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## The Color of Power: How Local Control over the Siting of Affordable Housing Shapes America


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## **THE COLOR OF POWER: HOW LOCAL CONTROL OVER THE SITING OF AFFORDABLE HOUSING SHAPES AMERICA**

*Kate Walz and Patricia Fron\**

**Abstract:** Some cities, such as Chicago, have power structures that allow hyperlocal control over the siting of affordable housing—and maintain racial segregation of residential housing as a result. Advocates can push for structural changes that can curb this power and reduce racial segregation. These changes include citywide comprehensive planning, racial equity impact assessments, an overhaul of the zoning process grounded in racial equity, and a comprehensive education campaign to address the city’s long history of segregation and the city’s duty to proactively address it.

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I. INTRODUCTION

Residential segregation is baked into the American experience. America has a long and sordid history of local, state and federal laws deliberately separating the races, seeking to advance the belief among whites that they were superior to blacks.<sup>1</sup> The 1968 Kerner Commission report found that the United States was “moving toward two societies, one black, one white—separate and unequal” that “threaten the future of every American.”<sup>2</sup> In response, the Fair Housing Act (FHA) was enacted, outlawing housing discrimination in its many forms. Yet, little has changed since its passage. Residential segregation stubbornly persists in the United States, leading to vastly different life outcomes by race and ethnicity.

The current power of local communities to veto affordable housing proposals is a potent reminder of America’s continued commitment to racial segregation.<sup>3</sup> Present-day proxies for racial discrimination are often most powerful when aimed at populations with the least political capital, namely, those in need of affordable housing who are disproportionately people of color in many parts of the country. Affordable-housing opponents, who are often homeowners, have used their status to reinforce racial boundaries under the guise of preserving property values. Their actions debunk commonly held beliefs that becoming a homeowner somehow automatically triggers a commitment to advance the common good of a community.<sup>4</sup>

From Los Angeles to Baltimore to Philadelphia, not-in-my-backyard (NIMBY) power plays out in many forms throughout the country.<sup>5</sup> However, Chicago has developed the master class for

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<sup>1</sup> See David Oshinsky, *A Powerful, Disturbing History of Residential Segregation in America*, New York Times (June 20, 2017), <https://www.nytimes.com/2017/06/20/books/review/richard-rothstein-color-of-law-forgotten-history.html> (reviewing Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017)).

<sup>2</sup> *Report of the National Advisory Commission on Civil Disorders*, 1 (1968). See Justin Driver, *The Report on Race That Shook America*, Atlantic (May 2018), <https://www.theatlantic.com/magazine/archive/2018/05/the-report-on-race-that-shook-america/556850/>.

<sup>3</sup> See Emily Badger, *How ‘Not in My Backyard’ Became ‘Not in My Neighborhood’*, New York Times (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/upshot/zoning-housing-property-rights-nimby-us.html>.

<sup>4</sup> See Brian J. McCabe, *No Place Like Home: Wealth, Community, and the Politics of Homeownership* (2016).

<sup>5</sup> See, e.g., *Baltimore Regional Housing Campaign v. State of Maryland*, American Civil Liberties Union of Maryland (n.d.), <https://www.aclu-md.org/en/cases/brhc-v-state-maryland> (In Maryland, state polices applied a federal government program, that aimed to create affordable rental housing, in a discriminatory manner that concentrated affordable family housing in high poverty black neighborhoods.); Patrick Kerkstra et al., *Philadelphia’s Councilmanic Prerogative: How It Works and Why It Matters*, The Pew Charitable Trusts (July 2015), <https://www.pewtrusts.org/-/media/assets/2015/08/philadelphia-councilmanic-report--with-disclaimer.pdf> (In Philadelphia, P.A., city council members can stop or alter a development project if they feel that a project is not a good fit for a neighborhood.); Emily A. Reyes, *L.A. Lawmakers Can Block Homeless Housing Projections by Simply Withholding a Key Letter*, Los Angeles Times (Mar. 12, 2018), <https://www.latimes.com/local/lanow/la-me-ln-council-power-20180312-story.html>

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other local governments on how hyperlocal control can maintain residential segregation and block affordable housing. In a decades-long practice that has systemically preserved racial segregation across Chicago communities, local council members, known in Chicago as aldermen and alderwomen, use their power—their “aldermanic prerogative”—to block family affordable housing developments.<sup>6</sup> This power is disproportionately exercised by those council members representing predominately white neighborhoods. Aldermanic prerogative allows council members to maintain control over their wards through control over virtually all decisions on zoning, planning, city financing, and city-owned lots. This power, though not the result of legislatively granted authority, is overwhelmingly assented to among other council members, the mayor, and city departments.

Local governments such as Chicago that cede to NIMBY demands of white communities face major consequences. Concentrating decision-making power in this way creates vast injustices beyond housing. As Dr. Kenneth B. Clark noted, “Racial segregation, like all other forms of cruelty and tyranny, debases all human beings—those who are its victims, those who victimize, and in quite subtle ways those who are merely accessories.”<sup>7</sup>

## II. CITY OF CHICAGO: 50 WARDS—50 FIEFDOMS

The City of Chicago is composed of 50 wards, and the interests of each ward are represented by an elected council member. In theory, the distribution of council members among 50 wards creates equal representation among the city’s almost three million residents. However, the policy decisions that shape Chicago’s communities—those that determine who gets to live where and what community amenities residents will have access to—are muddled by hyperlocal power dynamics that pit ward against ward and snuff out cohesive efforts to further the common good.<sup>8</sup> Through aldermanic prerogative, Chicago has tacitly established “mini-fiefdoms” held together by the simple understanding among council members and the city’s administration that each council

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(In Los Angeles, C.A., city council members can withhold a required “letter of acknowledgement” in order to halt funding from the housing department for a proposed building.)

<sup>6</sup> See Chicago Area Fair Housing Alliance & Sargent Shriver National Center on Poverty Law, *A City Fragmented: How Race, Power, and Aldermanic Prerogative Shape Chicago’s Neighborhoods*, 4 (2018), <http://povertylaw.org/aldermanic-report>.

<sup>7</sup> Kenneth B. Clark, *Dark Ghetto: Dilemmas of Social Power* 63 (1965). Dr. Clark was an educator and psychologist who, along with his wife, Mamie, originated the famous doll studies on the harmful effects of racism in black children—studies cited in the U.S. Supreme Court’s landmark ruling in *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954).

<sup>8</sup> Faisal Khan & Kelly Tarrant, *How a Chicago alderman has used zoning law and political strong-arming to control private businesses*, PROJECT SIX, (May 16, 2017), <https://thesecondsix.com/investigation/how-a-chicago-alderman-has-used-zoning-law-and-political-strongarming-to-control-private-businesses/>.

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member has the power to decide what happens within that their ward.<sup>9</sup> These “fiefdoms,” in turn, are plagued by an undercurrent of political influence concentrated among those who have their council member’s ear—notably those with money, power, and election clout—influence that forces either capitulation to the demands of their most powerful constituents or ouster. Low-income Chicagoans, by contrast, have little say in the decisions that determine where and how they live.

Aldermanic prerogative necessitates the continuation of the status quo, as council members rely on the preservation of neighborhood dynamics and demographics to secure their political longevity. Powerful and predominantly-white neighborhood interest groups, in turn, have relied on council members to assist in the preservation of neighborhood racial makeup. This is historically rooted in an explicit desire to restrict black access to white neighborhoods.<sup>10</sup> During the Great Migration, white communities devised outright barriers to stave off black integration.<sup>11</sup> With the enactment of the Federal FHA in 1968, many of these direct practices were outlawed.<sup>12</sup> However, over the years, racially-based housing discrimination has manifested in ever more insidious fashions.

Although affordable housing is needed at varying income levels and by all racial and ethnic groups, to many Chicagoans the face of affordable housing is black, and those in need of affordable housing have become racial stereotypes. Affordable housing and the discussions that stem from it—from property values and density to parking and schools—have become dog whistles evoking both explicitly and implicitly biased fears of neighborhood racial change and of black former public housing residents in particular. The consequences harm low- and moderate-income families of all racial and ethnic backgrounds, most acutely black and Latinx households, by erecting barriers to affordable rental housing and, to the greatest extent, family affordable housing.

The result is the perpetuation of racial segregation and the concentration of poverty, fueling vast inequities in community investments and access to opportunity for Chicago residents. Although

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<sup>9</sup> See Alex Keefe, *Pregnancy Tests? Pigeon Poo? What Chicago Aldermen Really Do*, WBEZ CURIOUS CITY, (June 11, 2013), <https://www.wbez.org/shows/curious-city/pregnancy-tests-pigeon-poo-what-chicago-aldermen-really-do/4d099e24-9b47-4b9d-8d39-fbbc92d379c0> (Quoting Alderman Joe Moore of the 49th Ward describing Chicago’s political system as “a feudal system, where the mayor is sort of a de facto king, and each alderman is the lord—I guess, lady, for female aldermen—of their individual fiefdom”); see also Maya Dukmasova, *How’s Chicago supposed to desegregate when developments with affordable housing can be blocked by aldermen on a whim?*, CHICAGO READER (Jan. 5, 2018), <https://www.chicagoreader.com/Bleader/archives/2018/01/05/how-chicago-supposed-to-desegregate-when-developments-with-affordable-housing-can-be-blocked-by-aldermen-on-a-whim>.

<sup>10</sup> See Rothstein, *supra* note 1, at 77–91.

<sup>11</sup> *Id.* at 143–46.

<sup>12</sup> Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 800-819, 82 Stat. 73, 81-89 (codified as amended at Fair Housing Act, 42 U.S.C. §§ 3601-3631 (2017)).

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racial segregation is unfortunately common throughout the country, what makes Chicago's (and generally the Midwest's) segregation unique is its durational potency and the resulting racial inequities manifested in every facet of life for Chicago's residents.<sup>13</sup> Chicago is, by consequence, an incontrovertibly fragmented city, where public investments and amenities are concentrated in select neighborhoods while others have been devalued and divested, where exclusionary policies ensure that predominantly white and low-poverty areas remain difficult to access for low- and moderate-income households and virtually impossible to access if those households are also black or Latinx.

In turn, Chicago's white, black, and Latinx residents live, to a significant degree, in separate neighborhoods and face distinct life outcomes.<sup>14</sup> Chicago is, and has been for more than 50 years, a "highly segregated city," with whites segregated on the North, Northwest, Southwest and far South Sides, blacks almost exclusively on the West and South Sides and Latinx populations in clearly identifiable clusters on the North, Northwest, Southwest and far South Sides. Except for the expansion of Latinx households, these color lines have remained virtually unchanged since the 1980 Census.<sup>15</sup> Black-white segregation remains the starkest in Chicago, with black households across income brackets segregated to a high degree in predominantly black neighborhoods.<sup>16</sup> This segregation drives inequities in access to opportunities such as jobs, community services, commercial and other neighborhood amenities and sufficiently-resourced schools.<sup>17</sup>

Chicago's enduring residential racial and economic segregation has produced harmful collateral consequences for all.<sup>18</sup> However, Chicago's political machine ignores what is good for all to advance what is good for the few. When making the decisions that shape Chicago neighborhoods, aldermanic prerogative forces council members to navigate a clamor of interests (from developers to advocates and NIMBYs)—the tone and tenor of which is unique to each ward—compelling many council members to do not what is best for the city or even their ward but what will least damage their reputation with powerful groups and their chances of reelection. The result is a culture where (a) council members in predominantly white and low-poverty areas erect barriers to family affordable housing to preserve the status quo; (b) council members in wards that have faced

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<sup>13</sup> John C. Austin, *Segregation and changing populations shape the rust belt's politics*, BROOKINGS: THE AVENUE (Sept. 14, 2017).

<sup>14</sup> Kasey Henricks et al., Institute for Research on Race and Public Policy, *A Tale of Three Cities: The State of Racial Justice in Chicago Report* (May 19, 2017).

<sup>15</sup> *2010–2014 Consolidated Plan*, City of Chicago, at 19–20 (Feb. 2010).

<sup>16</sup> Henricks et al., *supra* note 14, at 24, 26.

<sup>17</sup> *See Bouncing Back: Five-Year Housing Plan 2014–2018*, City of Chicago, at 5-6 (Feb. 2014), [https://www.cityofchicago.org/city/en/depts/dcd/supp\\_info/five-year-housing-plan-2014-2018.html](https://www.cityofchicago.org/city/en/depts/dcd/supp_info/five-year-housing-plan-2014-2018.html)

<sup>18</sup> Henricks et al., *supra* note 14.

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chronic disinvestment are obliged to take more than an equitable share of affordable housing because, if it is not built in their wards, it will not be built at all, and there exists a demonstrated need among their constituents; and (c) council members in gentrifying areas have diminished power to stave off the market forces creating an increasingly unaffordable housing landscape.

## III. NO PLACE HERE

Predominately white communities, fearing neighborhood racial change, often engage in aggressive NIMBY tactics to block family affordable housing deals. These tactics include publicly framing objections as concerns over school overcrowding, lowering property values and community safety. In the face of this pressure, council members—whether they personally agree with the community’s view or not—capitulate to these demands and prevent affordable housing projects from moving forward.

Yet, local governments that advance the racial animus of private citizens in their decision making do so at their peril. In examining whether the actions of a governmental body were illegally motivated by racial animus, statements made by private citizens and decision makers during the sequence of events leading up to the denial of housing are highly relevant.<sup>19</sup> References to community changes as a result of the inclusion of affordable housing, such as fear that a community will become “a ghetto,” that the residential character or shared values of the community will change or that there will be an increase in blight or crime or a decrease in property values have all been found to be camouflaged racial expressions.<sup>20</sup> A local government does not avoid liability by claiming that it was simply acquiescing its constituents’ desire.<sup>21</sup> Indeed, a

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<sup>19</sup> See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (certain facially innocuous statements are evidence of racial animus, especially when made during sequence of events preceding challenged decision).

<sup>20</sup> See Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982) see also Avenue 6E Investments LLC v. City of Yuma, No. 2:09-cv-00297, JWS, 2013 WL 2455928 (D. Ariz. June 5, 2013), *rev'd*, 818 F.3d 493 (9th Cir. 2016) (residents decried higher-density and lower-priced housing because it would increase crime and reduce property values based on “demographics” that they associated with developer’s other properties, which were at least 50% Latinx); Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Par., 641 F. Supp. 2d 563, 565 (E.D. La. 2009); Sunrise Dev., Inc. v. Town of Huntington, 62 F. Supp. 2d 762, 775 (E.D.N.Y. 1999) (substantial likelihood of discriminatory intent under Fair Housing Act when residents of community voiced opposition to construction of assisted living facility, including by criticizing “appearance and activity” of such facilities and asserting that such facilities would “alter the residential character,” lower property values, and drain community services); Atkins v. Robinson, 545 F. Supp. 852, 874 (E.D. Va. 1982) (statement that resident “feared the projects ‘would degenerate to slum-like conditions, with an abundance of crime’” was veiled reference to race).

<sup>21</sup> See Palmore v. Sidoti, 466 U.S. 429, 433 (1984); See also Lucas v. Forty-Fourth Gen. Assembly of State of Colo., 377 U.S. 713, 736–37 (1964); Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 49 (2d Cir. 1997); Ass'n of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin. or Administracion de Reglamentos y Permisos, 740 F. Supp. 95, 104 (D.P.R. 1990) (“[A] decisionmaker has a duty not to allow illegal prejudices of the majority to influence the decision-making process. A ... discriminatory act [is] no less illegal simply because it

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decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decision makers personally had no strong views on the matter.<sup>22</sup>

Many cities receive federal housing and community development funds, a significant portion of which is to support the affordable housing needs of low- to moderate-income households. As a condition of receiving these funds, cities certify annually to compliance with federal civil rights laws, including the duty of affirmatively furthering fair housing. This obligation requires cities to take meaningful actions, beyond simply combating discrimination, to tackle disparities in housing needs and access to opportunity and to create “integrated and balanced living patterns.”<sup>23</sup>

For new construction projects using HOME funds, additional analysis of each project according to the “site and neighborhood standards” is required to ensure that each project will not further segregation.<sup>24</sup> Under this analysis, the participating jurisdiction is prohibited from placing a project in an area of minority or poverty concentration unless “sufficient, comparable opportunities exist” for low-income families of color to live outside areas of minority concentration or one of several conditions of overriding need are met.<sup>25</sup> The conditions for placing housing in areas of minority and poverty concentration may not be repeatedly used “if the use of this standard in recent years has had the effect of circumventing the obligation to provide housing choice.”<sup>26</sup> The analysis requires the participating jurisdiction to identify the racial and ethnic makeup of the area, justify the placement of the project and consider the marginal effect of the project’s placement on the opportunities offered by the participating jurisdiction’s housing inventory.

Aldermanic prerogative is, however, one of the key vehicles for the infiltration of racial animus into Chicago’s decision making over where new rental housing is built. As a result, most affordable housing developers, at least those savvy about Chicago politics, will not bother to propose developments in wards where council members or powerful local stakeholders are known to oppose affordable housing. Because council members have certain tools at their disposal to block developments completely or influence the number and type of affordable units, developers focus

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enjoys broad political support.”); United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1223–24 (2d Cir. 1987).

<sup>22</sup> See *What Is Gautreaux?*, Business and Professional People for the Public Interest (1991).

<sup>23</sup> 24 C.F.R. §§ 5.152, 91.225(a)(1), 570.601(a)(2) (2018).

<sup>24</sup> *Id.* §§ 92.02(b), 983.57(e). See U.S Department of Housing and Urban Development, *The HOME Program: HOME Investment Partnerships* (n.d.).

<sup>25</sup> 24 C.F.R. § 983.57(e)(3)(i).

<sup>26</sup> *Id.* § 983.57(e)(3)(vi).



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their efforts on a few wards friendly to affordable housing.<sup>27</sup> However, this power is not equalized. Despite overwhelming deference to aldermanic prerogative, in instances in which aldermanic prerogative is deployed to advance affordable housing, it is often ignored and at times actively blocked by the city council.

## IV. UNFETTERED ZONING POWER

The cornerstone of aldermanic prerogative is the power to control zoning, as this allows or limits density. Limiting or reducing density on a single site has the effect of eliminating the financial feasibility of a particular affordable housing proposal on that site. Limiting or reducing density over a larger area artificially limits the supply of dwelling units, inflating both housing and land costs in a neighborhood and eliminating the financial feasibility of affordable housing on a broader basis. Chicago has delegated this vast power to individual council members and places virtually no check on its use. Council members, either on their own or through a ward committee process, ultimately decide the fate of residential and commercial development by pulling multiple levers to control zoning. The use of these levers has traditionally served to keep affordable housing out of predominantly white wards or those with predominantly white pockets and to heavily concentrate it in predominantly black or Latinx areas.<sup>28</sup> Similar power dynamics may be at play in cities beyond Chicago.

A. *Zoning Advisory Committees and the Development Proposal Process*

One of the most powerful tools to influence zoning and development is the use of constituent committees to decide or advise on most residential zoning matters in the ward. These committees are intended to inform and consult with their respective council members on community processes ranging from rezoning to sanitation. Ten wards, a majority of which (eight) are on the predominately white North or Northwest Side, have established formal “zoning advisory committees,” and council members within these wards rely on the committee as the primary informer on residential and commercial development. Zoning advisory committees are often used to preserve the demographic makeup of a single ward or as a means of preserving predominantly white populations within wards. The committees use this power not only to block zoning change requests but also to upend the overall character and nature of a proposed affordable housing development. For example, zoning advisory committees, as a precondition of receiving their approval, will often require a developer to reduce the number of affordable housing units in a project or reduce the size of units so that they are not available to families with children.

<sup>27</sup> Multiple developers independently noted that Alderman Walter Burnett (27th Ward) was one of the few North Side aldermen to welcome and support affordable housing.

<sup>28</sup> See John Byrne, Seven North Side Aldermen Vow to Add Affordable Housing to End “Legacy of Exclusion,” CHICAGO TRIBUNE (May 10, 2017).

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Additional hurdles to the development of affordable housing, most notably in white neighborhoods, are the ward-level development proposal processes. Often crafted by the zoning advisory committees and council member offices, these processes set forth a maze of varied ward-by-ward requirements and subsequent cost-burdens placed on residential and commercial developers. Requirements can include alerting all residents within 1,000 feet of the proposed site at the developer's expense, respecting architectural heritage or holding public hearings in conjunction with the respective neighborhood associations. These requirements often have the effect of deterring developers from attempting to develop affordable housing in certain wards entirely. In other cases, developers may spend significant time and money on completing one or more of these tasks, only to have their proposal rejected at the whim of a council member or zoning advisory committee.

A common element of the development processes is the formal or informal requirement to hold a community meeting before the developer receives aldermanic support. Community meetings, though intended to inform and elicit transparent feedback, are often hijacked by a vocal minority fearful of neighborhood change and invite early and discriminatory opposition to a project. In neighborhoods characterized by predominantly white populations, these community meetings become sounding boards for NIMBYism and fear-mongering. In many instances, such fear-based opposition is also expressed in virtual spaces, such as Nextdoor or Facebook, where council members are known to participate.<sup>29</sup>

Equivalent ward-level discretion over development does not exist to the same extent in the city's predominately black and Latinx neighborhoods. While 62% of majority-white wards have a zoning advisory committee, only 31% of majority black and Latinx wards have such a committee. Predominantly black or Latinx wards with a zoning advisory committee, whether informal or formal, have on average 320% more affordable units in the ward than their majority-white counterparts.

### *B. Downzoning and Landmarking*

By reducing density through "downzoning," council members increase the power they have to block affordable housing development by preemptively reducing the likelihood of higher-density proposals and ensuring proposals that do come through will trigger ward-specific approval processes, such as zoning advisory committee approval.

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<sup>29</sup> Members of a closed Facebook group who opposed the 5150 North Northwest Highway project frequently posted thinly veiled comments rooted in racist and classist misconceptions about affordable housing and voucher holders.

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If allowable density is reduced, housing supply is constricted, raising not only housing cost—particularly, rents—but land value as well, much to the detriment of affordable housing development. Downzoning also eliminates the potential incentive to redevelop existing properties by reducing or eliminating “zoning headroom,” or the difference between the amount of development (floor area/number of dwelling units) that exists on a particular property and what is allowed by the zoning district in which it is located. If zoning headroom is reduced, properties that may have been targets for redevelopment, with a potential for an affordable housing component, are in effect eliminated.

Council members have used their land-use powers to downzone large swathes of land, often under pressure from local community groups opposed to developments. In areas where development pressure exists, areas suitable for multifamily development are frequently downzoned to reduce the allowable floor area and number of dwelling units permitted in an attempt to prevent or limit new construction. Again, this power is not equalized. Downzoning to advance future affordable housing opportunities is not always offered the same support from the city as downzoning with the intention to block it.<sup>30</sup>

Additional restrictions on the development potential in an area can be enacted through the application of “landmark districts.” Although originated to preserve historic structures, the Chicago Landmarks Ordinance, for example, has been used to promote racial and economic segregation.<sup>31</sup> Historically, council members have expressed concern that landmarking has not had the intended results and has become another form of downzoning, used by neighborhood associations to control development.<sup>32</sup>

Once a landmark designation has been made, developing affordable units becomes virtually impossible. Any alteration or modification of designated landmarks or properties in landmark districts must be approved by the Commission on Chicago Landmarks through a process that can require permit fees, public hearings and appeals to the city council.<sup>33</sup> Designated landmarks are subject to additional building code restrictions and limitations not imposed on non-landmark

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<sup>30</sup> Downzoning can be used to advance affordable housing in a hot or gentrifying market. Community groups may want downzoning so that a developer who wants to build luxury condominiums will have to seek a zoning variance. They or their council member can then negotiate with the developer to ensure a percentage of affordable housing as a condition of the zoning change.

<sup>31</sup> CHI., ILL., CODE § 2-120-580 (Am. Legal Pub. Corp. 2018).

<sup>32</sup> See Vincent Leszczynski Michael, *Preserving the Future: Historic Districts in New York City and Chicago in the Late 20th Century* (2007) (unpublished Ph.D. dissertation, University of Illinois at Chicago).

<sup>33</sup> CHI., ILL., CODE §§ 2-120-740–2-120-850 (2018).

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buildings or districts.<sup>34</sup> Landmarking can substantially limit the availability of affordable housing by inhibiting the modification or development of residential properties.

*C. Access to City Funds*

Typically, affordable housing projects in Chicago use a mosaic of funding sources approved by the city council. Low-income housing tax credits available from both the State of Illinois and the City of Chicago are the primary source of financing, with other city programs such as the Multifamily Loan Program offering gap financing. Allocation and distribution of these funds require “evidence of community support” and, in the case of the Multifamily Loan Program, a letter of aldermanic support.

At a very basic level, council members control the funding mechanisms for affordable housing and have the power to refuse funding for developments of which they do not approve. This holds true for all forms of financial support, including tax increment financing and city-owned lots. After multiple Freedom of Information Act requests and interviews with developers, there was no evidence of a project receiving funds without a letter of aldermanic support. The letter of support is, in actuality, the most important and very first thing attended to by a developer.

The City of Chicago’s internal Department of Housing Procedures note that development projects in need of city funds over \$150,000 are initially assessed on a variety of factors including documented aldermanic support. Once the internal loan committee approves the project, an Intergovernmental Affairs Memo packet is prepared for City Council review. Internal procedures dictate that this packet must include a signed aldermanic support letter—the first item listed in the mandatory checklist. Chicago’s Multifamily Financing Program Guide also directs project managers, when conducting feasibility reviews, to assess the level of aldermanic and community support.<sup>35</sup> Chicago’s Qualified Allocation Plan aligns with these internal procedures by requiring development applications to include “evidence of community input and support for the project.”<sup>36</sup> Not only do these requirements hinder development, but they are also inconsistent with fair housing requirements and recent guidance by the Internal Revenue Service, which clarified that

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<sup>34</sup> See, e.g., *id.* §§ 13-32-020, 13-32-120, 13-32-200, 13-200-100, 13-200-110 (Am. LegalPub. Corp. 2018) (additional permit requirements effecting structures with landmark designation).

<sup>35</sup> Chicago Department of Housing, Internal Procedures (Summer 2005).

<sup>36</sup> City of Chicago Department of Planning and Development, 2017 Low-Income Housing Tax Credit Qualified Allocation Plan 5 (May 1, 2017).

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the Internal Revenue Code “neither requires nor encourages housing credit agencies to honor local vetoes.”<sup>37</sup>

Multifamily Loan Program projects are continually sited outside predominantly white and low-poverty areas. Because of aldermanic-support requirements and burdensome application processes and costs, this concentration is unlikely to change. For example, in addition to preapplication materials, the first stage of the two-stage application process has 30 items, including a “Plan for Community Input” and a “letter of support from the Alderman.”<sup>38</sup> Each portion of the application has a significant cost, which must be borne by the developer. High cost uncertainty over the approval of the development and high likelihood of rejection in predominantly white and low-poverty areas drive developers to restrict their operations to safer bets—areas where affordable housing has previously been approved.

Despite using the same application and process for securing subsidies, senior housing does not show the same absolute concentration by wards. For example, despite seniors (those over 65) making up only 10% of Chicago’s population, senior housing made up 39% of all affordable new construction and preservation from 2009 to 2013. Senior housing is also the only type of affordable housing constructed in predominantly white areas.<sup>39</sup> The same majority-white wards that account for 2% of new construction multifamily housing account for 15% of all senior housing. The relative distribution of senior projects suggests that a more equitable spatial placement of family affordable housing units is indeed possible were it not for community opposition and its influence on aldermanic prerogative.

#### *D. Control of City-Owned Lots*

The City of Chicago controls a large inventory of parcels throughout the city and, through various programs, makes them available to developers, community organizations and the public at large. This land inventory offers opportunities to build affordable housing by reducing a major cost barrier to development, especially in highly desirable areas. In fact, any sale of city-owned land for residential development triggers the city’s Affordable Requirements Ordinance mandating 10% of the units be affordable.<sup>40</sup>

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<sup>37</sup> Rev. Rul. 2016-29, 6 (state housing finance agency qualified allocation plans that have local-support requirement are inconsistent with § 42(m)(1)(A)(ii) of Internal Revenue Code and with federal fair housing laws).

<sup>38</sup> City of Chi. Dep’t of Planning and Dev., Multi-Family Housing Financial Assistance Application Instructions 2017, at 28, 53 (2017). – rule 13.7(b), rule 15.1(c), and rule 15.9

<sup>39</sup> Marisa Novara, *Is Fear of Young People Driving Our Housing Supply?*, Metropolitan Planning Council (March 16, 2016), <https://www.metroplanning.org/news/7283/Is-fear-of-young-people-driving-our-housing-supply..>

<sup>40</sup> CITY OF CHI. DEP’T OF PLANNING AND DEV., AFFORDABLE REQUIREMENTS ORDINANCE

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Indeed, city-owned land is often used in affordable development projects as a part of the local matching contribution required for the use of federal funds such as the HOME program. Projects that do use city-owned land for housing developments are universally located in the South and West Sides of the city. No city-owned parcel of land has been used to build a single affordable dwelling unit in the majority white, low-poverty wards on the North Side of the city, even though the city controls over 56 acres of land in these areas. Land disposition under the Negotiated Sales Program is subject to a letter of aldermanic support and redevelopment agreement with the city, but certain parcels may be earmarked by aldermen for “potential city projects,” in effect removing them from the developable land inventory. Council members opposed to the construction of affordable housing in their wards may withhold city-owned land for “other purposes” or simply refuse to approve sale of land resources for housing projects.

*E. Use of Parliamentary and Extra Parliamentary Power*

In situations where zoning relief is required for an affordable housing development, council members often use parliamentary and extra parliamentary maneuvers to delay or, in essence, to stop affordable housing projects in the approval process. City council members, especially when the power is being used to block affordable housing, defer to aldermanic ward decisions and even foster efforts to carry out those wishes.

The Chicago City Council Committee on Zoning, Landmarks and Building Standards is required to review all zoning amendments and planned developments before the amendments are sent to the full city council. The committee chairperson has the power to defer matters upon the request of a council member and may defer a matter “indefinitely,” which means a six-month deferral that has the effect of killing the project “in committee.” The parliamentary maneuver of deferring or indefinitely deferring a matter effectively denies the application, regardless of whether the full city council has a vote on it.

## V. PREROGATIVE AT PLAY

The following examples from Chicago illustrate what aldermanic prerogative looks like in reality.

*A. The Oliphant Development*

The proposed Oliphant development in Chicago serves as an example of aldermanic zoning power through a zoning advisory committee. Edison Park is a predominately white (89% white, 7% Latinx and 1% black with a total population of 11,150), single-family-home community on the North Side represented by Ald. Anthony Napolitano. Home to many employees of the City of Chicago, Edison Park enjoys quality schools and a touted “small town” feel. In 2016, developer

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Troy Realty proposed to construct a 44-unit ornate Italian Renaissance–styled residential and commercial development at 6655 North Oliphant in Edison Park. Troy Realty sought a zoning change from the city. Per city protocol and practice, the developer was to secure that zoning change from Napolitano. In turn, Napolitano referred the request to his zoning advisory committee and vowed to uphold whatever decision the committee made.<sup>41</sup>

On May 26, 2016, Napolitano sent an email to his constituents announcing a zoning advisory committee meeting to discuss the Oliphant project; the email expressly identified the proposal as creating rental units. As a condition of compliance with the 2007 Affordable Requirements Ordinance triggered by the zoning change, the developer was to set aside units as affordable and rent them at no more than 60% of the area median rent.<sup>42</sup>

On June 1, 2016, the zoning advisory committee met to discuss the project at a local park facility. The developer opted out of attending the meeting as it had become apparent that the presence of groups opposed to the development would dominate the meeting. As a result of the backlash, Napolitano urged the developer to consider building condominiums rather than rental housing “in an attempt to win the community’s support.”<sup>43</sup> When more than 500 people showed up to object to the proposal, the zoning advisory committee had to move the meeting to the field house’s gym. Napolitano accused his political opponents of further inciting opposition to the development by claiming the project would create 127 residential units that would be rented to Housing Choice “Section 8” Voucher holders.

In response to this opposition, the developer agreed to reduce the number of units from 44 to 30 and build condominium rather than rental units. Under the Affordable Requirements Ordinance, the developer would still be required to sell three condominium units at 60% of the market price. Instead the developer agreed to sell one condominium unit at 60% of its market price and contribute a \$250,000 in-lieu-of fee to the city’s affordable housing fund. Nevertheless, community opposition continued to grow, with residents claiming the proposed project would burden overcrowded schools and create traffic and parking challenges, even though more than 150 parking spaces would be available and the bulk of the 30 units would be one- and two-bedroom apartments.<sup>44</sup>

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<sup>41</sup> Alex Nitkin, *Edison Park Condo Proposal Shot Down by Advisory Committee*, DNAINFO (Jan. 5, 2017).

<sup>42</sup> Heather Cherone, *Things Get Ugly as Rival Politicians Clash over Edison Park Apartment Plan*, DNAINFO (June 2, 2016).

<sup>43</sup> *Id.*

<sup>44</sup> Heather Cherone, *Proposed Edison Park Mixed-Use Condo Project Blasted by Residents*, DNAINFO (Oct. 7, 2016), <https://www.dnainfo.com/chicago/20161007/edison-park/downtown-edison-park-condos-troy-realty-napolitano-heneghan/>.

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In two of the later public zoning advisory committee meetings on the development, the power of ward residents to move their council member became abundantly clear. At the October 6, 2016 meeting, Napolitano promised ward residents that he would not allow the project to be built over their objections: “If the community does not want it, I do not want it.... I would never do that to you.”<sup>45</sup> At the subsequent zoning advisory committee meeting on November 10, 2016, a majority of the 65 attendees came to voice their opposition to the project. One resident said that she was “paying massive taxes to live here, so I want people who are living the same way as me.”<sup>46</sup> In January 2017, the zoning advisory committee voted against the mixed-use development’s zoning change request. One of the stated reasons for opposing the development was the concern over “newcomers” into the tight-knit neighborhood.<sup>47</sup> Napolitano accepted the zoning advisory committee’s decision, effectively killing the proposal.<sup>48</sup> In defending the process, Napolitano said, “People are paying a lot to live in this neighborhood exactly as it is, and they don’t necessarily want to see it filled with multi-unit rental buildings.... People cherish where they live, and they want to safeguard it.... They have every right to do that, and I’ll protect their right to do that, as long as I’m representing them.”<sup>49</sup>

### B. *The Central Project*

Portage Park is one of four neighborhoods partially located within the 36th Ward on the far Northwest Side of Chicago. While the 36th Ward is 67% Latinx, 26% white, 4% black and 3% Asian, Portage Park is the only plurality white neighborhood within the ward with 49% white, 43% Latinx and 1% black with a total population of 64,523.<sup>50</sup> Considered part of the bungalow belt, the ward is represented by Ald. Gilbert Villegas.

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<sup>45</sup> *Id.*

<sup>46</sup> Alex Nitkin & Heather Cherone, *Edison Park Condo Proposal Still Faces Heat from Community, Despite Tweaks*, DNAINFO (Nov. 11, 2016).

<sup>47</sup> Jay Koziarz, *Local Zoning Committee Scuttles Condos Planned Near Edison Park Transit Stop*, CURBED CHICAGO (Jan. 5, 2017).

<sup>48</sup> Alex Nitkin, *Red Hot Edison Park Wants to Stay Exactly as It Is, Alderman Says*, DNAINFO (Jan. 10, 2017).

<sup>49</sup> *Id.*

<sup>50</sup> Elliott Ramos, *Interactive: City Council-Approved Chicago Ward Map*, WBEZ NEWS (Jan. 19, 2012).



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In January 2016, Full Circle Communities proposed the development of a \$17 million, 55-unit affordable housing complex, called the Central, for veterans in Portage Park.<sup>51</sup> The lot for the proposed development had sat vacant for more than ten years.

As part of the development process requirements for the ward, Villegas requested that the Full Circle developers hold a community meeting prior to Full Circle receiving city permits or applying for state low-income housing tax credits. Prior to the meeting, Portage Park community members voiced opposition to the development on EveryBlock, citing concerns related to increased crime, declining property values, density, increased traffic and parking shortages.<sup>52</sup> Other comments made derogatory and discriminatory statements about the development's potential residents: "I have over 15 years of law enforcement experience and working in low income areas and high income [*sic*] areas. I [h]ave worked in high income areas in Lincoln [P]ark which have low income housing apartments, [M]arshall [I] [F]ield [G]ardens and Cabrini [G]reen, but are [ ] responsible for 90[%] of robberies, shootings and drug transactions which occur daily."<sup>53</sup>

More than 500 residents showed up at the January 26, 2016 community meeting.<sup>54</sup> A second meeting had to be scheduled to accommodate the residents who were denied access due to overcrowding concerns.<sup>55</sup> Many in attendance expressed concerns that the project would attract crime to the area: "They'll come in and treat this place like crap."<sup>56</sup> Other residents, noting that children may engage in criminal activity, wanted to limit the prospective tenants to seniors and veterans. Ald. Nicholas Sposato, whose 38th Ward borders the 36th Ward, also attended the meeting. Sposato said that some of the crime concerns were overstated: "I'm sick and tired of people saying it's a crime-ridden neighborhood.... You do not live in an unsafe community."<sup>57</sup>

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<sup>51</sup> Heather Cherone, 55-Unit Affordable Apartment Complex Proposed for Portage Park, DNAINFO (Jan. 25, 2016).

<sup>52</sup> See Portage Parke, Low Income Development at Central and Patterson (the Vacant Lot North of the CVS), EVERY BLOCK CHICAGO (Jan. 18, 2016).

<sup>53</sup> Metallicblue, Low Income Development at Central and Patterson (the Vacant Lot North of the CVS), EveryBlock Chicago (Jan. 18, 2016), <https://web.archive.org/web/20160122032644/https://chicago.everyblock.com/kindness/jan18-low-income-development-central-and-patterson-vacant-lot-7301705/>.

<sup>54</sup> Brian Nadig, Alderman Villegas Pulls Plug on Affordable Housing Plan for Portage Park, NADIG NEWSPAPERS (Jan. 27, 2016).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

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The meeting ended with Villegas pulling the plug on the project: “I’ve heard nothing but you don’t want this . . . I don’t think we’re going to move forward with this.”<sup>58</sup> Just a few hours after the community meeting, Villegas officially announced that he would not be supporting the proposal. He indicated that the overwhelming negative response from community members drove his decision: “The response from the community tonight was overwhelming. I have decided not to support the proposed development at 3655 W. Central Ave.”<sup>59</sup>

In June 2017, Villegas announced that an assisted living facility would be looking at the site.<sup>60</sup> At a community meeting where the proposal was met with praise, the developer, acknowledging the community’s prior opposition, promised that he would not build any affordable housing: “I wouldn’t insult the neighborhood by even thinking like that.”<sup>61</sup>

## VI. PLANNING AGAINST PREROGATIVE: TOWARD A LESS SEGREGATED SOCIETY

For Chicago and many cities like it, racial and ethnic inequities remain “pervasive, persistent, and consequential” due to failures to address widespread private, public and entrenched institutional discrimination.<sup>62</sup> This institutional discrimination leads to what social scientists refer to as the “poverty trap,” perpetuated indefinitely when local government is blind to, or willfully ignorant of, its critical role in designing and enacting interventions against structural disadvantage.<sup>63</sup> In Chicago, this has led to a precipitous drop in population—8,638 residents lost from 2015 to 2016—and the residents who have left Chicago are disproportionately black and disproportionately low- and moderate-income.<sup>64</sup> Census data show that from 2000 to 2010 alone, Chicago lost 181,000

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<sup>58</sup> *Id.*

<sup>59</sup> Gilbert from Chicago on Behalf of Alderman Villegas, *Proposed Development at 3655 W. Central Ave.*, EVERYBLOCK CHICAGO (Jan. 26, 2016).

<sup>60</sup> Cite

<sup>61</sup> Alex Nitkin, Portage Park Dementia Care Facility Plan Wins Praise from Neighbors, DNAINFO (June 30, 2017, 6:09 AM), <https://www.dnainfo.com/chicago/20170630/portage-park/anthem-memory-care-alzheimers-dementia-assisted-living-treatment-center-portage-park>.

<sup>62</sup> HENRICKS ET AL., *supra* note 14, at 1.

<sup>63</sup> Robert J. Sampson, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT 99 (2012).

<sup>64</sup> Marwa Eltagouri, Chicago only major U.S. city to lose population from 2015 to 2016, CHICAGO TRIB., May 25, 2017.

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black residents.<sup>65</sup> Moreover, economic trends further paint the picture of a city in flux—with low- and moderate-income residents moving out and higher-income households moving in.<sup>66</sup>

When individuals are left to languish in a trap of poverty, when entire communities are devalued, and when housing is not available at a range of affordability levels and for a range of household types, reactionary outmigration is the natural consequence. Until the city has an objective and centralized system for approving affordable housing and creates a comprehensive plan for community investment that is grounded in achieving racial equity, the city will remain segregated and will risk extinguishing its vibrancy, its very core and constitution.

*A. Adopt a Citywide Comprehensive Plan*

Chicago and other cities often lack citywide comprehensive plans. The City of Chicago implements land-use policies without a comprehensive plan for development. In 1946, a comprehensive plan was drafted but never released, and in 1966 a Comprehensive Plan was published but with little fanfare. “It remains the last fully realized comprehensive planning effort undertaken by the city of Chicago.”<sup>67</sup>

Today, what the city does plan is fragmented and segmented by issue area and continues to skirt issues of segregation and NIMBYism. For the last 20 years, the City of Chicago has adopted a five-year housing plan that does not take on residential segregation or racial equity. Likewise, the city creates plans targeting other issues such as homelessness, health, transportation and economic development. These issue-specific plans fail to connect housing and community development issues and inadequately assess the landscape of racial and economic segregation, the mechanisms that fuel present-day segregation and the social ills that stem from it.

Chicago and other cities must therefore streamline housing and community development planning by producing a central comprehensive plan that assesses citywide community development and affordable housing needs and barriers, identifies where affordable housing and other types of investments—such as infrastructure improvements—are lacking and creates measurable goals and benchmarks for meeting community development and affordable housing need. This plan should include analysis of past and present subsidized affordable housing units that can be updated quarterly with tabulation indicating neighborhood distribution. The plan should include benchmarks for the equitable distribution of future subsidized affordable housing units including

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<sup>65</sup> *Id.*

<sup>66</sup> Inst. for Hous. Studies at DePaul Univ., Calculation of data from American Communities Survey 5-year estimates, 2006-2010 and 2011-2015.

<sup>67</sup> Chicago Department of City Planning, Basic Policies for the Comprehensive Plan of Chicago 27 (1964).

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distributing subsidies geographically. This plan must take on issues of segregation and inequities in community investment and serve as a guide for decision making and funding.

*B. Implement a Racial Equity Impact Assessment*

Chicago and all state and local governments should also implement a racial equity impact assessment as a central component of citywide planning and housing decision making. In acknowledgment that racial inequities are borne out of systematic, institutionalized racism perpetuated through public policy, racial equity impact assessments allow a systematic examination of the racial impact of proposed decisions before any harm can be done. Such assessments are used proactively to identify unintended consequences and influence proposed decisions to mitigate adverse outcomes. Otherwise, when racial equity is not consciously considered, “racial inequality is often unconsciously replicated.”<sup>68</sup> Several cities have taken steps to implement racial equity impact assessments in various fashions in the public policy sphere.<sup>69</sup>

*C. An Overhaul of Zoning Consistent With Race Equity Zoning*

An overhaul of the zoning process to advance the equitable distribution of affordable and rental housing will further advance racial equity and reduce the obstruction of NIMBYism. In Illinois, decisions over municipal zoning are considered a police power of local legislative bodies, and this means that the power over zoning cannot be completely removed from the Chicago City Council. However, the city’s policy and practice of delegating zoning decisions to individual council members and, in turn, many council members delegating that power to zoning advisory committees, is an unauthorized exercise of that zoning power.

The zoning ordinance must be amended to be consistent with a comprehensive plan grounded in advancing racial equity, meaning that each zoning decision is evaluated to determine if it advances the city’s commitment to racial equity and if it is based upon the findings from the city’s racial equity impact assessment. Zoning ordinances must also remove all references to “preserving the character of existing neighborhoods,” serving to maintain residential segregation in predominately white, single-family-home communities. While local communities can continue to have input into proposed zoning changes, that feedback must be based upon the findings of the racial equity impact assessment in addition to any objective concerns, such as the property being placed in a flood plain.

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<sup>68</sup> Terry Keleher, *Race Forward: The Center for Racial Justice Innovation, Racial Equity Impact Assessment*, Applied Research Center, 2009, [https://www.raceforward.org/sites/default/files/RacialJusticeImpactAssessment\\_v5.pdf](https://www.raceforward.org/sites/default/files/RacialJusticeImpactAssessment_v5.pdf)

<sup>69</sup> *Id.*

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*D. Embrace Transparency and Accountability*

To bring greater transparency and accountability to the housing development review process, cities should establish uniform proposal and approval processes, with mandated timelines, for affordable housing development applications that are not infringed by hyperlocal rules. The application process should place a favorable emphasis on projects that further the goals of the comprehensive plan, bring about more balanced affordable housing and enhance racial equity. Cities also should have an open and uniform policy for the transfer, sale and donation of city-owned lots.

*E. Eliminate Pocket Vetoes and Letters of Support*

Any pocket veto or letter of support requirement for affordable housing development must be eliminated. Instead, developers should be required to certify that their proposed request for financing is consistent with comprehensive planning. Objections to a project should be limited to objective criteria such as that the proposed project will perpetuate segregation or be in a flood plain. In this manner, local officials would be required to make public the reasons for their opposition, and those reasons must be clearly related to rational interests in the “sticks and bricks” of the project and not the demographics of the residents of the proposed project. Opposition must also be consistent with treatment of other types of housing plans.

*F. Adopt Anti-NIMBY Laws*

The adoption of anti-NIMBY laws could bar opponents from blocking or stalling affordable housing developments, as long as those developments align with the comprehensive plan and meet other specifications. Local politicians would retain the power to impose certain requirements on developers and influence the overall developments, but if the ward needs affordable housing, local politicians would not be able to block or delay the deal.

*G. Require Racial Equity Training & A Public Education Campaign*

City employees involved in housing and community development programs, including local council members, should undergo mandatory annual training on fair housing and racial equity. This type of training would help guide the city towards ensuring compliance with civil rights laws. This training should be coupled with a broader public education campaign to address the city’s long history of segregation and the city’s duty to proactively address it.

## VI. CONCLUSION

Local governments such as Chicago have neglected to fulfill their civil rights obligations by failing to ensure more equitable, affordable housing opportunities for families and to balance the power

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dynamics involved in community planning. Ultimately this power rests with the federal government, which can force state and local governments receiving federal housing dollars to take active steps to dismantle policies and practices perpetuating residential segregation. The recent announcement by the secretary of the U.S. Department of Housing and Urban Development (HUD), Ben Carson, of a rollback of HUD's power to advance balanced living patterns and civil rights and instead give local governments more control is essentially a blank check to those who want to maintain residential segregation and violate civil rights laws.<sup>70</sup> As a nation, we must commit ourselves to justice and equity and finally create change that affords everyone, whoever they are, the opportunity to live wherever they choose.

Editor's Note: This article is adapted from [Chicago Area Fair Housing Alliance & Sargent Shriver National Center on Poverty Law, A City Fragmented: How Race, Power, and Aldermanic Prerogative Shape Chicago's Neighborhoods](#) [2018].

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<sup>70</sup> Brakkton Booker, Ben Carson Moves Forward with Push to Change Fair Housing Rule, National Public Radio, August 13, 2018, <https://www.npr.org/2018/08/13/638285344/ben-carson-moves-forward-with-push-tochange-fair-housing-rule>