ten million dollars in damage at the end of the five-day period. See Jessica Mazzola & Karen Yi, *Race, Riots and Reputation: Has N.J.'s Largest City Recovered?*, NJ.COM (July 21, 2017), [https://www.nj.com/essex/index.ssf/page/newark\\_riots\\_50th\\_anniversary.html#incart\\_election](https://www.nj.com/essex/index.ssf/page/newark_riots_50th_anniversary.html#incart_election) [<https://perma.cc/8PP9-8S9L>].

9. Yi, *supra* note 8 ("While we squabble with one another, these developers are moving forward . . . they're not going to wait for us," said Mayor Baraka at the Newark City Council Meeting held on July 12, 2017.).

10. Newark, N.J., Ordinance 17-1457 (Oct. 4, 2017), <https://newark.legistar.com/LegislationDetail.aspx?ID=3114782&GUID=A589FC09-949F-459C-86C3-8DD51C0E0BF5&Options=ID|Text|&Search=17-1457> [<https://perma.cc/UBE7-7YVY>]; see Hoboken, New Jersey, Municipal Code § 65A-1-65A-19 (adopted by the Hoboken City Council on Oct. 17, 2012); cf. Corey W. McDonald, *Jersey City Forms Committee to Create Single City-Wide Affordable Housing Policy*, JERSEY J. (May 23, 2019), <https://www.nj.com/udson/2019/05/jersey-city-forms-committee-to-create-single-city-wide-affordable-housing-policy.html> [<https://perma.cc/Y6H3-MTZZ>] ("Jersey City has lagged quite a bit in estab-

hough housing advocates and constituents contended that certain terms were insufficient to both address the ongoing issues of affordability and protect against resident displacement,<sup>11</sup> Mayor Baraka hailed the law as a “groundbreaking step” for Newark, “defining to the nation how a city cares for its residents, and what a city should be.”<sup>12</sup>

Ordinance 17-1457 is consistent with New Jersey’s long history of intervening on behalf of its most vulnerable residents against land use regulations intended to preclude opportunities for low-income families. Yet, despite the groundwork of the celebrated *Mount Laurel* decision and its progeny, New Jersey continues to face an affordable housing crisis, becoming what state officials, such as Assemblywoman Holly Schepisi, believe to “be the most urgent issue in [the] state.”<sup>13</sup> In fact, in a 2018 unpublished opinion, Judge Mary C. Jacobson found that New Jersey needs approximately 160,000 more affordable housing units statewide.<sup>14</sup> While the state’s cities have been traditionally ex-

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lishing a city-wide affordable housing policy compared to other municipalities. Newark and Hoboken both have policies requiring developers to include a certain number of affordable homes.”).

11. See Karen Yi, *Newark Adopts ‘Groundbreaking’ Affordable Housing Ordinance*, NJ.COM, (Oct. 4, 2017), [https://www.nj.com/essex/index.ssf/2017/10/newark\\_approves\\_inclusionary\\_zoning\\_ordinance.html](https://www.nj.com/essex/index.ssf/2017/10/newark_approves_inclusionary_zoning_ordinance.html) [<https://perma.cc/Y7M3-F5Q4>] (Felicia Alston-Singleton, a tenant advocate and Newark’s Fair Housing Officer, argued that developers should set aside forty to sixty percent of new projects as affordable units, stating: “Where is the evidence that’s saying we only need [twenty] percent?”).

12. *Mayor Baraka Hails Passage of Inclusionary Zoning Ordinance; Groundbreaking Measuring Will Promote Development of Affordable Housing*, CITY OF NEWARK (Oct. 4, 2017), <https://www.newarknj.gov/news/mayor-baraka-hails-passage-of-inclusionary-zoning-ordinance-groundbreaking-measuring-will-promote-development-of-affordable-housing> [<https://perma.cc/BCT6-AWSX>].

13. Joe Atmonavage, *N.J. Needs to Build 155,000 Affordable Housing Units, No One Can Agree on How or Where*, NJ.COM (July 27, 2018), [https://www.nj.com/news/index.ssf/2018/07/affordable\\_housing\\_new\\_jersey\\_fair\\_share\\_housing\\_c.html](https://www.nj.com/news/index.ssf/2018/07/affordable_housing_new_jersey_fair_share_housing_c.html) [<https://perma.cc/X25L-MV5D>].

14. *In re Application of Municipality of Princeton*, No. MER-L-1561-15, 2018 N.J. Super. Unpub. LEXIS 1241, at \*229 (2018). The total housing need is calculated by adding the “gap present need” (i.e., 74,248 units), which accounts for the number of needed units between 1999 and 2015 during which the state’s Council on Affordable Housing (COAH) failed in its responsibilities to enforce municipalities’ fair share obligation, with the “prospective need” (i.e., 85,382 units) for the period of 2015 to 2025. *Id.* Judge Jacobson issued the comprehensive decision following a forty-day trial, acknowledging “the technical complexities involved in developing a methodology to calculate numerical affordable housing needs.” *Id.* at \*6, \*9. The challenge in calculating the gap present need and prospective need, however, is not one that is unique to Judge Jacobson’s courtroom. In March 2015, the New Jersey Supreme Court determined that trial courts in each county would assume the responsibility of calculating affordable housing determinations. See *Mount Laurel IV*, *infra* note 48, at 6.

cused from providing their fair share in part due to their already affordable housing stock,<sup>15</sup> that narrative is changing in the wake of urban revitalization.

With this backdrop, it must be acknowledged that inclusionary land use policies are by no means a novel device; although particulars of the programs vary, over five hundred exist across twenty-seven states.<sup>16</sup> Yet, in Newark their implementation will prove to be a critical part in ameliorating the shortage of affordable housing in the city and mitigating against the risk of displacement amid the wave of incoming development concentrated in the downtown area. A mandatory, city-wide inclusionary zoning ordinance is the first necessary step to achieve equitable growth, but this Note principally argues that in isolation the policy is more symbolic than it is effective upon analyzing its terms. Therefore, true integration in redeveloping cities can only be realized by enacting a combination of anti-displacement and equitable growth regulations tailored to the particular needs of its residents.

Part II of this Note begins by briefly tracing the post-World War II shift in housing preferences from cities to emerging suburbs before discussing the use of so-called exclusionary zoning to keep out the urban poor. It is with this context that Part II also discusses the progressive *Mount Laurel* doctrine, calling attention to the New Jersey Supreme Court's limited success in dismantling socioeconomic segregation in its suburbs. Mindful of these limitations, Part III then analyzes the efficacy of land use regulations as implemented within the context of urban revitalization. This analysis is conducted through the lens of Newark's inclusionary zoning ordinance, and argues that although such a tool is necessary at the outset of redevelopment, as presently constructed, the law will not be able to sufficiently protect its most at-risk residents or meaningfully add to the city's shrinking affordable housing inventory. This Note concludes in Part IV by highlighting other equitable growth policies, land use regulations, and legislative reform that can act in conjunction with inclusionary zoning ordinances to better address the affordability

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15. See *infra* note 42.

16. See Rick Jacobus, LINCOLN INST. OF LAND POL'Y, INCLUSIONARY HOUSING: CREATING AND MAINTAINING EQUITABLE COMMUNITIES 8 (2015), [https://www.lincolninst.edu/sites/default/files/pubfiles/inclusionary-housing-full\\_0.pdf](https://www.lincolninst.edu/sites/default/files/pubfiles/inclusionary-housing-full_0.pdf) [<https://perma.cc/E8XX-GZ6G>].

crisis and promote dynamic and diverse interactions between both present and future city residents.

## II. THE ORIGINS OF INCLUSIVE LAND USE REGULATION IN NEW JERSEY: AN ATTEMPT TO INTEGRATE SUBURBS

Professor Charles Haar, the late, great pioneer of land use law and urban development, once wrote that the *Mount Laurel* decision was “the boldest and most innovative judicial intervention ever to countermand exclusionary zoning. . . . It set the tone for all future legal encounters with discriminatory local land-use regulatory barriers.”<sup>17</sup> Part II.A first recounts the underlying forces that shifted housing preferences from urban centers to the suburbs before discussing the exclusionary tactics that Professor Haar references, which were employed under the veneer of zoning laws in order to preserve the concentration of wealth in New Jersey’s suburban neighborhoods. Part II.B then challenges Professor Haar’s view of *Mount Laurel*’s influence by examining the degree of success the decision has had in integrating suburbs in the decades that followed.

### A. THE URBAN EXODUS AND CONCURRENT RISE OF SUBURBAN EXCLUSIONARY ZONING

Up until the mid-twentieth century, New Jersey’s growth and development were concentrated in its cities, as were its jobs.<sup>18</sup> The combination of commercial spaces, such as banks, retail facilities, and entertainment venues, along with industrial factories engendered opportunities attracting incomers, particularly immigrants, to move into urban areas where residents could both conveniently live and work.<sup>19</sup>

Following the end of World War II, forces in business and the federal government redirected their focus, encouraging individual consumption, especially in the home-building industry.<sup>20</sup> New

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17. CHARLES HAAR, *SUBURBS UNDER SIEGE* 3 (1996).

18. HOWARD GILLETTE JR., *Suburbanization and the Decline of the Cities: Toward an Uncertain Future*, in *NEW JERSEY: A HISTORY OF THE GARDEN STATE* 265, 265 (2012).

19. *Id.*

20. *Id.* at 266. Even before the war’s end, the federal government was instrumental in influencing detached-home living to the detriment of more congested urban areas. For example, the Home Owners Loan Corporation (HOLC) of 1933 made long-term, self-amortizing mortgages more feasible, but also instituted “red lining,” a practice that, in

Jersey was a prime candidate for the experimental shift in housing preference; the introduction of the Federal Aid Highway Act of 1956 did its part to usher out middle-class city dwellers and promote a new suburban “wealth belt,” particularly in its northeastern counties, where most of the one million units built in the state between 1950 and 1970 were located.<sup>21</sup> Although there were a number of influential factors at play, the sheer availability of cheap land outside city bounds, offering more open space to produce desirable low-density and land-consuming projects, helped the suburban lifestyle rise to prominence.<sup>22</sup>

The impact of decentralized development, however, devastated cities’ populations and employment markets.<sup>23</sup> Concurrently, the demographics of cities also experienced a seismic shift; urban neighborhoods once dominated by whites soon became predominantly occupied by blacks who had not long before struggled to find adequate housing in these racially restricted markets.<sup>24</sup> Mounting tensions between minority groups and governing bodies due to the shrinking job market and redevelopment plans that were seen as promoting “black removal,” culminated in protests, and in some cases violent riots, causing devastating damage to cities’ infrastructure and communities.<sup>25</sup> The aftermath left New Jersey’s cities with reputational damage seemingly unrepairable as demonstrated by accelerated population decline and further loss of employment.<sup>26</sup>

Although members of the middle class were able to escape deteriorating cities seemingly unscathed, similar prospects for poor, working class families, few of whom were white, were far less likely. While the Fair Housing Act of 1968 outlawed *overt* discrimination against protected classes in the sale, rental, and fi-

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effect, largely prevented homeowners in urban communities with a discernible black population from receiving a loan. Newark is one of the cities to have suffered at the hands of the HOLC’s arbitrary and discriminatory appraisal methods. See JACKSON, *supra* note 1, at 190–218.

21. See GILLETTE, *supra* note 18, at 270–71.

22. See *id.* at 266; see also Gerald S. Dickinson, *Inclusionary Eminent Domain*, 45 LOY. U. CHI. L.J. 845, 853–54 (2014).

23. In Newark, the state’s largest city lost nearly 20,000 jobs in a decade alone and saw its population shrink by 36.8% between 1950 and 2010. See GILLETTE, *supra* note 18, at 267, 280.

24. Between 1961 and 1966, the black population in the Weequahic neighborhood of Newark shot up from nineteen percent to seventy percent. See GILLETTE, *supra* note 18, at 269.

25. *Id.* at 269–70.

26. *Id.* at 270.

nancing of dwellings, housing discrimination in America on the basis of race had not been entirely eradicated.<sup>27</sup> Instead, the prejudicial practice barring racial minorities from moving to the suburbs persisted through a more inconspicuous form: land use regulations, known as “exclusionary zoning” policies, utilized in order to segregate cities and suburbs by socioeconomic status, thereby circuitously perpetuating racial segregation.<sup>28</sup>

Exclusionary zoning’s potency in accomplishing the discriminatory agenda of municipalities largely rested in its enduring legality. As far back as 1926, the U.S. Supreme Court landmark decision in *Euclid v. Ambler Realty Co.*, in which Justice Sutherland infamously called apartment houses a “parasite,” tacitly gave municipalities across the country the green light to impose such exclusionary restrictions on land so long as the decisions had “a rational relation to the health and safety of the community.”<sup>29</sup> For decades after *Euclid*, the New Jersey Supreme Court consistently upheld zoning ordinances mandating square-footage and lot-size minimums under the guise of furthering local well-being.<sup>30</sup> These superficially innocuous laws artificially inflated land values and thereby denied the entry of low-income families

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27. See Fair Housing Act of 1968, 42 U.S.C. §§ 3601–19 (2012).

28. See Elizabeth Winkler, ‘Snob Zoning’ is Racial Segregation by Another Name, WASH. POST (Sept. 25, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/09/25/snob-zoning-is-racial-housing-segregation-by-another-name> [https://perma.cc/KE3M-H5RW].

29. 272 U.S. 365, 391, 394 (1926). In the district court’s opinion, Judge David Westenhaver saw the Village of Euclid’s zoning ordinance for what it in fact stood for: an unconstitutional and illegitimate exercise of police power. Judge Westenhaver wrote: “[T]he result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic.” *Ambler Realty Co. v. Euclid*, 297 F. 307, 316–17 (N.D. Ohio 1924). Fifty years after *Euclid*, the Supreme Court reaffirmed Justice Sutherland’s stance on apartment houses. See *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270 (1977) (held zoning ordinance barring construction of multifamily units constitutional because there was no proof that a “discriminatory purpose was a motivating factor in the Village’s decision”).

30. See *Fischer v. Bedminister Twp.*, 11 N.J. 194 (1952) (five-acre minimum building lots); *Lionshead Lake, Inc. v. Wayne Twp.*, 10 N.J. 165 (1952) (minimum house size); see also *Vickers v. Twp. Comm. Gloucester Twp.*, 37 N.J. 232 (1962) (upholding prohibition on trailer parks). In a 2008 published survey on land use regulation, over eighty percent of jurisdictions across the United States still had zoning laws containing minimum lot size requirements. See Joseph Gyourko et al., *A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index*, 45 URB. STUD. J. 693, 701 (2008).

in suburban municipalities as evidenced by their lack of affordable housing stock.<sup>31</sup> As Professor Andrea Boyack points out, these land use measures segregated urban and suburban areas by income and race, forcing largely poor minorities to remain “trapped in a physical, economic, and social death spiral.”<sup>32</sup>

Indeed, even public officials at the time had no reservations in openly upholding class distinctions through segregated communities. In October of 1970, Mount Laurel Township Mayor Bill Haines responded to plans seeking to build affordable housing, stating: “If you people” — i.e., poor people of color — “can’t afford to live in our town, then you’ll just have to leave.”<sup>33</sup> Without federal legislation to combat exclusionary zoning’s pervasive effects on society, the New Jersey Supreme Court took the bold first step and intervened.<sup>34</sup>

#### B. MOUNT LAUREL AND THE DOCTRINE’S CONTEMPLATED SUCCESS IN THE SUBURBS

With the establishment of suburbs, municipalities exercised their control through land use decisions in order to “maximize property values while [also] minimizing social costs.”<sup>35</sup> These “social costs” emanated from the fear that lower-income influences would dismantle the idyllic insularity that neighborhoods promoted.<sup>36</sup> Under the direction of states’ highest courts and even the U.S. Supreme Court, exclusionary zoning, indirectly upheld as a constitutional exercise of police power, impliedly encouraged socioeconomic segregation.<sup>37</sup> Yet, exclusionary zoning’s

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31. See Dickinson, *supra* note 22, at 847.

32. See Andrea J. Boyack, *Side by Side: Revitalizing Urban Cores and Ensuring Residential Diversity*, 92 CHL.-KENT L. REV. 435, 437 (2017).

33. DAVID L. KIRP et al., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA 3 (1995).

34. This is not to say that the federal government was unaware of the problem of residential segregation promulgated through the use of local zoning ordinances. In fact, the United States Secretary of Housing and Urban Development, George Romney, instituted the “Open Communities” program in 1969 to promote racial and economic integration in the suburbs. Amidst major backlash from municipalities, the Nixon Administration ultimately nixed the effort. See generally CHRISTOPHER BONASTIA, KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT’S ATTEMPT TO DESEGREGATE THE SUBURBS (2006).

35. GILLETTE, *supra* note 18, at 266–67.

36. See William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317, 323 (2004).

37. Class still remains an unprotected group under the Fair Housing Act. See generally Fair Housing Act of 1968, 42 U.S.C. §§ 3601–19 (2012).

effects were far more corrosive. A 2011 study conducted by Professors John Logan and Brian Stults revealed that in the decades following the *Euclid* decision, the nationwide degree of segregation between the white and black population had steadily increased, reaching its peak in the 1960s and 1970s.<sup>38</sup> Since then, there has been a decline, which Logan and Stults attribute to large-scale black suburbanization beginning around 1970, the same time period when the first *Mount Laurel* decision was handed down.<sup>39</sup>

In *Southern Burlington County NAACP v. Mount Laurel* (hereinafter *Mount Laurel I*, or *Mount Laurel* when generally referencing the doctrine established by the 1975 decision), the New Jersey Supreme Court was confronted with the issue of whether a developing municipality could use zoning laws to effectively exclude people from living in the township on the basis of their income.<sup>40</sup> Breaking away from decades of precedent, the court proclaimed such regulatory arrangements violative of the “elementary theory that all police power enactments . . . must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws,” regardless of whether the plans were adopted with the intent to exclude.<sup>41</sup> In an act of judicial intervention, Justice Hall also called on each municipality, not just Mount Laurel Township, to bear its fair share of the regional need for affordable housing.<sup>42</sup>

Yet, in the years that followed *Mount Laurel I*, it appeared that the groundbreaking judgment had no discernible bite and, moreover, received little support from the lower courts.<sup>43</sup> In hindsight, the immediate problem with *Mount Laurel I* was that

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38. See JOHN R. LOGAN & BRIAN J. STULTS, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 4 (2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf> [<https://perma.cc/XVJ6-JRRT>].

39. *Id.*

40. 67 N.J. 151, 173 (1975).

41. *Id.* at 159, 174.

42. *Id.* at 174. Although *Mount Laurel I* and its progeny oblige *each* municipality to provide its share of affordable housing, the mandate has largely applied only to suburban municipalities. Conversely, over fifty cities, including Newark, have historically been exempt from their obligation because they receive urban aid from the state. See N.J.A.C. 5:92-5.3(b) (1986).

43. See HAAR, *supra* note 17, at 30–35. Lower court compliance was not facilitated in due part because of the New Jersey Supreme Court’s own lackadaisical enforcement after *Mount Laurel I*. See *Pascack Ass’n Ltd. v. Washington Twp.*, 74 N.J. 470 (1977) (backing away from its decision in *Mount Laurel I*, the state supreme court limited the fair share obligation to only “developing communities”).

it imposed on towns a radically progressive scheme of integration without providing any specificity or calculable procedure on how to do so. Even more erroneously, the judgment was silent as to the consequences for noncompliance.<sup>44</sup>

Recognizing the decision's ineffectuality, the New Jersey Supreme Court came together again in 1983 to unanimously reaffirm, strengthen, and clarify the *Mount Laurel* doctrine.<sup>45</sup> In the decision known as *Mount Laurel II*, Chief Justice Wilentz authorized inclusionary measures, such as density bonuses, mandatory set-asides, and "builder's remedy"<sup>46</sup> lawsuits, to incentivize municipalities to satisfy their fair share obligation if they were unwilling to do so on their own volition.<sup>47</sup> Soon after the decision, New Jersey state legislators interjected and adopted the Fair Housing Act of 1985 (NJFHA), which thereby established the Council on Affordable Housing (COAH) in order to further assist with the implementation of the *Mount Laurel* doctrine.<sup>48</sup> Unlike previous attempts to push for suburban integration, COAH sought to induce municipalities into adopting and implementing concrete affordable housing schemes. It did so by granting mu-

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44. See Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 49 (2001).

45. See *S. Burlington Cnty. NAACP v. Mt. Laurel*, 92 N.J. 158, 200 (1983) [hereinafter *Mount Laurel II*].

46. A builder's remedy is a voluntary scheme that permits a developer to challenge a municipality's zoning code in court as long as the proposed higher-density development sets aside at least twenty percent of the project to low- or moderate-income homes. See *id.* at 218, 279. The tool is a potent one: developers — incentivized to construct housing at higher densities in order to accumulate greater profits than would be cognizable in a municipality with an exclusionary zoning regime in place — are empowered to act as private regulatory forces, compelling towns' zoning codes to be brought into compliance.

47. *Id.* at 217–18, 279. For further explanation of the methods the court in *Mount Laurel II* provided to create more affordable housing opportunities, see Dickinson, *supra* note 22, at 871–81 (builder's remedy, set-aside program, density bonus, and in-lieu fee).

48. See N.J. STAT. ANN. § 52:27D-301 *et seq.* (1985); *Hills Dev. Co. v. Twp. Bernards*, 103 N.J. 1 (1986) [hereinafter *Mount Laurel III*] (upheld the constitutionality of New Jersey's Fair Housing Act and ordered all pending cases to be transferred to COAH for the Council to administer *Mount Laurel*). In an insightful discussion on *Mount Laurel III*, Professor Paula Franzese contended that the creation of COAH was a legislative tactic to remove the judiciary from the equation. In doing so, Professor Franzese hypothesized that "the statutory scheme seems destined to promote understatement of the true extent of qualifying municipalities' fair share of regional housing needs." Paula A. Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30, 37 (1988). Written in 1988, it was as though Professor Franzese's article foresaw the state supreme court's 2015 decision, referred to as *Mount Laurel IV*, which held that the courts would once again be the first line of defense in resolving constitutional obligations under *Mount Laurel I* because COAH had failed to fulfill its statutory mission. See *In re N.J.A.C. 5:96 & 5:97*, 221 N.J. 1, 6 (2015) [hereinafter *Mount Laurel IV*].

municipalities immunity from builder's remedy lawsuits if, in exchange, they were compliant with the COAH process and obtained "substantive certification" from the agency.<sup>49</sup>

Although COAH has since dissolved, the *Mount Laurel* doctrine still stands for the proposition that New Jersey's 565 municipalities have an ongoing constitutional obligation to affirmatively use their police powers in a manner that promotes economic integration. While over 60,000 affordable homes have been created since *Mount Laurel II*, structural loopholes have undermined the doctrine's progressive potential.<sup>50</sup> Moreover, empirical research has shown that, in spite of the affordable homes created, and in contrast to the findings of Logan and Stults, eligible minorities still experienced barriers in moving to predominantly white suburbs.<sup>51</sup>

One of the more glaring explanations for the doctrine's weakened influence lies in its voluntary nature. Although Chief Justice Wilentz's opinion in *Mount Laurel II* spoke of an "obligation," the NJFHA conflicts with this mandate because it permits municipalities to carry a discretionary attitude towards implementing comprehensive plans.<sup>52</sup> In fact, between 1983 and 2000, only fifty-eight percent of New Jersey's municipalities had addressed their fair share obligation in some form.<sup>53</sup> In that same period,

49. See David N. Kinsey, *The Growth Share: Approach to Mount Laurel Housing Obligations: Origins, Hijacking, and Future*, 63 RUTGERS L. REV. 867, 868 (2011).

50. See Editorial, *The Mount Laurel Doctrine*, N.Y. TIMES (Jan. 28, 2013), <https://www.nytimes.com/2013/01/29/opinion/the-mount-laurel-doctrine.html> [<https://perma.cc/84UL-WVJ9>] (citing sociologist Douglas Massey's study on the effect of the *Mount Laurel* approach); see also Robert S. Powell, Jr. & Gerald Doherty, *Demographic and Economic Constraints on the Inclusionary Zoning Strategy Utilized for the Production of Low and Moderate Income Housing in New Jersey*, N.J. LEAGUE OF MUNICIPALITIES 3 (2015) (reporting the creation of affordable units over the twenty-year period spanning 1990 to 2010); but see Andrew Jacobs, *New Jersey's Housing Law Works Too Well, Some Say*, N.Y. TIMES (Mar. 3, 2001), <https://www.nytimes.com/2001/03/03/nyregion/new-jerseys-housing-law-works-too-well-some-say.html> [<https://perma.cc/8C5W-7EF6>] (citing advocates and social scientists who argue that the *Mount Laurel* doctrine "is the most successful model in the nation").

51. See Wish & Eisdorfer, *infra* note 59; see also LOGAN & STULTS, *supra* note 38.

52. *Mount Laurel II*, *supra* note 45, at 258; see N.J. STAT. ANN. § 52:27D-309 (1985) ("[E]ach municipality which so elects shall . . . notify [COAH] of its intent to submit . . . its fair share housing plan.") (emphasis added).

53. See Kinsey, *supra* note 49, at 871; cf. *About the Council*, STATE OF N.J. DEP'T OF CMTY. AFF., <https://www.state.nj.us/dca/affiliates/coah/about> [<https://perma.cc/76MT-7R3X>] (last visited Sept. 4, 2019) (assuring that municipality participation in the COAH process is "voluntary"). As of 2017, the number of jurisdictions in New Jersey with some form of an inclusionary housing program had risen to seventy-one percent. See Emily Thaden & Ruoni Wang, *Inclusionary Housing in the United States: Prevalence, Impact, and Practices*, LINCOLN INST. OF LAND POL'Y 8 (2017).

while 600,000 residential building permits had been issued, about four percent of that number led to the construction of new affordable units.<sup>54</sup>

Equally troubling was the NJFHA's Regional Contribution Agreements (RCAs) system. In essence, RCAs were statutorily authorized contracts, which allowed one municipality to transfer up to fifty percent of its fair share obligation to another municipality located within the same housing region.<sup>55</sup> Parties to this "intermunicipal bargaining system"<sup>56</sup> were almost always the affluent, white suburbs seeking to pay their way out of socioeconomic and racial integration, and the poorer, more racially diverse cities that became "unwilling repositories of affordable housing."<sup>57</sup> Although the RCA system was repealed in 2008, more than fifty, multi-million dollar transactions had already been consummated, thereby cementing further setbacks to *Mount Laurel's* promise of integrated communities.<sup>58</sup>

Yet, perhaps the most indicative evidence of *Mount Laurel's* reduced impact comes from a study of applicants for, and occupants of, affordable housing in New Jersey.<sup>59</sup> According to the findings of Professor Naomi Wish and Stephen Eisdorfer, even when black households living in urban communities were eligible to apply for affordable housing, only five percent occupied units in

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54. See Kinsey, *supra* note 49, at 871. Based on the number of residential certificates of occupancy issued and office-retail development completed over this period, a "growth share" system proposed by the Coalition for Affordable Housing and the Environment (CAHE) would have created affordable housing in New Jersey at six times the rate of affordable units actually created under COAH. *Id.* at 871–72.

55. See N.J. STAT. ANN. § 52:27D-312 (1985).

56. Patrick Field et al., *Trading the Poor: Intermunicipal Housing Negotiation in New Jersey*, 2 HARV. NEGOT. L. REV. 4 (1997). The authors' article evaluates three negotiated RCAs, including the Wayne-Paterson transaction, which at \$8.33 million, made it one of the largest deals, and suggests ways in which the legislature could improve RCAs to promote equity and efficiency.

57. David D. Troutt, *Making Newark Work for Newarkers: Housing and Equitable Growth in the Next Brick City*, RUTGERS CTR. ON LAW, INEQ. & METRO. EQUITY 28 (2017), <https://law.rutgers.edu/sites/law/files/CLiME%20Report%202018.pdf> [https://perma.cc/L9BC-BM93]; see Field et al., *supra* note 56, at 12 ("Only one of the fifty-four RCAs involved a poor community sending its housing obligations to a wealthier community.").

58. See N.J. STAT. ANN. § 52:27D-312(g) (2008); Field et al., *supra* note 56, at 12 ("Between 1987 and 1996 New Jersey townships produced fifty-four such agreements, involving a total of more than ninety-two million dollars.").

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

the suburbs.<sup>60</sup> In contrast, sixty-five percent of eligible whites moved from cities to the suburbs.<sup>61</sup> Those numbers are further compounded by the reality that, at the time of this 1996 study, over ninety percent of all housing units in urban areas were occupied by blacks and Latinos, whereas whites comprised of over eighty percent of suburban households.<sup>62</sup> While Wish and Eisdorfer acknowledge the possibility of individual or group preferences, the more persuasive explanation for this phenomenon is “regional mismatch;” because applicants could not apply for affordable housing outside their designated region, minorities concentrated in regions containing New Jersey’s largest cities simply remained confined to urban areas.<sup>63</sup>

The twenty-three-year-old Wish and Eisdorfer study, and the dearth of related empirical research since then, calls into question the effectiveness of both judicial intervention and the NJFHA in ending residential segregation by race and class. Although the *Mount Laurel* doctrine has had some measured success in creating affordable housing units throughout the state, a closer look at the structural loopholes reveals that the spirit of the doctrine — the mission to provide housing opportunities in suburbs for poor, urban residents of color — got lost along the way. As housing preferences in the twenty-first century are increasingly favoring urban living again, the lessons learned from the implementation of *Mount Laurel* are necessary for legislators, planners, and judges, alike, to consider when reviewing land use regulations in the context of urban revitalization. The new challenge for local governments in cities like Newark is encouraging development without the displacement of marginalized community members, who were trapped in cities as a consequence of past exclusionary zoning practices and the fallible inclusionary policies that followed.

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60. *Id.* at 1296. However, the Wish and Eisdorfer study notes that, of the 129 black-household applicants already situated in the suburbs, only twenty-one percent moved to occupy affordable units in urban centers.

61. *Id.* at 1302.

62. *Id.* at 1295.

63. *Id.* at 1303–04. Wish and Eisdorfer also note that in these regions there were more applicants than available affordable units, whereas in regions demonstrating the most robust suburban growth, there were more affordable units available than applicants. *Id.* at 1287. This data illustrates the strong possibility that the demarcation of regions was another attempt to further suppress the possibility of racial integration in the suburbs, a practice that would be in line with the other unsavory, albeit permissive, tactics of the time.

### III. INCLUSIONARY ZONING FOR TWENTY-FIRST CENTURY URBAN REVITALIZATION

American cities are on the mend. After years of social unrest and reputational turmoil culminating in the 1960s, the turn of the twenty-first century has brought with it a renewed interest in city-living across the country as evidenced by the increase in population totals.<sup>64</sup> The New York-New Jersey-Pennsylvania Metro Area, for example, has experienced over an estimated five percent increase in its population between 2000 and 2017.<sup>65</sup> Such gains in the northeastern corridor are consistent with findings that show coastal regions around the world are growing in population size and becoming increasingly urban.<sup>66</sup>

One cited explanation for this phenomenon is a current shift in the real estate market favoring “walkable urbanism.”<sup>67</sup> The term coined by Professor Christopher Leinberger is reflective of urban spaces containing “mixed-use, compact projects, of the kind where careless urbanites might live, work and grocery shop.”<sup>68</sup> Evidence for the rising demand in these walkable urban places is most apparent from the price premium — up to 200% per square

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64. Between 2010 and 2018 alone, the population of Americans living in metropolitan areas is estimated to have grown by almost nine percent. See *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2018*, U.S. CENSUS BUREAU (Apr. 2019), factfinder.census.gov [https://perma.cc/FS2H-JUZE] (on file with Colum. J.L. & Soc. Probs.) (2010: 309,338,421; 2018: 327,167,434). The United Nations projects that by 2050, sixty-six percent of the world’s population will inhabit urban areas; an increase of twelve percent from the urban population in 2014. See *World’s Population Increasingly Urban with More than Half Living in Urban Areas*, UNITED NATIONS (July 10, 2014), <http://www.un.org/en/development/desa/news/population/world-urbanization-prospects-2014.html> [https://perma.cc/2E4E-TY6S].

65. Compare U.S. CENSUS BUREAU, *supra* note 64 (2018 population: 19,979,477) with *Population Change for Metropolitan and Micropolitan Statistical Areas in the United States and Puerto Rico (February 2013 Delineations): 2000 to 2010 (CPH-T-5)*, U.S. CENSUS BUREAU (2010), <https://www.census.gov/data/tables/time-series/dec/cph-series/cph-t/cph-t-5.html> [https://perma.cc/K2S7-UVVD] (2000 population: 18,944,519). These population totals make the New York-Newark area one of the ten most populous “mega-cities” (defined as having 10 million inhabitants or more) in the world. See UNITED NATIONS, *supra* note 64.

66. See generally Liz Creel, *Ripple Effects: Population and Coastal Regions*, POPULATION REFERENCE BUREAU (Sept. 25, 2003), <https://www.prb.org/rippleeffectspopulationandcoastalregions> [https://perma.cc/RFG7-5V85].

67. See generally CHRISTOPHER B. LEINBERGER, *THE OPTION OF URBANISM* (2007).

68. Emily Badger, *The Next Major Real Estate Cycle: Walkable Urbanism?*, CITYLAB (Sept. 5, 2012), <https://www.citylab.com/life/2012/09/next-major-real-estate-cycle-walkable-urbanism/3161> [https://perma.cc/55A2-RK8R].

foot — individuals are willing to pay in comparison to adjacent, drivable suburbs.<sup>69</sup>

Presently, the tri-state region ranks as the most walkable urban metro area in the country.<sup>70</sup> Although New York City contributes substantially to the area's overall walkable space, rising land costs have motivated investors to look across the Hudson River for cheaper options in New Jersey to continue fulfilling the increasing demand.<sup>71</sup> The resultant "Gold Coast" comprises of waterfront cities Hoboken, Jersey City, Weehawken, West New York, and Edgewater, which have all become primed with transit links, green spaces, white-collar office parks, luxury apartments, and trendy retail venues.<sup>72</sup> Now Newark is the latest, and largest, waterfront city to join in on the urban revitalization trend.<sup>73</sup>

However, Newark's journey towards economic growth and forthcoming prosperity is structured radically different from its Gold Coast predecessors. Learning from its history steeped in racial and socioeconomic inequality, this time Newark's development strategy took the risk of placing inclusion and affordability at the forefront of its concerns. Using land use laws as its primary tool, Newark City Council adopted a historic inclusionary zoning ordinance, that in essence, requires at least twenty percent of residential projects be set aside for moderate- and low-income households in order to generate more affordable housing stock.<sup>74</sup> The ordinance effectively makes Newark the second city in New Jersey to pass legislation requiring affordable housing in new developments, and the first to do so at the early stages of its revival.<sup>75</sup>

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69. Christopher B. Leinberger & Kojo Nnamdi, *Walkable Urbanism is Changing City Life*, BROOKINGS INST. (Jan. 9, 2008), <https://www.brookings.edu/on-the-record/walkable-urbanism-is-changing-city-life> [https://perma.cc/3N9L-YB7Z].

70. See Christopher B. Leinberger et al., *The WalkUP Wake-Up Call: New York*, CTR. FOR REAL EST. & URB. ANALYSIS, GEO. WASH. U. SCH. OF BUS. (Apr. 2017), <http://chrisleinberger.com/docs/reports/WalkUPWakeUpNY.pdf> [https://perma.cc/ZG3V-U97P].

71. See GILLETTE, *supra* note 18, at 278.

72. See Rich Bockmann, *Gold Coast Development Glut in NJ?*, REAL DEAL (Oct. 1, 2014), [https://therealdeal.com/issues\\_articles/gold-coast-glut](https://therealdeal.com/issues_articles/gold-coast-glut) [https://perma.cc/YYX4-PWB2].

73. See Kathy Anderson, *Looking Beyond the Gold Coast: Newark is Poised for a Big Revival*, PROGRESS CAP. (Sept. 27, 2017), <https://progresscapital.com/beyond-the-gold-coast-newark-is-poised-for-a-big-revival> [https://perma.cc/BZQ7-LEWX].

74. See Ordinance 17-1457, *supra* note 10.

75. See Municipal Code § 65A-1-65A-19, *supra* note 10. Hoboken was the first New Jersey municipality known to pass a city-wide mandatory inclusionary zoning ordinance in 2012; however, widespread redevelopment in the city was already well underway al-

Although Mayor Ras Baraka touted the measure as a triumph for the city, the path leading up to mandating affordable housing in Newark was met with contentious challenges. In fact, when the ordinance initially came before City Council, it failed.<sup>76</sup> The following sections address the unique arguments opposing mandatory inclusionary zoning in Newark, before analyzing and critiquing the substance of the mandate through the lens of *Mount Laurel's* tenets. While this Note does not take up the issue of gentrification specifically, concerns of Newark gentrifying certainly influenced the early push for inclusionary zoning. Therefore, the matter will be discussed to the extent that Newark's revival-era land use regulations curb or accelerate gentrification.

## A. THE OPPOSITION TO INCLUSIONARY ZONING IN NEWARK

### 1. *Immature Economy*

Following the city council's failure to pass the inclusionary zoning ordinance, then-Councilwoman Gayle Chaneyfield Jenkins of Newark's Central Ward — which includes the rapidly developing downtown area — enumerated her issues with the prospect of mandating affordable housing in the city.<sup>77</sup> The first of the Councilwoman's objections concerned the immaturity of Newark's market to cause “landlords (in the form of lower net operating income) or tenants (in the form of higher rents) to bear the cost of this tax on new development.”<sup>78</sup> Unlike the more established markets of New York, Boston, and San Francisco, the Councilwoman claimed that Newark did not possess the same means to

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most thirty years earlier, thus distinguishing its circumstances compared to that of Newark's present-day redevelopment. See Anthony DePalma, *A New Hoboken Revival Area*, N.Y. TIMES (Nov. 11, 1984) <https://www.nytimes.com/1984/11/11/realestate/a-new-hoboken-revival-area.html> [<https://perma.cc/TB8Z-F7JX>]. The problem with using Hoboken as a case study in order to gauge the relative success of the mandate rests in the city's micro size; Hoboken is approximately two square miles in size (including water area), whereas Newark is more than thirteen times larger. See *2010 Census Gazetteer Files: New Jersey County Subdivisions*, U.S. CENSUS BUREAU (2010), [https://www2.census.gov/geo/docs/maps-data/data/gazetteer/county\\_sub\\_list\\_34.txt](https://www2.census.gov/geo/docs/maps-data/data/gazetteer/county_sub_list_34.txt) [<https://perma.cc/J5RM-932V>].

76. See Yi, *supra* note 8.

77. See Gayle Chaneyfield Jenkins, *The Truth About Inclusionary Zoning and Its Likely Impact on Newark*, TAPINTO NEWARK (July 21, 2017), <https://www.tapinto.net/towns/newark/articles/the-truth-about-inclusionary-zoning-and-its-likely> [<https://perma.cc/42AA-5H8D>].

78. *Id.*

provide developers with larger property tax abatements or other incentivizing relief out of public revenues.<sup>79</sup>

Instead, the Councilwoman advocated for a “free market.”<sup>80</sup> Under this approach, her assumption was that growth would sprawl beyond the downtown locale into marginalized areas, such as the South and West Wards, which are not as desirably located, but are in desperate need of a rehabilitated perception.<sup>81</sup> In the Councilwoman’s estimation, inclusionary zoning would cut short this chain reaction of growth and ultimately “handicap” low-income residents.<sup>82</sup>

Yet, to classify Newark as an “immature” market is a mischaracterization. Through substantial investments, Newark has been able to become a home base to major companies, such as Prudential, Panasonic, and Audible, and has attracted visitors through its entertainment venues well before the real estate market’s expansion into the city began. More appropriately, Newark should be classified as a rising market. Despite the city’s initial difficulty in bouncing back from the 2008 financial crisis, the recent boom in multimillion-dollar projects strongly suggests that inclusionary zoning law has not curbed the appetite of developers to build, and consumers to live, in Newark.<sup>83</sup>

Similarly misplaced is the Councilwoman’s praise of market-rate development under a free market regime. In Jersey City, for

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79. *Id.*; see also Thaden & Wang, *supra* note 53, at 3 (various studies between 2003 and 2012 found that mandatory inclusionary housing programs that are implemented in stronger markets with “greater local political will” are likely to produce more affordable units).

80. Jenkins, *supra* note 77. Just how “free” this market would be is unclear. The Councilwoman admits that major publicly-subsidized incentives have been necessary to jumpstart development in the Central Ward.

81. *Id.*

82. *Id.*

83. See, e.g., Rebecca Panico, *City, State Officials Break Ground on Affordable Housing in Newark’s North Ward*, TAPINTO NEWARK (July 25, 2018), <https://www.tapinto.net/towns/newark/sections/development/articles/city-state-officials-break-ground-on-affordable> [<https://perma.cc/BWJ6-ERDL>] (mixed-use development in North Ward with sixty affordable units, ten of which are dedicated for people with mental health needs); Rebecca Panico, *Developer Proposes Four Residential Towers in Newark’s West Ward*, TAPINTO NEWARK (Aug. 17, 2018), <https://www.tapinto.net/towns/newark/sections/development/articles/developer-proposes-4-residential-towers-in-newark-s-west-ward> [<https://perma.cc/3ZXG-LPQD>] (proposal for four high-rise apartment buildings with twenty to twenty-five percent of units set aside for affordable housing); but see, e.g., Rebecca Panico, *See the View From Luxury High-Rise that Just Opened in Downtown Newark*, TAPINTO NEWARK (Oct. 3, 2018), <https://www.tapinto.net/towns/newark/articles/see-the-view-from-luxury-high-rise-that-just-opened-in-downtown-newark> [<https://perma.cc/Y8TJ-TY9J>] (245-unit high-rise in the downtown with less than ten percent of units set aside as affordable).

example, where the inclusion of affordable units in new developments has been voluntary,<sup>84</sup> urban revitalization has allowed the waterfront area to prosper, while the city's surrounding neighborhoods have continued to experience spikes in violent crime and a decline in household income.<sup>85</sup> Given the similarities in the size, topographic layout, and prevalence of concentrated poverty between the two cities, Jersey City serves as a cautionary tale for the segregation of wealthy incomers and the priced-out poor that can emerge in the absence of inclusionary land use regulation.

## 2. *Illusion of Displacement*

Councilwoman Chaneyfield Jenkins and other opponents of inclusionary zoning have also argued that displacement of New-arkers is an unlikely consequence of a free market approach.<sup>86</sup> Specifically, critics have reasoned that market-rate development could not cause wide-spread displacement in the downtown area because few residents presently live there.<sup>87</sup> They have also pointed out that many of the upcoming residential projects are to be built on land that was previously vacant or formerly used as office space.<sup>88</sup>

However, Professor David Troutt finds this logic to fundamentally misunderstand the mechanics behind housing displace-

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84. See Jared Kofsky, *Jersey City Studies Whether to Enact Inclusionary Housing Ordinance*, JERSEY DIGS (Oct. 29, 2018), <https://jerseydigs.com/jersey-city-considers-inclusionary-affordable-housing-ordinance> [<https://perma.cc/4GKW-KM2P>].

85. See GILLETTE, *supra* note 18, at 278–79 (“Such new investments put Jersey City in the lead among the state’s larger cities in job growth, new construction, and median income. Nevertheless, not all areas of the city benefited. Two reports . . . noted a 10 percent rise in violent crime and an income decline from 71 to 69 percent. . . . As a result, . . . there were pockets of well-being downtown largely surrounded by poor neighborhoods.”); see also Ann Owens, *Urban Revitalization in U.S. Cities and Neighborhoods, 1990 to 2010*, 21ST CENTURY CITIES INITIATIVE SYMP., JOHNS HOPKINS U. 18 (Aug. 2016), [http://21cc.jhu.edu/wp-content/uploads/2017/07/owens\\_21cc\\_neighborhood\\_transformation\\_final.pdf](http://21cc.jhu.edu/wp-content/uploads/2017/07/owens_21cc_neighborhood_transformation_final.pdf) [<https://perma.cc/72XH-PGUV>] (finding that following Jersey City’s redevelopment, the city retained more white residents while the minority population declined); Dustin Read & Drew Sanderford, *Examining Five Common Criticisms of Mixed-Income Housing Development Found in the Real Estate, Public Policy, and Urban Planning Literatures*, 25 J. REAL EST. LITERATURE 31–48 (2017) (arguing, in part, that mixed-income housing contributes to gentrification at the expense of poor residents).

86. See Jenkins, *supra* note 77.

87. *Id.*

88. *Id.*

ment.<sup>89</sup> Instead, Professor Troutt explains that the process of gentrification merely *begins* with low-cost investments in distressed downtown areas.<sup>90</sup> If successful, it then sets off a ripple effect of investment activity in neighboring areas, bringing along with it rising living costs and the displacement of long-time residents.<sup>91</sup> Therefore, while development in the downtown may bring in more residents than it can theoretically push out, growth will likely continue beyond the purview of the downtown into immediately surrounding neighborhoods before eventually moving further along the coast to other waterfront cities like Bayonne and Elizabeth.

Indeed, concerns of housing displacement have already become an increasing reality for residents living just south of downtown Newark in the Ironbound neighborhood. Immediately following the adoption of inclusionary zoning, Newark City Council passed Ordinance 17-1437, which created the controversial “MX-3” zone permitting the construction of high-density residential and commercial uses up to twenty stories high in the otherwise “low-lying” Ironbound.<sup>92</sup> The legislation, which is essentially a density-bonus freebie for developers, passed despite fierce opposition from constituents and community organizers, who repeatedly called attention to the potential effects the zone could have on already overcrowded schools, the environment,<sup>93</sup> existing infra-

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89. See David D. Troutt, *Zoning for Inclusion Needed in Newark*, STAR-LEDGER (Aug. 2, 2017), [https://www.nj.com/opinion/index.ssf/2017/08/zoning\\_for\\_inclusion\\_comes\\_to\\_newark\\_opinion.html](https://www.nj.com/opinion/index.ssf/2017/08/zoning_for_inclusion_comes_to_newark_opinion.html) [<https://perma.cc/KC2M-GB82>].

90. *Id.*

91. *Id.*

92. Newark, N.J., Ordinance 17-1437 (Oct. 4, 2017), <https://newark.legistar.com/LegislationDetail.aspx?ID=3114669&GUID=B1F2125C-7F52-4988-AF25-48987C2B8D75&Options=&Search> [<https://perma.cc/PC4T-J54E>]; Rebecca Panico, *Ironbound Building Height Ordinance Stirs Up Gentrification Concerns*, TAPINTO NEWARK (Jan. 7, 2019), <https://www.tapinto.net/towns/newark/articles/ironbound-building-height-ordinance-stirs-up-gentrification-concerns> [<https://perma.cc/3UBD-F2FX>]. The bill was discussed in tandem with Ordinance 17-1488, a measure seeking to amend Newark’s River Public Access and Redevelopment Plan by increasing the maximum permitted height to twenty-five stories in one zone and forty stories in another zone of the Ironbound and downtown neighborhoods. Newark City Council passed the ordinance one week after approving the MX-3 Zone. See Newark, N.J., Ordinance 17-1448 (Oct. 11, 2017), <https://newark.legistar.com/LegislationDetail.aspx?ID=3131837&GUID=C657A049-216F-4F89-A73A-063CA72DB48F&Options=&Search> [<https://perma.cc/BK29-77FK>].

93. For a primer on the ongoing water crisis in Newark caused by elevated levels of lead leaching into the city’s tap water, see Nick Corasaniti et al., *Tainted Water, Ignored Warnings, and a Boss with a Criminal Past*, N.Y. TIMES (Aug. 24, 2019), <https://www.nytimes.com/2019/08/24/nyregion/newark-lead-water-crisis.html> [<https://perma.cc/B3E5-8GVZ>]. Shortly after the *New York Times* article, New Jersey

structure, and the acceleration of gentrification and displacement in Newark.<sup>94</sup>

Although community members were able to secure a judgment voiding MX-3 zones, their victory was short lived.<sup>95</sup> Soon thereafter, City Council approved another iteration of the law. In an effort to appease residents (it did not) without losing the interest of developers left in limbo, Ordinance 18-1802 lowered the maximum height of mixed residential and commercial buildings around the Ironbound's transportation hub Newark Penn Station from twenty to twelve stories.<sup>96</sup>

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officials, including Governor Phil Murphy and Newark Mayor Ras Baraka, announced a \$120 million plan to replace the 18,000 pipes causing lead to seep into the city's drinking supply. See Michael Sol Warren & Karen Yi, *A \$120M Plan Will Fix Newark's Water. Here's How Long It'll Take, and Who's Paying*, NJ.COM (Aug. 26, 2019), <https://www.nj.com/news/2019/08/a-120m-plan-will-fix-newarks-water-heres-how-long-itll-take-and-whos-paying.html> [<https://perma.cc/SJ4G-78RG>].

94. See *Municipal Council on 2019-01-09 12:30 PM – Regular Meeting*, CITY OF NEWARK, N.J. (Jan. 9, 2019), [http://newark.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=361&meta\\_id=160485](http://newark.granicus.com/MediaPlayer.php?view_id=2&clip_id=361&meta_id=160485) [<https://perma.cc/83AN-6472>] (discussion begins at 17:15); Panico, *supra* note 92 (Joseph Della Fave, Director of the community advocacy group Ironbound Community Corporation (ICC), warned that “taller, mixed-use residential buildings will lead to more market-rate units that will spark higher rents in the neighborhood and eventually displace residents,” thereby also preventing most low-income residents already living in the MX-3 zone to benefit from the limited affordable units set under the inclusionary zoning law.).

95. On November 7, 2017, residents of the Ironbound and planning advocacy group, PLANewark, filed a complaint against the Newark Municipal Council, the Newark Central Planning Board, and the City Clerk, challenging the validity of the MX-3 Zone for failure to comply with Newark's 2012 Master Plan. The complaint also alleged that the law was passed without providing proper notice to owners of the affected areas and that the planning board failed to follow due process by not permitting public comment at a hearing on the issue. Newark Superior Court Judge Patrick Bartels overturned the ordinance, granting summary judgment in favor of the residents due to the city's failure to respond to the motion. See Complaint at 5, 14–18, *PLANewark et al. v. Mun. Council Newark et al.* (N.J. Super. Ct. Law Div. Nov. 7, 2017) (No. ESX-L-008631-17); *PLANewark et al. v. Mun. Council Newark et al.* (N.J. Super. Ct. Law Div. Oct. 18, 2018) (No. ESX-L-008631-17); see also Rebecca Panico, *Judge Overturns Controversial MX-3 Zone Ordinance for Newark's Ironbound*, TAPINTO NEWARK (Oct. 13, 2018), <https://www.tapinto.net/towns/newark/sections/development/articles/judge-overturns-controversial-mx-3-zone-ordinance-for-newark-s-ironbound> [<https://perma.cc/SAU3-5BBA>]; Karen Yi, *High-Rises In One Section of Newark Struck Down – At Least For Now*, NJ.COM (Oct. 14, 2018), [https://www.nj.com/esssex/2018/10/high-rises\\_in\\_one\\_section\\_of\\_newark\\_struck\\_down\\_-.html](https://www.nj.com/esssex/2018/10/high-rises_in_one_section_of_newark_struck_down_-.html) [<https://perma.cc/LW8A-ABDV>].

96. See Newark, N.J., Ordinance 18-1802 (Nov. 27, 2018), <https://newark.legistar.com/LegislationDetail.aspx?ID=3760256&GUID=97FC002E-28A0-472B-9C8F-38D8F6FFAF82&Options=&Search> [<https://perma.cc/C6LJ-REZA>]; Rebecca Panico, *City Council Approves Ironbound Building Height Ordinance Despite Residents' Concerns*, TAPINTO NEWARK (Jan. 9, 2019), <https://www.tapinto.net/towns/newark/sections/development/articles/city-council-approves-ironbound-building-height-ordinance-despite-residents-concerns> [<https://perma.cc/XSA5-PMPT>]. In March 2019, a group of residents filed a complaint against the city to challenge the new iteration of the MX-3 zone. See

As development flourishes in the area, the infiltration of high-density uses in the Ironbound will likely contribute to escalating housing costs, which are already rising by virtue of the neighborhood's proximity to intercity transportation.<sup>97</sup> Without inclusionary zoning to act as a regulating buffer, development in the desirable areas of the city will benefit those who can afford to enjoy it at the expense of particularly susceptible residents who cannot. Although this Note recognizes that inclusionary zoning does not entirely prevent displacement, such regulations on land are still necessary, particularly at the beginning stages of redevelopment, to combat the segregating tendencies of urban revitalization.

### 3. *Government Overreach*

The third argument that critics like Councilwoman Chaneyfield Jenkins have put forth contends that inclusionary zoning is a self-imposed tax on new development, and therefore constitutes an exercise of unnecessary government overreach.<sup>98</sup> Support for their proposition arises from research studies that cast doubt on the promise of inclusionary policies to yield inclusive results as evidenced by the small number of reported affordable units built.<sup>99</sup> However, a closer look at these studies does not support the conclusion that rising waterfront markets are better off without any inclusionary measures regulating development.

At the outset, it must be acknowledged that there exists a problematic paradox in the evaluation of affordable housing programs in this country. Although organizations have identified over five hundred inclusionary programs across twenty-seven states, empirical research regarding these programs remains lim-

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Complaint, *Martinez et al. v. Newark et al.* (N.J. Super. Ct. Law Div. Mar. 7, 2019) (No. ESX-L-001930-19). The court granted the city's motion for summary judgment, dismissing the case with prejudice, on September 13, 2019. *Martinez et al. v. Newark et al.* (N.J. Super. Ct. Law Div. Sept. 13, 2019) (No. ESX-L-001930-19).

97. See IRONBOUND CMTY. CORP., *East Ironbound Neighborhood Plan 1* (Feb. 2018), [https://hesterstreet.org/wp-content/uploads/2018/03/EINP\\_FinalReport032818\\_web\\_small.pdf](https://hesterstreet.org/wp-content/uploads/2018/03/EINP_FinalReport032818_web_small.pdf) [<https://perma.cc/BRQ9-8AHT>] (finding that the presence of a PATH station "drives up rents, property taxes and quality of life issues").

98. See Jenkins, *supra* note 77.

99. See Lance Freeman & Jenny Schuetz, *Producing Affordable Housing in Rising Markets: What Works?*, 19 CITYSCAPE 217, 225 (2017) (affordable units created under inclusionary zoning laws accounted for less than one percent of the housing stock built); see also Constantine E. Kontokosta, *Mixed-Income Housing and Neighborhood Integration: Evidence from Inclusionary Zoning Programs*, 36 J. URB. AFF. 716 (2013) (finding that inclusive programs have the potential to exacerbate racial and income segregation).

ited because most local governments fail to maintain consistent records of the production of resulting affordable units.<sup>100</sup> Therefore, researchers largely rely on the available data of programs in the San Francisco Bay Area as well as the Boston and Washington, D.C. suburbs.<sup>101</sup>

Yet, the issue with drawing inferences about the potential effectiveness of Newark's inclusionary zoning law from this limited pool extends beyond the inherent dynamic differences between cities and suburbs. It also fails to recognize that suburbs traditionally utilized exclusionary policies as they were developing; only later on were inclusionary zoning laws enacted as a Band-Aid to an already chronic condition. It then follows logically that inclusive regulation in suburbs is less likely to produce the same impact as compared to markets like Newark that are not already built-out or oversaturated.

Furthermore, critics' reliance on such findings reveals a conflated understanding of how inclusionary programs can be structured. As discussed earlier, where local inclusionary zoning and statewide "fair share" laws in New Jersey are voluntary, they have often proved to be more symbolic than they have been effective in creating needed affordable housing opportunities.<sup>102</sup> This is true not only for suburbs, but also for reviving waterfront cities. For example, the Greenpoint and Williamsburg neighborhoods of North Brooklyn are among the most heavily gentrified in New York City, despite having adopted a voluntary inclusionary housing program.<sup>103</sup> Since the area's rezoning from industrial to residential use, less than ten percent of the total units built have been made affordable.<sup>104</sup>

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100. See Jacobus, *supra* note 16; Freeman & Schuetz, *supra* note 99, at 224–25.

101. See Freeman & Schuetz, *supra* note 99, at 225; Jenny Schuetz et al., *31 Flavors of Inclusionary Zoning*, 75 J. AM. PLAN. ASS'N 441, 441–56 (2009).

102. See *supra* Part II.B.

103. See Filip Stabrowski, *Inclusionary Zoning and Exclusionary Development: The Politics of 'Affordable Housing' in North Brooklyn*, 39 INT'L J. URB. & REG'L RES. 1120, 1121 (2015). As of 2016, New York City now has a "Mandatory Inclusionary Housing" plan requiring that a share of new housing be permanently affordable through zoning actions. See *Mandatory Inclusionary Housing*, N.Y.C. DEP'T OF CITY PLAN. (Mar. 22, 2016), <https://www1.nyc.gov/site/planning/plans/mih/mandatory-inclusionary-housing.page> [<https://perma.cc/MC2U-GJ3Y>].

104. Stabrowski, *supra* note 103, at 1121 ("[O]f the 7,218 total units built since the rezoning, only 700 (or less than 10%) have been new affordable housing units."). Meanwhile, the high rates of displacement of poor and minority groups have been further compounded by an increase in pernicious landlord-harassment tactics. *Id.*

In contrast, studies regard mandatory programs as being capable of producing more affordable units than voluntary ones.<sup>105</sup> Moreover, these studies also suggest that early adopters of such programs tend to build more units over time.<sup>106</sup> However, the degree of discretion that an inclusionary policy permits for the creation of affordable units is still not completely determinative of the program's potential for success. Instead, inclusionary zoning laws must be analyzed comprehensively and in light of the needs of its residents. The following section dissects the features of Newark's Ordinance 17-1457, critiquing its duration of affordability, set-aside percentage, and income targets in order to gauge the strengths and weakness of the law.

### B. COMPONENTS OF NEWARK'S ORDINANCE 17-1457

The 2015 New Jersey appellate court decision in *Fair Share Housing Center, Inc. v. The Zoning Board of the City of Hoboken* paved the way for the state's municipalities to adopt land use laws requiring new developments to set aside affordable units for moderate- and low-income households.<sup>107</sup> Following in the footsteps of Hoboken, Newark passed a mandatory inclusionary zoning law "to ensure that as the City grows and attracts new market-rate residential development, the City also provides a realistic opportunity [to] . . . help Newarker's of *all* types, ages, and income levels find quality homes."<sup>108</sup> Although the ordinance is relatively new, rapidly occurring development along and around the riverfront and Newark Penn Station neighborhoods will soon provide visibility into whether the law will curb or accelerate gentrification and displacement. In the meantime, much can be inferred from its features relative to similarly structured laws.

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105. See Freeman & Schuetz, *supra* note 99, at 227 (citing the Mukhija study of Los Angeles and Orange Counties and the Schuetz study of Boston suburbs and the San Francisco Bay Area).

106. *Id.*

107. 119 A.3d 951 (N.J. Super. Ct. App. Div. 2015) (reversing the trial court's decision that Hoboken's ordinance violated statewide affordable housing policies under the Fair Housing Act).

108. Ordinance 17-1457, *supra* note 10, Recitals (emphasis added); see Karen Yi, *Development vs. Displacement: How Newark Wants to Keep the Balance*, NJ.COM (Feb. 2, 2017), [https://www.nj.com/esssex/index.ssf/2017/02/newark\\_moves\\_toward\\_mandating\\_affordable\\_housing\\_f.html](https://www.nj.com/esssex/index.ssf/2017/02/newark_moves_toward_mandating_affordable_housing_f.html) [<https://perma.cc/BCG5-RL6E>].

### 1. *Mandatory Set-Aside Percentage*

Under Ordinance 17-1457, new residential and mixed-use developments with thirty or more units must set aside at least twenty percent of the project for income-restricted units.<sup>109</sup> Although seemingly uncontroversial, the structure of this feature has embedded within it limits that may threaten the potential of fostering palpable inclusivity particularly in the downtown neighborhood.

As a threshold matter, it must be recognized that not all new projects with thirty or more residential units will be obligated to set aside affordable housing opportunities. Rather, the mandate will only apply in a limited number of circumstances, one of which is when developments are granted any variance relief<sup>110</sup> from Newark's Zoning Board of Adjustment.<sup>111</sup> It is unclear how many developers will attempt to skirt their newly-imposed responsibility — aimed at promoting the general welfare of all Newarkers, not just upper-income residents — through this albeit narrow loophole, but it nevertheless presently exists as an option at developers' disposal. Thus far, there is already at least one approved plan near Newark Penn Station that will not be required to set aside any income-restricted units in the nineteen-story, 256-unit luxury project.<sup>112</sup>

The next source of contention arising from this term concerns the percentage allotment. At the public hearing held before the

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109. Ordinance 17-1457, *supra* note 10, § 2(a). The mandate also requires a twenty-percent set-aside for substantially rehabilitated residential development containing forty or more units. *Id.* § 2(b).

110. In the context of zoning, a variance is a form of relief granted to an applicant by a government agency (for example, a zoning board of appeals), permitting the applicant to be exempted from the literal requirements of a particular zoning ordinance. See *Zoning Board Application Process*, TWP. OF WEST ORANGE, <https://www.westorange.org/824/Zoning-Board-Application-Process> [<https://perma.cc/M3WX-PNJ3>] (last visited Sept. 19, 2019).

111. Ordinance 17-1457, *supra* note 10, § 2(a). Other circumstances that will subject new developments to the twenty-percent set-aside requirement include: if the development is pursuant to a redevelopment plan that is adopted or amended to change the zoning of the property or increase the permitted floor area ratio, density, or height; if the development occurs on city-owned residential properties sold under a redevelopment agreement; and if the development is in an MX-3 Zone. *Id.* § 2(c)–(e). Curiously, the MX-3 language appears in the ordinance before Ordinance 17-1437, which created the zone in an area near Newark Penn Station, was officially adopted.

112. See Karen Yi, *Rooftop Pool? Check. Shuffleboard? Check. This New High-Rise Even Comes with Alexa*, NJ.COM (Apr. 17, 2018), [https://www.nj.com/essex/index.ssf/2018/04/vibe\\_millennial\\_inspired\\_tower\\_coming\\_to\\_newark\\_wi.html](https://www.nj.com/essex/index.ssf/2018/04/vibe_millennial_inspired_tower_coming_to_newark_wi.html) [<https://perma.cc/9P63-PUVQ>].

adoption of Ordinance 17-1457, community organizers supportive of inclusionary policies lamented that the regulation still did not go far enough to consider the unique realities and circumstances of the city's denizens.<sup>113</sup> Specifically, advocates expressed that a set-aside of twenty percent was an arbitrary and insufficient allotment. Instead, they urged the council to require developers to restrict upwards of sixty percent of new development.<sup>114</sup>

Although this Note attempts to elucidate how certain terms render Newark's inclusionary zoning law ultimately insufficient to singlehandedly upend imminent displacement, for present purposes it is worth acknowledging that the twenty-percent set-aside is actually more progressive than other jurisdictions with inclusionary programs. For example, set-asides vary from five percent in Seattle to ten percent in Chicago and Hoboken, and fifteen percent in Boston.<sup>115</sup> New York City, though, has recently become an outlier, raising the minimum in some areas to be as high as thirty-five percent.<sup>116</sup> However, it is unlikely that Newark or other New Jersey municipalities will be able to match New York City in this respect so long as the decision in *Urban League v. Mahwah*, which found that a twenty percent set-aside is the "maximum permissible to engender the construction of lower income housing," remains good law.<sup>117</sup>

What remains to be discussed, then, is the location of the required affordable units. Section 3(a) of Ordinance 17-1457 explicitly states that the "[p]rovision of any of the required income-restricted units off-site is prohibited."<sup>118</sup> Section 5, though, not only contradicts, but also practically voids this language altogether by permitting developers to "make a voluntary cash payment into the City of Newark's Affordable Housing Trust Fund in lieu of constructing all or part of the income-restricted units re-

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113. See *Municipal Council on 2017-10-04 12:30 PM - Regular Meeting*, CITY OF NEWARK, N.J. (Oct. 4, 2017), [http://newark.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=279&meta\\_id=121672](http://newark.granicus.com/MediaPlayer.php?view_id=2&clip_id=279&meta_id=121672) [<https://perma.cc/UPT5-A4DA>] (discussion begins at 16:47).

114. *Id.*

115. See N.Y.C. DEP'T OF CITY PLAN., *supra* note 103; Municipal Code § 65A-1-65A-19, *supra* note 10.

116. N.Y.C. DEP'T OF CITY PLAN., *supra* note 103. Note that the percentage applies to offsite housing, although New York City's requirement of thirty percent onsite is still higher than in other jurisdictions.

117. 504 A.2d 66, 84 (N.J. Super. Ct. Law Div. 1984).

118. Ordinance 17-1457, *supra* note 10, § 3(a).

quired.”<sup>119</sup> Under the terms of section 5, it is difficult to resist drawing a comparison between in-lieu opt-outs and the formerly permissible use of RCAs under the NJFHA.<sup>120</sup> The players in this bargaining scheme may have changed (two municipalities in the RCA system as opposed to developers and Newark’s local governance under Ordinance 17-1457), but the structural power imbalance between the parties remains; the forces with deeper pockets have the opportunity to make a business out of the public welfare at the expense of low-income residents who are, once again, exposed to policies that re-concentrate poverty and perpetuate racial and socioeconomic segregation in housing.

Apart from language in section 5(h) stating that ten percent of the in-lieu payment will be “applied or expended within the Ward where the development is located,”<sup>121</sup> it remains to be seen where exempted affordable opportunities will ultimately be built within Newark’s twenty-six square miles of land. If the decades that followed *Mount Laurel I* serve as an indicator, the prospect of low-income residents being cast away to the outer bounds of the city is not unimaginable. Similarly, it does not provide at-risk denizens much solace that the in-lieu policy “favors construction of income-restricted units” and “should not be construed as a right available to developers at their sole option.”<sup>122</sup> Irrespective of the ordinance’s other provisions, in-lieu payments, no matter how discretionary, realistically add an asterisk next to the word “inclusionary” when considering who will ultimately benefit from Newark’s renaissance.

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119. *Id.* § 5(a).

120. *See supra* Part II.B.

121. Ordinance 17-1457, *supra* note 10, § 5(h). Section 5(c) is similarly noteworthy as it vests the city with the discretion to reduce the payment-in-lieu amounts set forth in section 5(b) if the developer agrees to build within “specific neighborhoods.” *See id.* § 5(c). As developers and investors rush towards opportunities in the riverfront and Ironbound neighborhoods, it is more likely the case that the vague demarcation is in reference to struggling communities that would be less likely to see new development were it not procured through the use of such incentivizing measures.

122. *Id.* § 5(e).

## 2. *Income Targets*

The area median income (AMI) of a region is used to determine the monthly rental rate and initial purchase price for income-restricted units.<sup>123</sup> For Essex County, the region where Newark is located, the median income is \$54,277 (2016 value) per household.<sup>124</sup> Section 2 of Ordinance 17-1457 mandates that at least twenty percent of new development units must be set aside for households with a gross income between forty and eighty percent of this AMI value.<sup>125</sup> Therefore, in order to qualify for an affordable unit in Newark, an individual in the county must earn roughly between \$19,000 and \$50,000 a year.<sup>126</sup>

In comparison to other jurisdictions, where the income target ranges from fifty to over one hundred percent of their respective AMI, Newark's inclusionary zoning ordinance appears to demonstrate its commitment to fostering inclusivity by requiring developers to provide both middle- and lower-income units.<sup>127</sup> On the surface, this assumption is warranted. However, to accept this conclusion ignores the more exigent realities looming in the background that gave rise to the legislative regulation in the first place.

As the proposal for inclusionary zoning traversed its way through city council meetings and public hearings, a consistent theme that arose, even after its enactment, concerned the meaning of affordability.<sup>128</sup> "Affordable for who?" became a rhetorical

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123. See Benjamin Schneider, *CityLab University: Inclusionary Zoning*, CITYLAB (July 17, 2018), <https://www.citylab.com/equity/2018/07/citylab-university-inclusionary-zoning/565181> [<https://perma.cc/4RXA-7AC8>].

124. See *Essex County, NJ*, DATA USA, <https://datausa.io/profile/geo/essex-county-nj/#income> [<https://perma.cc/9V4Q-V6HZ>] (last visited Sept. 14, 2019). Located in the northeastern part of the state, Essex County is home to some of the richest and poorest municipalities in New Jersey. According to data from the 2000 United States Census, towns like Essex Fells, Millburn, Glen Ridge, and North Caldwell had median household incomes well above \$100,000, compared to the \$26,913 median household income in Newark. See *New Jersey – Place and County Subdivision: GCT-P14. Income and Poverty in 1999*, U.S. CENSUS BUREAU (2000), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (on file with Colum. J.L. & Soc. Probs.).

125. Ordinance 17-1457, *supra* note 10, § 2(a)–(b).

126. See Yi, *supra* note 108.

127. See N.Y.C. DEP'T OF CITY PLAN., *supra* note 103. Middle-income units are considered restricted units for people earning typically 80–120% of the AMI, whereas low-income units are reserved for people earning between 30–50% of the AMI. See Schneider, *supra* note 123.

128. See Karen Yi, 'Affordable for Who?' City Tackles New Housing Costs, Heights, NJ.COM (Sept. 8, 2017), [https://www.nj.com/essex/index.ssf/2017/09/newark\\_tackles\\_development\\_affordable\\_housing.html](https://www.nj.com/essex/index.ssf/2017/09/newark_tackles_development_affordable_housing.html) [<https://perma.cc/Q2GA-9S8Z>]; Karen Yi, *Don't Let*

device asserted by both proponents and critics of the law, for which an absence of a satisfactory response suggests that perhaps only time will be able to provide a cognizable answer. But perhaps there is an answer, albeit an unfortunate one. Newarkers have historically faced a crisis of housing affordability, and the affordability gap has been widening since 2000.<sup>129</sup> An analysis of this underlying data indicates that Newark's inclusionary zoning law, as presently constructed, is not capable of adequately serving the very residents it was created to protect against the rising costs associated with oncoming market-rate development in the city.

Of the estimated 280,000 residents living in Newark, almost thirty percent of the city's population lives below the poverty line; a number that is about double the national average of fourteen percent.<sup>130</sup> Similarly alarming is the fact that in a city where seventy-eight percent of its residents are renters, sixty percent are rent burdened (i.e., spending thirty percent or more of income on housing costs), with over 20,000 Newarkers "extremely" rent burdened (i.e., paying more than fifty percent of income towards rent).<sup>131</sup> Professor David Troutt points out that this inequitable oppression is commonly experienced by individuals earning under \$50,000.<sup>132</sup> Now, consider that the median household income in Newark hovers below \$35,000.<sup>133</sup>

This data is significant in a number of respects, but as it relates specifically to the inclusionary zoning law, it reveals that most Newarkers fall at or below fifty percent of the AMI; an income target for which less than ten percent of restricted units are

*the Starbucks Fool You. We're Not Gentrifying, and This is How*, NJ.COM (Apr. 9, 2018), [https://www.nj.com/essex/index.ssf/2018/04/can\\_newark\\_be\\_a\\_model\\_city\\_to\\_curb\\_against\\_gentrif.html](https://www.nj.com/essex/index.ssf/2018/04/can_newark_be_a_model_city_to_curb_against_gentrif.html) [<https://perma.cc/7X7C-EF5A>].

129. See Troutt, *supra* note 57, at 1.

130. See *Newark, NJ*, DATA USA, <https://datausa.io/profile/geo/newark-nj> [<https://perma.cc/DP2Z-7TYK>] (last visited Sept. 4, 2019).

131. See *Figure 5: Rental Homes in Newark, NJ*, TOWNCHARTS (2017), <http://www.towncharts.com/New-Jersey/Housing/Newark-city-NJ-Housing-data.html> [<https://perma.cc/DY6J-HK8C>]; *When Renters Rise, Cities Thrive*, POLICYLINK 1-2 (2017), <http://nationalequityatlas.org/sites/default/files/Newark-Fact-Sheet.pdf> [<https://perma.cc/6LKU-8FQ4>]; Troutt, *supra* note 57, at 1; see also NAT'L LOW INCOME HOUSING COALITION, *Gap Report: New Jersey*, <https://reports.nlihc.org/gap/2017/nj> [<https://perma.cc/7D3Z-QNGM>] (last visited Sept. 17, 2019) (rent burden and deficit of affordable and available rental units in the New York-New Jersey-Pennsylvania tri-state area).

132. Troutt, *supra* note 57, at 1; see *QuickFacts: Newark City, New Jersey*, U.S. CENSUS BUREAU <https://www.census.gov/quickfacts/fact/table/newarkcitynewjersey/POP060210> [<https://perma.cc/4WCP-P5G2>] (last visited Sept. 4, 2019).

133. U.S. CENSUS BUREAU, *supra* note 132.

being set aside in new developments.<sup>134</sup> If the trend of increasing median rents and decreasing median household incomes remains constant through Newark's revival era, an even larger segment of the community will vie for the limited opportunities of affordable, decent housing.<sup>135</sup> Indeed, this problem became apparent when almost eight hundred applicants applied for just twenty-four affordable housing units in a Central Ward luxury high-rise that opened in 2018.<sup>136</sup>

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134. Ordinance 17-1457, *supra* note 10, § 2(a)–(b); *see supra* note 124.

135. Troutt, *supra* note 57, at 14. The city's communication team released a statement following Mayor Baraka's signing of Ordinance 17-1457 into law, reporting that the new measure would be required to give priority to Newark residents in the marketing of affordable units. *See Mayor Baraka Signs Two Measures Making Newark a National Affordable Housing Leader at City Hall Ceremony*, CITY OF NEWARK (Oct. 11, 2017), <https://www.newarknj.gov/news/mayor-baraka-signs-two-measures-making-newark-a-national-affordable-housing-leader-at-city-hall-ceremony> [https://perma.cc/UTN8-BU93]. However, section 20 of the law provides that "[t]he affirmative marketing plan is a *regional* marketing strategy" and that applications for units will be required to be made available at least at the "Essex County administrative building; Newark City Hall and the City of Newark municipal library." Ordinance 17-1457, *supra* note 10, § 20 (emphasis added). Other jurisdictions, such as Seattle, have proposed a "Community Preference Policy," which would give current neighborhood residents preference to a specified portion of all income-restricted units. *See* Natalie Bicknell, *Community Resident Preference Policy and the Fight Against Displacement in Seattle*, URBANIST (July 23, 2018), <https://www.theurbanist.org/2018/07/23/community-resident-preference-policy-and-the-fight-against-displacement-in-seattle> [https://perma.cc/BR7T-SUCW]. Perception of the policy has received mixed results. In New York, for the last three years, the city has been embroiled in a lawsuit initiated by three black women, who allege that the policy is violative of the federal Fair Housing Act "by perpetuating segregation and intentionally discriminating against and causing a disparate impact amongst racial minorities." *Winfield v. New York*, No. 15CV5236-LTS-DCF, 2016 U.S. Dist. LEXIS 146919, at \*1 (S.D.N.Y. Oct. 24, 2016); *see* J. David Goodman, *From Former de Blasio Official, an Admission on Segregation*, N.Y. TIMES (May 2, 2018), <https://www.nytimes.com/2018/05/02/nyregion/nyc-segregation-affordable-housing.html> [https://perma.cc/X335-2KZA]. This Note does not have the capacity to take up the significant legal considerations posed by Community Preference Policies but does make the point that the strategy was at least considered by policymakers in Newark and advertised as part of the proposal to the general public. *See Inclusionary Zoning Will Create Housing that Newark Families Can Afford: The Facts*, CITY OF NEWARK (Aug. 31, 2017), <https://www.newarknj.gov/news/inclusionaryzoning> [https://perma.cc/T4AA-EBUK] ("Newark residents will have a preference for the new affordable housing."); *see also* Zachary C. Freund, *Perpetuating Segregation or Turning Discrimination on Its Head? Affordable Housing Residency Preferences as Anti-Displacement Measures*, 118 COLUM. L. REV. 833 (2018) (arguing how residency preferences can be utilized in order to effectively address urban displacement).

136. *See* Rebecca Panico, *774 Applicants and Counting for Affordable Units in Newark's Luxury Apartments*, TAPINTO NEWARK (Aug. 2, 2018), <https://www.tapinto.net/sections/central-ward/articles/774-applicants-and-counting-for-affordable-units> [https://perma.cc/J566-LCWL]; *see also* *One Theater Square in Newark*, PIAZZA & ASSOCIATES INC., <http://www.piazza-and-associates.com/afhousing.php?pa=onetheatersquare> [https://perma.cc/ZF6T-FJ83] (contains monthly rental rates and maximum gross annual income limits for affordable units in a new development). San Francisco grappled with the same issue in 2018. *See* Emily Badger, *These 95 Apartments Prom-*

Although this Note acknowledges that inclusive land use regulations are not the only tools available to local governments, in Newark's unique case, they are still one of the most important. With the rise in development, residents' apprehension about the current stock of affordable housing is justifiable. In 2011, more than two hundred Newark families were told they had to leave Carmel Towers after the Department of Housing and Urban Development (HUD) cut off financial assistance to the building's landlord.<sup>137</sup> Despite qualifying for vouchers, tenants faced difficulties in finding another home due to the shortage of options and insufficient funds to move.<sup>138</sup> Fast-forward to 2016, developers have acquired the complex with plans to convert the dilapidated towers into luxury high-rises.<sup>139</sup>

As prices for new two-bedroom, two-bathroom apartments in the downtown and Ironbound neighborhoods reach almost \$3000 per month, Newark's residents, especially those who qualify for income-restricted units, are undeniably at risk of displacement with the already limited affordable opportunities waning.<sup>140</sup> Therefore, it is within this frame of reference that the ongoing battle between low-income tenants and the Newark Housing Authority to keep the severely run-down Millard E. Terrell Homes open has been such a symbolic one.<sup>141</sup> The resilience that New-

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*ised Affordable Rent in San Francisco. Then 6,580 People Applied*, N.Y. TIMES (May 12, 2018), <https://www.nytimes.com/2018/05/12/upshot/these-95-apartments-promised-affordable-rent-in-san-francisco-then-6580-people-applied.html> [<https://perma.cc/G2ZV-A5SB>].

137. See Patrick McGeehan, *As Newark High-Rise Loses Aid, Fear Sweeps Through Its Tenants*, N.Y. TIMES (Oct. 25, 2011), <https://www.nytimes.com/2011/10/26/nyregion/as-newark-tower-loses-us-aid-tenants-fear-eviction.html> [<https://perma.cc/A5P7-6YLP>].

138. *Id.*

139. See *The Essex Lake House*, ISHAY GROUP, [http://theishaygroup.com/?page\\_id=114](http://theishaygroup.com/?page_id=114) [<https://perma.cc/W573-XPFB>] (last visited Sept. 4, 2019).

140. See, e.g., *Walker House*, APARTMENTS.COM <https://www.apartments.com/walker-house-newark-nj/yrct8qs/> [<https://perma.cc/KYT8-GTAX>] (last visited Sept. 20, 2019) (two-bedroom, two-bathroom apartment along the river in the Central Ward advertised for \$2677–\$2857 per month). In a comprehensive empirical study conducted by the National Low Income Housing Coalition (NLIHC), researchers found that New Jersey has the seventh highest “Housing Wage” in the country. The study defines “Housing Wage” as “the hourly wage a full-time worker must earn to afford a modest and safe rental home without spending more than 30% of his or her income on housing costs.” This means that in order to afford a two-bedroom apartment at the Fair Market Rent (FMR) of \$1420 in New Jersey, a household must earn about \$57,000 annually. See Andrew Aurand et al., *Out of Reach 2017: The High Cost of Housing*, NAT'L LOW INCOME HOUSING COAL. 1, 162 (2017).

141. See Rebecca Panico, *Redevelopment Plan Detailed for Embattled Millard Terrell Homes*, TAPINTO NEWARK (Sept. 14, 2018), <https://www.tapinto.net/towns/newark/articles/redevelopment-plan-detailed-for-embattled-millard-terrell-homes> [<https://perma.cc/3ZWF-RJCU>].

arkers have demonstrated in endeavoring to protect their homes is the city's most reliable tool in protecting against the sort of exclusionary tactics that effectively trapped them in these urban areas decades earlier.

Newark community and business leaders assure that the purpose of inclusionary land use decisions is to "establish legally a level of certainty and consistency in the development process which will benefit *all* moving forward."<sup>142</sup> Indeed, this mission is possible, but the laws must be structured in a manner that is more reflective of its occupants' *sui generis* needs and circumstances. Therefore, a reconsideration of the income targets under Ordinance 17-1457 could yield more inclusivity grounded in Newark's present reality.

### 3. *Duration of Affordability*

A great deal of discussion emanating from inclusive land use laws centers around *how* many income-restricted units will be created and for *whom* will the units be affordable. However, researchers at the Lincoln Institute of Land Policy (LILP) argue that preserving affordable housing is as important as generating it.<sup>143</sup> Sections 10 and 16 of Newark's Ordinance 17-1457 set forth a control period of thirty years for both income-restricted ownership and rental units.<sup>144</sup> Because Newark is an overwhelmingly renter-occupied city, this section of the Note will predominantly discuss the issues that the thirty-year duration period presents for preserving the affordability of rental housing with only occasional reference to for-sale housing.

According to the available data derived from the LILP, for both rental and for-sale units, the majority of inclusionary housing programs in the United States have affordability terms of ninety-nine years or arrangements which require that the units be preserved in perpetuity.<sup>145</sup> For programs that have less than perpetual affordability periods, almost all "restart their affor-

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142. Richard Cammarieri et al., *Broadening Economic Integration, Affordable Housing Key to Newark Growth*, STAR-LEDGER (July 28, 2017), [https://www.nj.com/opinion/index.ssf/2017/07/controlled\\_gentrification\\_measure\\_protects\\_newarks.html](https://www.nj.com/opinion/index.ssf/2017/07/controlled_gentrification_measure_protects_newarks.html) [<https://perma.cc/UVL5-35E4>] (emphasis added).

143. Robert Hickey et al., *Achieving Lasting Affordability through Inclusionary Housing*, LINCOLN INST. OF LAND POL'Y 5 (2014).

144. See Ordinance 17-1457, *supra* note 10, §§ 10, 16.

145. Hickey et al., *supra* note 143, at 20.

bility terms whenever a property is resold within the control period,” or utilize other legal mechanisms, such as deed covenants (some jurisdictions have supplemented these with a deed of trust on the property), shared appreciation loans, and the right of first refusal at resale.<sup>146</sup> In the case of rental units, although there exists a paucity of scholarship on effective legal strategies for ensuring lasting affordability, the LILP suggests Community Land Trusts, stewardship requirements, and strategic partnerships as possibilities.<sup>147</sup>

Aside from the city’s right of first refusal on ownership units, Ordinance 17-1457 accords moderate- and low-income residents of income-restricted housing no other protective mechanisms to preserve affordability beyond the thirty-year period. To what extent this tenuous construction of the law will implicate Newark’s affordable housing inventory is presently undeterminable, but evidence from research on federally-subsidized units foreshadows a potentially preventable setback in the city’s mission to promote social and economic integration. For instance, a study by the National Low Income Housing Coalition (NLIHC) estimated that almost 500,000 of the nation’s 1.4 million federally-assisted rental units are at risk of losing their affordability status.<sup>148</sup> In Florida, legislators grappled with this disappearing act while the need for affordable housing concurrently rose in the state.<sup>149</sup> Similarly, research on the Low Income Housing Tax Credit (LIHTC) program, the nation’s largest affordable rental housing subsidy program, predicted that in 2020 more than one million homes developed under the initiative could become available at market-rate prices as a result of expiring affordability control periods.<sup>150</sup>

Therefore, in this respect Newark cannot claim to be a “national affordable housing leader,” especially when cities across the country, ranging from New York to San Francisco and Samford to Boulder, all ensure permanent affordability.<sup>151</sup> The city

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146. *Id.* at i, 10–12, 25–27. Ordinance 17-1457 contains a right of first refusal for the City of Newark to purchase an income-restricted ownership unit at the end of the thirty-year control period. *See* Ordinance 17-1457, *supra* note 10, § 10(f).

147. Hickey et al., *supra* note 143, at 10, 12–14.

148. *Id.* at 7.

149. *Id.* at 8.

150. *Id.*

151. CITY OF NEWARK, *supra* note 135; *see* Hickey et al., *supra* note 143, at 21–23, 46–100; N.Y.C. DEPT OF CITY PLAN., *supra* note 103.

could benefit from this equitable arrangement as research finds in favor of preservation from both a social and economic perspective.<sup>152</sup> In fact, preceding its revival era, Newark has already demonstrated a critical need for more preservation tools to achieve lasting affordability as evidenced by persistently high rates of foreclosure within the city and an eviction rate of twenty-five percent of total rental units in Essex County.<sup>153</sup>

This Part of the Note concludes by asserting that, while the current structuring of Ordinance 17-1457 contains gaps significant enough to undermine the potential to produce and preserve affordable housing for Newark's most vulnerable residents, local land use regulation by means of inclusionary zoning laws is nevertheless an essential starting point in the process of urban revitalization. Part IV of this Note next looks at the supplemental policies Newark has implemented in order to bolster the city's commitment to inclusive growth and redevelopment, and provides recommendations that fall in line with this pursuit.

#### IV. INCLUSION, BUT NOT IN ISOLATION

While scholars generally agree that inclusionary zoning is "one of the most promising strategies available" to promote economic integration in America's rebounding cities, many also recognize that it is not a cure-all for the increasing need of lasting affordable housing.<sup>154</sup> This Note has similarly argued that the enactment of Newark's Ordinance 17-1457 was necessary to implement during the beginning stages of redevelopment, but that

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152. For example, permanent affordability "assures the highest return on public investment in affordable housing production . . . and provides a key mechanism by which affordable units remain affordable when market pressures are increasingly likely to remove them from the affordable housing stock." Hickey et al., *supra* note 143, at 7–8. NLIHC also points out it can "cost 40 percent less to preserve an existing affordable unit than to build a new one." *Id.*

153. See Troutt, *supra* note 57, at 21, 24. Professor Troutt includes in his report one study that found there were 6810 foreclosures that occurred in Newark between 2008 and 2012. Professor Troutt also highlights empirical research led by Professor Paula Franzese, revealing that in 2014, approximately 40,000 rental eviction proceedings were brought in Essex County. *Id.*

154. Jacobus, *supra* note 16, at 3 ("For cities struggling to maintain economic integration, inclusionary housing is one of the most promising strategies available to ensure that the benefits of development are shared widely."); see, e.g., Freeman & Schuetz, *supra* note 99, at 217, 230; Amy Armstrong et al., *The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the Francisco, Washington DC and Suburban Boston Areas*, FURMAN CTR. FOR REAL EST. & URBAN POL'Y & CTR FOR HOUSING POL'Y 9 (Mar. 2008), <https://furmancenter.org/files/publications/IZPolicyBrief.pdf> [<https://perma.cc/35R2-4GZV>].

its terms are not progressive enough to be truly inclusive of all Newarkers, especially its at-risk, low-income residents. This Part of the Note highlights a number of commendable initiatives Newark has in place and also offers additional means for policymakers to consider in their effort to achieve equitable growth.

#### A. ANTI-DISPLACEMENT AND EQUITABLE GROWTH STRATEGIES

*We do not want to wait for the market to dictate to [Newark] how to develop. . . . We want to influence the market . . . to create something different than what the market anticipates.*

– Newark Mayor Ras Baraka announcing the city’s Equitable Growth Advisory Commission<sup>155</sup>

On December 6, 2018, Mayor Ras Baraka announced at a press conference the formation of Newark’s Equitable Growth Advisory Commission as per the recommendations set forth by Professor David Troutt and Rutgers University’s Center for Law, Inequality and Metropolitan Equity (CLiME).<sup>156</sup> The fifteen-member commission, comprised of the city’s community, academic, business, and non-profit sectors, has been tasked with providing recommendations on an array of issues, including planning and land use policy, housing policy, and real estate and business development.<sup>157</sup> The impetus for establishing the commission was to ensure that the pre-existing crisis in affordable housing would not be exacerbated during the redevelopment surge.<sup>158</sup> Or as Mayor Baraka put it bluntly: “[So] Newark [does] not become another Brooklyn.”<sup>159</sup>

The Advisory Commission is one strategy among a dozen others that are aimed at ensuring that “all residents and neighborhoods benefit from the development boom.”<sup>160</sup> This section features a sampling of two such measures — right to counsel legisla-

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155. City of Newark NJ, *Newark Announces Equitable Growth Advisory Commission*, YOUTUBE (Dec. 14, 2018), <https://www.youtube.com/watch?v=rmTOhd9tfgU> [<https://perma.cc/9Q3C-A9NS>].

156. See *Newark Announces Creation of Commission to Prevent Gentrification and Assure Equitable Growth*, CITY OF NEWARK (Dec. 6, 2018), <https://www.newarknj.gov/news/newark-announces-creation-of-commission-to-prevent-gentrification-and-assure-equitable-growth> [<https://perma.cc/F9EU-4S5N>].

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

tion and strengthened rent controls — which could establish Newark as the gold standard for equitable urban redevelopment.

### 1. *Right to Counsel Legislation*

The 1963 Supreme Court decision in *Gideon v. Wainwright* established the right to the assistance of counsel in all criminal prosecutions.<sup>161</sup> Fifty years later, housing advocates in a handful of jurisdictions are now pursuing so-called “civil *Gideon*” laws to extend this right to cases involving evictions in landlord-tenant proceedings.<sup>162</sup> In 2017, New York City became the first in the country to pass such a law, and just one year later Newark followed in the major city’s footsteps, making it the third jurisdiction in the nation to vow to provide free legal services for low-income renters facing eviction.<sup>163</sup>

Although certain fundamental particulars of the law, such as its budget, continue to be fleshed out,<sup>164</sup> Ordinance 18-0673, which establishes the right to counsel initiative, provides a framework that can serve as an example for other cities undergo-

161. 372 U.S. 335 (1963).

162. See Kriston Capps, *New York City Guarantees a Lawyer to Every Resident Facing Eviction*, CITYLAB (Aug. 14, 2017), <https://www.citylab.com/equity/2017/08/nyc-ensures-eviction-lawyer-for-every-tenant/536508/> [https://perma.cc/GP3B-Y7WZ]; see, e.g., *Mission of the Philadelphia Bar Association’s Civil Gideon and Access to Justice Task Force*, PHILA. B. ASS’N, <http://www.philadelphiabar.org/page/CivilGideon> [https://perma.cc/HCU6-S4Y6] (last visited Sept. 4, 2019).

163. See Capps, *supra* note 162 (San Francisco was the second U.S. city to approve a similar law); Karen Yi, *N.J. City is Fighting a ‘Wave of Gentrification’ With These Free Lawyers*, NJ.COM (Jan. 3, 2019), <https://www.nj.com/essex/2019/01/nj-city-is-fighting-a-wave-of-gentrification-with-these-free-lawyers.html> [https://perma.cc/NB9X-HKQ2].

164. On June 6, 2019, about six months after Ordinance 18-0673 was passed, the newly created Office of Tenant Legal Services began providing pro bono legal representation to low-income tenants facing eviction in Newark. See *Free Legal Help for Low Income At-Risk Tenants Facing Eviction Now in Operation and Taking Applications*, CITY OF NEWARK (June 3, 2019), <https://www.newarknj.gov/news/free-legal-help-for-low-income-at-risk-tenants-facing-eviction-now-in-operation-and-taking-applications> [https://perma.cc/QYK3-73VP]. At that time, the city committed \$400,000 to the initiative while simultaneously working to secure additional funding. See Karen Yi, *Renters Getting Evicted From Their Apartments in N.J. City Will Now Get Free Lawyers*, NJ.COM (June 7, 2019), <https://www.nj.com/essex/2019/06/renters-getting-evicted-from-their-apartments-in-nj-city-will-now-get-free-lawyers.html> [https://perma.cc/QDY6-HKK2]; see also Karen Yi, *Bill Gates Just Chose 10 Cities to Invest In and One of Them is Newark*, NJ.COM (June 19, 2019), <https://www.nj.com/essex/2019/06/bill-gates-just-chose-10-cities-to-invest-in-and-one-of-them-is-in-nj.html> [https://perma.cc/PHK3-QTUT] (The investment from Bloomberg Philanthropies, the Bill & Melinda Gates Foundation, and Ballmer Group will focus on affordable housing and reducing eviction by providing consulting services to ensure, for example, that the Office of Tenant Legal Services runs efficiently and effectively.).

ing redevelopment.<sup>165</sup> Declaring there to be an “emergency” as a result of “frivolous and/or retaliatory eviction actions by landlords[,] . . . the deterioration . . . of the existing housing stock, insufficient construction of affordable housing units, increasing costs of construction, financing, and . . . [reliance] on fixed or stagnating incomes,” the legislation reckons with Newark’s troubled past while also acknowledging that its rebirth has the potential to further exacerbate these circumstances.<sup>166</sup> Following through with the city’s promise that “all” should have the opportunity to benefit during this period of change, the ordinance seeks to mitigate this housing emergency for Newark’s most vulnerable renters, i.e., individuals whose annual gross income is less than two hundred percent of the federal poverty line.<sup>167</sup>

Such a measure is undoubtedly ambitious, especially in a city like Newark where eviction filings are remarkably high and virtually all tenants are unrepresented in these proceedings.<sup>168</sup> Nevertheless, the act of providing Newark’s low-income tenants with access to free legal services this early on in its renaissance sends a clear message to potential incomers and investors. The message is that the city embraces newfound growth and prosperity, but not at the expense of long-time residents who stuck it out when those with marginally better means would not step foot within its bounds. By placing affordability and basic fairness principles at the forefront, Newark demonstrates how socioeconomic integration can be a reality in other emerging cities.

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165. See Rebecca Panico, *City Council Moves Ahead with Plan to Give Evicted Residents Free Legal Services*, TAPINTO NEWARK (Dec. 24, 2018), <https://www.tapinto.net/towns/newark/articles/city-council-moves-ahead-with-plan-to-give-evicted-residents-free-legal-services> [<https://perma.cc/K8D7-XHF2>].

166. Newark, N.J., Ordinance 18-0673, Recitals (2018).

167. *Id.* § 19:3-1a.

168. See Newark, NJ, EVICTION LAB, <https://evictionlab.org/map/#/2006?geography=cities&bounds=-74.368,40.642,-73.929,40.862&type=efr&locations=3451000,-74.182,40.731> [<https://perma.cc/2FPM-USHN>] (last visited Sept. 4, 2019) (since 2008, there have been over 17,000 eviction filings made in Newark each year, having peaked in 2006 when there were reportedly 23,740 eviction filings in the city that year); Paula A. Franzese, *A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 FORDHAM URB. L.J. 661, 663 (2018) (“[A]pproximately ninety percent of landlords have legal counsel while ninety percent of tenants do not.”); see also Paula A. Franzese et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS L. REV. 1 (2016) (reports the significant underuse of the implied warranty of habitability available as a defense to tenants in eviction proceedings).

## 2. *Strengthened Rent Controls*

While Newark was still pushing for the inclusionary zoning ordinance, the city was also tackling another major initiative to preserve its affordable housing stock through strengthened rent control laws. However, the first attempt had the opposite effect; the passed legislation effectively lowered the bar for how much a landlord would need to spend rehabilitating vacant apartments in order to increase rent up to twenty percent.<sup>169</sup> It was only after a public-sponsored initiative led by a coalition of housing advocates and renters that the law was amended to place tighter restrictions on landlords seeking to increase rental rates.<sup>170</sup>

As important as it is for Newark to enact rent control laws that place more accountability on the shoulders of landlords, there are more administrative policies that the city itself can implement in order to ensure the availability of affordable housing opportunities for low-income residents. A CLiME study found that in 2015 only half of units eligible for rent control in Newark were registered with the city.<sup>171</sup> This jarring gap in promised equality is not unique to Newark, signaling a critical need for comprehensive rent control reform.<sup>172</sup> Professor David Troutt outlines five key elements of the process, which include increased regulation of landlord compliance and rent regulation enforcement while also providing clarity and notice to tenants of their rights.<sup>173</sup>

Legislation can help advance reform, but achievable progress necessitates more targeted resources to such enduringly palpable issues, not just measures symbolic of change. Professor Troutt

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169. Compare Newark, N.J., Ordinance 17-0273 § 19:2-18.4(a) (2017) (requiring landlords to spend at least up to eight months of rent per unit to be entitled to a twenty percent increase of rental rate charge) with Newark, N.J., Ordinance 14-0553 § 19:2-18.4(a) (2014) (requiring landlords to spend \$5000 multiplied by the number of vacant rooms in a unit in order to raise rent up to twenty percent).

170. See Newark, N.J., Ordinance 17-1498 § 19:2-18.4(a) (2017) (amending earlier version of Ordinance 17-0273 by requiring that landlords spend at least twelve months' rent per unit in order to raise the rent rate by a new, lowered maximum of ten percent).

171. David D. Troutt & Cristina Garmendia, *Housing in Newark Research Brief: Status and Trends, 2000-2015*, RUTGERS CTR. ON L., INEQ. & METROPOLITAN EQUITY 26 (Nov. 2017), <https://clime.newark.rutgers.edu/sites/CLiME/files/Newark%20Housing%20Research%20Brief.pdf> [https://perma.cc/4Y3M-RMLB].

172. See Cezary Podkul, *Many 'Rent-Stabilized' NYC Apartments Are Not Really Stabilized*. See *Where They Are*, PROPUBLICA (June 22, 2017), <https://www.propublica.org/article/rent-stabilized-nyc-apartments-preferential-rent-mapped-zip-code> [https://perma.cc/SQW8-AH44].

173. See Troutt, *supra* note 57, at 56.

recommends investing in digitization to improve government transparency and data-sharing capabilities as well as broadening alliances with professional allies to receive guidance from disinterested experts.<sup>174</sup> Incremental change on this front, along with the use of other policies and regulations, can cumulatively act as safeguards to vulnerable city residents.

## B. SUPPLEMENTAL LAND USE REGULATIONS AND LEGISLATIVE REFORM

This Note has largely centered its discussion around Newark's inclusionary zoning ordinance to conclude that, in isolation, the law is more likely to be symbolic than effective in promoting socioeconomic integration, let alone address the rising need for affordable housing. For cities making a comeback, there lies a delicate balance between embracing economic growth and preserving affordability. Land use controls, such as "inclusionary eminent domain" and historic preservation, can play a role by embedding in the law equitable principles in addition to other similarly-oriented policies. Moreover, regulations on land use, such as those proposed, function to maximize the efficiency of underused city property and preserve affordability. Finally, in light of the foregoing analysis, this Note also contemplates legislative reform through an economic Fair Housing Act as the most progressive and inclusive strategy.

### 1. *Inclusionary Eminent Domain*

Professor Gerald Dickinson proposed the concept of "inclusionary eminent domain" as a mechanism to construct or preserve affordable housing in areas where the property is likely to be condemned.<sup>175</sup> Inclusionary eminent domain is analogous to inclusionary zoning in a number of respects, including their shared emphasis on fostering a "three-way engagement process and partnership among the community, private developer and municipality."<sup>176</sup> However, inclusionary eminent domain is distinguishable on the grounds that it operates as an "organic ex

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174. *See id.* at 59–61.

175. *See Dickinson, supra* note 22, at 882.

176. *Id.* at 883.

ante and ex post remedy with little, if any, imposition of the courts or legislature.”<sup>177</sup>

A non-exhaustive list of land assembly tools that can be employed to effectuate inclusionary takings include: Land Assembly Districts (LADs), Land Banks (LABs), and Neighborhood Improvement Districts (NIDs).<sup>178</sup> LADs place a particularly strong emphasis on general welfare and fairness by enabling residents to collectively decide how and for what purposes condemned land will be repurposed.<sup>179</sup> Conversely, LABs focus more generally on how vacant, abandoned, and tax-delinquent parcels of land can be revitalized in a way that “contribute[s] to the health and vitality of the community[, especially] where the needs and concerns of the community are not being met.”<sup>180</sup> Lastly, NIDs levy additional property taxes on certain geographic areas within a municipality for the purpose of extending public services or financing other positive externalities, such as the construction of affordable housing.<sup>181</sup>

In a city like Newark, where the vacancy rate is as high as sixteen percent, inclusionary eminent domain can be utilized to create more affordable housing opportunities throughout the city, especially in neighborhoods outside the downtown area.<sup>182</sup> In fact, Newark may be ahead of the curve as it has been conducting ongoing studies in the West Ward, where abandoned and dilapidated properties are scattered throughout, to determine whether eminent domain can be used as an effective means for purposeful redevelopment.<sup>183</sup> As for the downtown, Newark should consider

177. *Id.* at 883.

178. *Id.* at 845.

179. *Id.* at 895–96.

180. *Id.* at 903–06.

181. *Id.* at 909–10.

182. See Troutt, *supra* note 57, at 2.

183. See Rebecca Panico, *Those Boarded-Up Homes in the West Ward? Newark Has a Plan for Them*, TAPINTO NEWARK (July 19, 2018), <https://www.tapinto.net/towns/newark/articles/those-boarded-up-homes-in-the-west-ward-newark-h> [https://perma.cc/FS72-R6SD]. As of 2019, New Jersey Governor Phil Murphy has already signed a number of bills aimed at reducing the foreclosure crisis and revitalizing abandoned buildings in the state, particularly targeting municipalities like Newark that are the most affected by these “zombie” properties. See TAPINTO Newark Staff, *New ‘Zombie’ Foreclosure Law Aims To End Blight in Newark, Camden*, TAPINTO NEWARK (Apr. 29, 2019), <https://www.tapinto.net/towns/newark/sections/development/articles/new-zombie-foreclosure-law-aims-to-end-blight-in-newark-camden> [https://perma.cc/6A8S-T6HJ] (summary of the nine bills Gov. Murphy signed into law addressing New Jersey’s foreclosure crisis); Brent Johnson & Karen Yi, *Murphy Just Gave N.J. Cities a New Weapon to Revitalize Abandoned Buildings*, NJ.COM (July 10, 2019), <https://www.nj.com/politics/>

incorporating a NID assessment in the future to supplement the construction of affordable units in addition to those that are to be created under the inclusionary zoning ordinance. Therefore, implementing any combination of these land use tools are recommended in order to enable equitable redevelopment in cities contemplating how to benefit from incoming market forces without leaving behind its low-income residents.

## 2. *Historic Preservation*

Notwithstanding the aim of safeguarding the architectural and historical value of buildings and spaces, landmarks laws have the potential to also create and maintain affordable housing in the wake of urban revitalization. Although challengers of this proposition claim that historic districts interfere with the development of affordable opportunities and drive up housing costs,<sup>184</sup> research indicates that preserving character and affordability are not mutually exclusive goals. Across American cities, research from the National Trust for Historic Preservation found that blocks with older, smaller, mixed-age buildings tend to be more inclusive, diverse, and capable of providing affordable rental housing as compared to areas in the cities with large, new structures.<sup>185</sup>

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2019/07/murphy-just-gave-nj-cities-a-new-weapon-to-revitalize-abandoned-buildings.html [https://perma.cc/D3ZK-8QCV] (discussing a new law that enables New Jersey municipalities “to designate nonprofits or public entities as ‘land banks’ to obtain vacant and abandoned properties that blight neighborhoods and revitalize them into something that can benefit the area, such as housing or places to work”).

184. See Edward L. Glaeser, *Preservation Follies: Excessive Landmarking Threatens to Make Manhattan a Refuge for the Rich*, CITY J. (2010), <https://www.city-journal.org/html/preservation-follies-13279.html> [https://perma.cc/V6TY-XSMY] (arguing that historic preservation in New York keeps real estate “enormously” expensive by impeding new construction); Dan Bertolet, *When Historic Preservation Clashes with Housing Affordability*, SIGHTLINE INST. (Dec. 19, 2017), <https://www.sightline.org/2017/12/19/when-historic-preservation-clashes-with-housing-affordability/> [https://perma.cc/2GUW-SWUY] (identifying the benefits of historic preservation while also citing examples of potential homes lost to historic preservation laws in Seattle).

185. See, e.g., *Fact Sheet: New York, NY*, NAT’L TRUST FOR HISTORIC PRESERVATION, <https://forum.savingplaces.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=0a48c7d9-a50a-1881-5439-e169e4d8864b&forceDialog=0> [https://perma.cc/4BTA-S3HF] (last visited Aug. 14, 2019) (twice the number of jobs in small and new businesses in New York City); *Fact Sheet: Philadelphia, PA*, NAT’L TRUST FOR HISTORIC PRESERVATION, <https://forum.savingplaces.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=22949ce2-b874-e47a-6a80-7a9223907f96&forceDialog=0> [https://perma.cc/MQ3B-AW5V] (last visited Aug. 14, 2019) (more than twice the population density in Philadelphia); *Fact Sheet: Newark, NJ*, NAT’L TRUST FOR HISTORIC

As rents skyrocket in the Ironbound and downtown areas of Newark, other neighborhoods suffer from underuse as almost two thousand properties remain vacant.<sup>186</sup> In a city where about half of its buildings were built before 1920, Newark could use historic preservation to salvage distressed but character-rich properties for the purpose of providing affordable housing.<sup>187</sup> Pittsburgh is just one of many successful examples where the establishment of revolving funds for preservation has resulted in the development of better quality homes utilizing its existing inventory.<sup>188</sup> Furthermore, research supports this preservation movement as a long-term plan to address the affordability crisis as it tends to be more cost effective than new construction and more capable of preventing displacement of residents.<sup>189</sup>

With steel and glass-clad high-rises beginning to tower over the city, Newark must be mindful of how incoming development will interact with existing infrastructure and impact the retention of existing affordable units. Historic preservation is one such land use regulation usable in order to promote integration of its people while also preserving its history as the “Brick City” in the face of redevelopment.

### 3. *An Economic Fair Housing Act*

Where the Fair Housing Act left off, a handful of states and municipalities over the last fifty years have taken the spirit of the law and extended it even further by enacting inclusionary land use policies aimed at mitigating socioeconomic segregation in housing. New Jersey, first with its progressive “fair share” obli-

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PRESERVATION, <https://forum.savingplaces.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f424c80c-fb4e-fa52-7e9c-b73297b7111e&forceDialog=0> [<https://perma.cc/AG5E-LU5V>] (last visited Aug. 14, 2019) (more than \$200 million in private investment through the federal historic tax credit in Newark).

186. See *Abandoned Properties*, CITY OF NEWARK: OPEN DATA, <http://data.ci.newark.nj.us/dataset/abandoned-properties/resource/796e2a01-d459-4574-9a48-23805fe0c3e0> [<https://perma.cc/6ZTG-MZNU>] (last visited Sept. 4, 2019); Karen Yi, *This N.J. Block is Dying, One Abandoned Property at a Time*, NJ.COM (Sept. 3, 2017), [https://www.nj.com/esssex/2017/09/newark\\_abandoned\\_properties\\_pushing\\_longtime\\_homeo.html](https://www.nj.com/esssex/2017/09/newark_abandoned_properties_pushing_longtime_homeo.html) [<https://perma.cc/JXG5-T4RP>].

187. See Fact Sheet: Newark, *supra* note 185.

188. See Elizabeth Byrd Wood, *Making the Affordable Housing-Historic Preservation Connection*, 29 FORUM J. 21, 22–24 (2014), <https://muse-jhu-edu.ezproxy.cul.columbia.edu/article/556361/pdf> [<https://perma.cc/6YNJ-GC7W>].

189. See Elizabeth M. Tisher, *Historic Housing for All: Historic Preservation as the New Inclusionary Zoning*, 41 VT. L. REV. 603, 620–628 (2017).

gation under the *Mount Laurel* doctrine and then followed by the recent emergence of mandatory inclusionary zoning laws in its cities, became a leader and remains a model in this nation for promoting equitable inclusion. However, as this Note has pointed out, local land use regulation can only go so far. Structural loopholes and porous constructions embedded in its terms mar the potential of these laws to fight racial and income-based segregation. Even worse, these gaps can exacerbate the growing affordability crisis. Therefore, perhaps now is the time to consider federal action through an “Economic Fair Housing Act.”

A Senior Fellow at The Century Foundation, Richard Kahlenberg proposed the progressive idea in order to strengthen existing strategies in states, such as New Jersey, Massachusetts, California, and Maryland, and to put an end to exclusionary practices still legal throughout the country.<sup>190</sup> Recognizing that free markets naturally discriminate by income, Kahlenberg argues that these forces do not excuse the complicit contributions of local governments through their land use regulations that restrict segments of the population from living and participating in their communities.<sup>191</sup> To be sure, there are a number of objections that have been raised in response to such progressive legislation, but Kahlenberg insists that at its core, an Economic Fair Housing Act is symbolic of liberal principles about equity and conservative ideals tied to liberty; private individuals should be allowed to build at greater densities than exclusionary zoning permits, thereby facilitating the production of more affordable housing opportunities and fostering socioeconomic integration.<sup>192</sup>

Although the prospect of an Economic Fair Housing Act may be untenable in light of the current political climate,<sup>193</sup> Congress has already begun to propose piecemeal policies that address the affordability crisis as well as the segregating effects of exclusion-

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190. Richard D. Kahlenberg, *An Economic Fair Housing Act*, CENTURY FOUND. (Aug. 3, 2017), <https://tcf.org/content/report/economic-fair-housing-act> [https://perma.cc/DBX5-CDG6].

191. *Id.*

192. *Id.*

193. See, e.g., Tracy Jan, *HUD Secretary Ben Carson Doubles Down on Dismantling Obama-Era Fair-Housing Policies*, WASH. POST (May 19, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/05/19/hud-secretary-ben-carson-doubles-down-on-dismantling-obama-era-fair-housing-policies> [https://perma.cc/YK2S-B3MD].

ary zoning.<sup>194</sup> To curtail these “economically discriminatory government zoning policies,” Kahlenberg and other scholars have also suggested that in jurisdictions practicing exclusionary zoning, federal funding for infrastructure should be stripped and family mortgage interest deductions should be reduced.<sup>195</sup> Through the use of intermediary steps, this policy momentum can pave the way for eventual reform on the federal level.

## V. CONCLUSION

Inclusionary zoning ordinances requiring the integration of affordable units alongside market-rate ones are an essential land use regulation for cities entering into a redevelopment era. When implemented at the beginning stages, these laws have the capacity to curtail displacement in the face of rising rents and can ensure that moderate- and low-income residents have an opportunity to benefit from the city’s long-awaited prosperity. However, this policy should not be considered a panacea for the increasing need of affordable housing. The terms of the mandate must be reflective of the needs and circumstances of current residents in order to produce meaningful socioeconomic integration and preserve realistic affordability. Moreover, mandatory inclusionary zoning should be viewed not as the ceiling, but as the foundation from which other regulatory policies can supplement in working towards its goals.

In this regard, Newark will undoubtedly be a city to watch and learn from as it experiences a renaissance well over a century in the making. By placing affordability at the forefront of its concerns, the city has valiantly demonstrated its commitment to equitable growth. Yet, during this window of opportunity, Newark can and should do more to protect its vulnerable residents from the unintended consequences of booming development. More regulations on land to preserve affordability can help, but it also

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194. See Casey Berkovitz, *New Bills Mark a Step Forward on Housing Equity*, CENTURY FOUND. (Nov. 20, 2018), <https://tcf.org/content/commentary/new-bills-mark-step-forward-housing-equity> [<https://perma.cc/SDS8-HHX7>] (Senator Kamala Harris has proposed to give tax credits to burdened individuals; Senator Elizabeth Warren has proposed policies that would incentivize relaxing exclusionary zoning codes and provide federal assistance in formerly redlined neighborhoods; Senator Cory Booker, former Mayor of Newark, proposed a bill similar to the “fair share” obligation under *Mount Laurel* in exchange for federal funding).

195. Kahlenberg, *supra* note 190.

starts with reforming the laws it has presently. While Newark does not need a history lesson to drive the urgency of the point home, it is worth asking where at-risk denizens, who have historically faced barriers in attempting to find refuge in the suburbs, will be able to turn to next if they are priced out.