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Affirmatively Furthering Neighborhood Choice: Vacant Property Strategies and Fair Housing

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Affirmatively Furthering Neighborhood Choice: Vacant Property Strategies and Fair Housing

JAMES J. KELLY, JR.*

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I. INTRODUCTION

When many of us think about fair housing enforcement, scenes involving undercover apartment applicants ferreting out racially biased landlords come to mind. Indeed, fair housing “testers” have been and continue to be an important element of civil rights accountability.¹ However, implementation of the Fair Housing Act of 1968 has had at least as much to do with increasing the supply of decent, affordable housing options to members of protected groups as with assuring those individuals that they will not be denied a particular housing unit because of the color of their skin or a disability.²

* Clinical Professor of Law, Notre Dame Law School. I would like to thank the participants in the Symposium, particularly my fellow presenters, for their engaging questions and feedback. I am especially grateful to the editors of this symposium issue and my colleagues, Kermit Lind, Joe Schilling, Danny Schaffzin, and Steve Barlow, for all their work in organizing this wonderful discussion of these vitally important issues.

1. Michael J. Yelnosky, *What Does “Testing” Tell us About the Incidence of Discrimination in Housing Markets?*, 29 SETON HALL L. REV. 1488, 1492 (1999); see also Teresa Coleman Hunter & Gary L. Fischer, *Fair Housing Testing—Uncovering Discriminatory Practices*, 28 CREIGHTON L. REV. 1127, 1132–34 (1995).

2. The Fair Housing Act bans housing discrimination on any one of six bases: “race, color, religion, sex, familial status, or national origin.” 42 U.S.C.

This macro aspect of fair housing enforcement has been led by organized activists challenging the policies, actions, and inactions of state and local housing and land use agencies. Early on, it involved battles over the siting of public housing projects outside areas of concentrated poverty, like the 1980's-era struggle in Yonkers depicted in the recent critically acclaimed HBO series, *Show Me a Hero*.³ As housing subsidy increasingly took the form of rent payment vouchers, advocates litigated to force local agencies to facilitate the voluntary relocation of poor, inner-city residents of color to suburban areas that had good schools as well as jobs.⁴

Critical to plaintiffs' prospects for success in these impact cases has been the ability to establish a violation of the Fair Housing Act through evidence that showed that the policies in question disproportionately harmed the housing opportunities of federally protected racial groups. Proving racial bias as the motivation behind the adoption of a harmful governmental policy has been even more difficult than it has been in the reason for denial of an apartment or mortgage application. The U.S. Supreme Court has ruled that a showing of deliberate discrimination is required to establish a violation of constitutional rights under the Equal Protection Clause, but the lower court, upon remand, held that the Fair Housing Act was not so limited in its protection.⁵ Evidence that a facially neutral policy nevertheless harmed the housing prospects of a protected group would at least shift the burden of proof to the defendant governmental unit to justify the policy approach.⁶ Advocates battling against the exclusion of affordable housing have had some success in showing that targeted policies harm the hous-

§ 3604(a) (2012). Racial minorities and the disabled, however, face the most compromised housing options because they, to a greater extent than religious minorities, face significant economic marginalization, which causes them to be harmed by shortages of affordable housing. See *The Fair Housing Act*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/fair-housing-act-1> ("The number of cases filed since 1968 alleging religious discrimination is small in comparison to some of the other prohibited bases, such as race or national origin.") (last visited April 4, 2016).

3. *Show Me a Hero* (HBO 2015).

4. See, e.g., *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005).

5. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 (1977), *remanded to* 558 F.2d 1283 (7th Cir. 1977).

6. *Metro. Hous. Dev. Corp. v. Arlington Heights*, 558 F.2d at 1294–95.

ing options of racial minorities.⁷ But, local jurisdictions' ability to escape liability by showing a non-racial basis for a detrimental policy has contributed to a declining overall success rate in federal appellate courts.⁸ Such a record has encouraged activists to look elsewhere in the law to advance housing justice for protected groups.⁹

Potentially more important than the ability to prove unlawful discrimination through disparate impact evidence is the capacity to scrutinize a local agency's compliance with its Fair Housing Act obligation to Affirmatively Further Fair Housing ("AFFH").¹⁰ Offered as a possible "missing link" in the chain of fair housing accountability,¹¹ AFFH has significant potential to affect local decision-making. By law, recipients of funding from the United States Department of Housing and Urban Development ("HUD") not only have to avoid policies that deny protected groups housing opportunities, they also are required to work proactively to eliminate entrenched segregation in their communities regardless of who is to blame for its creation.¹²

7. This success with prima facie cases against exclusionary policies is particularly notable when compared with the struggle to challenge revitalization efforts. See Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 399–402 (2013).

8. *Id.* at 388–89.

9. Advocates have sought state law remedies against exclusionary zoning in the courts. See, e.g., *S. Burlington Cty. NAACP v. Mt. Laurel*, 336 A.2d 713, 713 (1975). Advocates have also sought these remedies in the legislature through the enactment of inclusionary housing land use measures. See, e.g., MASS. GEN. LAWS ANN. ch. 40B, §§ 20–30 (West 2012).

10. 42 U.S.C. § 3608(e)(5) (2012) ("The Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title"); 24 C.F.R. § 5.150–5.180 (2015) (establishing regulations which further the policy of affirmatively furthering fair housing).

11. Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 1006 (2012), reprinted in 23 J. AFFORDABLE HOUSING & COMTY. DEV. L 149, 188 (2015).

12. The AFFH duty applies to all barriers to the housing opportunities of protected groups, but those impediments to fair housing brought about by a local jurisdiction's policies may be entitled to a priority response under its AFFH strategy. See *infra* text accompanying note 65.

In 2009, the new leadership at HUD began a process of developing regulations for the AFFH duty. Those efforts came to fruition in July 2015 with the publication of the Final Rule for AFFH.¹³ In this Article, I will examine how the new AFFH rule impacts local government efforts to confront the epidemic of vacant houses in America's older cities. Market-sensitive responses to vacant properties drive many of the best practices in code enforcement and land banking.¹⁴ Reconnecting marginalized areas to functioning real estate markets promotes neighborhood choice not only because remaining in the communities they have called home should be a viable option for residents of color but also because the ability of local government to provide essential services requires the elimination of vacant property nuisances. Yet, the short-term effects of these strategies and their similarities to previous publicly sanctioned instances of government redlining raise profound questions of racial and social equity.¹⁵ The first Part of this Article will examine both the unique role of AFFH within the Fair Housing Act and its articulation in the recently released Final Rule. The next Part will articulate how local governments required by the Final Rule to submit Assessments of Fair Housing ("AFHs") to HUD should structure and discuss innovative, market-based approaches to their vacant property challenges.

13. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272–42,371 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, & 903).

14. Understanding the availability of capital investment for renovations is vital to a municipality's strategic planning for vacant property nuisance responses. James J. Kelly, Jr., *A Continuum In Remedies: Reconnecting Vacant Properties to the Market*, 23 ST. L. U. PUB. L. REV. 109, 117–20 (2013). Mapping neighborhoods for the strength of their housing markets can "make it possible not only to design cost-effective strategies for revitalization but also to adjust them to reflect changes in market conditions." ALAN MALLACH, BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS 23. For an explanation of how data can inform vacant property strategies, see Ira Goldstein, *Using the Market Value Analysis to Analyze Markets, Set Strategy and Evaluate Change*, THE REINVESTMENT FUND (2013), <http://www.trfund.com/using-the-market-value-analysis-to-analyze-markets-set-strategy-and-evaluate-change>.

15. JAMES J. KELLY, JR., JUST, SMART: CIVIL RIGHTS PROTECTIONS AND MARKET-SENSITIVE VACANT PROPERTY STRATEGIES 2 (2014), *reprinted in* 23 J. AFFORDABLE HOUS. & CMTY. DEV. L. 209, 210–11 (2015).

Market-sensitive vacant property strategies affirmatively further fair housing as long as they are not implemented in a way that runs afoul of the Fair Housing Act's prohibitions and provided that they look to the potential unintended consequences of strengthening real estate markets in marginalized neighborhoods.¹⁶ Furthermore, framing vacant property strategies as an AFFH approach may have benefits for vacant property reforms, especially those connected with acquisition of vacant properties by land banks. Because the AFFH framework sees the problem of housing justice for statutorily protected groups as a regional one, municipal jurisdictions in need of cooperation from county governments in order to achieve their land banking goals may be able to use the AFFH requirement as leverage.

II. AFFIRMATIVELY FURTHERING FAIR HOUSING

The Fair Housing Act prohibits discrimination based on race, color, religion, sex, family composition, disability, or national origin in the marketing and management of residential real estate.¹⁷ Specifically it prohibits motivated rejection or steering of a prospective tenant or homebuyer, discriminatory advertising, and blockbusting.¹⁸ These prohibitions directly address many of the tactics that individual private actors employed to perpetuate residential segregation of various kinds but especially that of race. But, the Fair Housing Act also provides mechanisms for eliminating systemic barriers to neighborhood integration.

The Fair Housing Act makes it unlawful to “otherwise make unavailable or deny a dwelling to any person because of race.”¹⁹ Civil rights groups, affordable housing activists, and anti-poverty advocates have used the “otherwise make unavailable”

16. Paul C. Brophy & Jennifer S. Vey, *Seizing City Assets: Ten Steps to Urban Land Reform*, THE BROOKINGS INST. CEOS FOR CITIES RES. BRIEF 18 (Oct. 2002), <http://www.brookings.edu/~media/research/files/reports/2002/10/metropolitanpolicy-brophy/brophyveyvacantsteps.pdf> (“Step 9: Be Sensitive to Gentrification and Relocation Issues”).

17. 42 U.S.C. § 3604(a) (2012).

18. 42 U.S.C. §§ 3604, 3605. The FHA also makes it illegal to hinder those who support protected persons in securing their fair housing rights. 42 U.S.C. § 3617.

19. 42 U.S.C. § 3604(a).

language to confront various housing assistance,²⁰ community development²¹ and zoning²² policies, and decisions of state and local governments. As with the provisions holding parties in real estate deals accountable, the broader prohibition on discriminatory policies can be proven with a showing that the banned action was motivated by bias. However, if proof of racist or other discriminatory intent can be difficult to uncover when someone's apartment application is denied, it is all but impossible to find evidence of similar intent behind the enactment of a policy that prevents the construction of the entire apartment building.

In seeking to invalidate a policy under the Fair Housing Act, advocates have offered, and courts have considered, statistical evidence of the policy's disproportionate adverse impact on a protected group's access to housing.²³ Because the actions of both governments and private institutions can be motivated by a wide range of goals and have an even greater number of effects, courts have allowed defendant policymakers to respond to showings of disparate impact by presenting evidence of legitimate, neutral policy objectives that cannot be attained, easily or, sometimes, at all, without the cited adverse impacts.²⁴ The approach of the U.S. Court of Appeals for the Seventh Circuit, sometimes labeled "impact plus," incorporates elements of both effect and intention.²⁵ In

20. See, e.g., *Gautreaux v. Chicago Hous. Auth.*, 436 F.2d 306 (7th Cir. 1970).

21. See, e.g., *Resident Advisory Bd. v. Rizzo*, 564 F.2d 1261 (3rd Cir. 1977).

22. See, e.g., *Metro. Hous. Dev. Corp. v. Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

23. 100 A.L.R. Fed. 97, § 2(a).

24. *Bradley v. U.S. Dep't Hous. & Urban Dev.*, 658 F.2d 290, 295 (5th Cir. 1981) ("If the court ruled, as the plaintiffs would have us, that the transfer of funds to redevelopment planning was illegal because it did not benefit persons of low and moderate income as much as would rehabilitation of the area's stock housing, we would be usurping the legislature's role in determining community needs and establishing priorities.").

25. *Metro. Hous. Dev. Corp.*, 558 F.2d at 1290 ("We therefore hold that at least under some circumstances a violation of section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent. . . . [W]e agree that a showing of discriminatory intent is not required under section 3604(a), we refuse to conclude that every action which products discriminatory effects is illegal.").

examining the rejection of a petition to rezone a parcel for the development of affordable multifamily housing, the Seventh Circuit found that the plaintiffs' evidence should be judged by weighing the following factors: (1) the presentation of strong evidence for discriminatory effect; (2) the existence of some evidence for discriminatory intent; (3) the lack of a substantial nondiscriminatory basis for the defendant's action; and (4) a showing that the defendant is interfering with, rather than merely failing to produce, housing opportunities for protected persons of color.²⁶

As influential as this and other, similar disparate impact tests have been in the federal courts, the U.S. Supreme Court did not rule on the sufficiency of disparate impact evidence until its 5-4 decision last year in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*²⁷ In an opinion authored by Justice Anthony Kennedy, the majority upheld the disparate impact test but emphasized the burden plaintiffs bore to show a strong causal connection between the challenged policy and the adverse effects on protected groups.²⁸ The Court also cautioned lower courts not to disregard defendants' justifications for policy decisions if they are not shown to be "artificial, arbitrary and unnecessary barriers."²⁹ Even as the courts have solidified the Fair Housing Act as a tool against unlawful practices and policies, another FHA mechanism for dismantling segregation and promoting meaningful residential choice is only now coming into its own nearly half a century after its enactment.

Even with the ability to challenge harmful policies by demonstrating causation if not intent, civil right advocates struggle against an overwhelming array of state and local government decisions that contribute to the isolation of poor people of color. Many of these decisions will never be successfully invalidated in federal court. Complainants can produce a compelling account of the desperation that racial minorities and the disabled face in their search for decent, affordable housing. They may go further and show how various exclusionary zoning practices aggravate that hardship.

26. *Id.* at 1290–93.

27. 135 S. Ct. 2507 (2015).

28. *Id.* at 2523.

29. *Id.* at 2522 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

But, once the defendant local government articulates an otherwise neutral—that is, nondiscriminatory—basis for the policies, the burden remains on the plaintiff to show how that objective can be achieved, at little or no additional cost, without the adverse impact on any protected group.³⁰ Striking down practices and policies, while effective in some cases,³¹ fails to hold local and state agencies accountable for the persistence of deeply-rooted racial segregation spanning decades and generations.

The Fair Housing Act charges HUD not only to enforce its prohibitions but to “affirmatively further” its stated goals of ending segregation in housing and increasing meaningful housing choice for members of protected groups.³² The principal method by which HUD has affirmatively furthered fair housing is to extend that obligation to the hundreds of states, participating jurisdictions, and public housing authorities that receive HUD funding. The legal obligations of many state and local agencies do not end, then, with mere compliance with FHA’s primary prohibitions against interfering with the housing and neighborhood choices of protected group members. On the contrary, these municipal and county actors appear to have an unbounded mandate to break down barriers to racial integration, no matter their role in creating or sustaining those barriers. Given the broad array of governmental actions that could be taken to bring about more housing choice for marginalized racial minorities and disabled persons, it is not completely surprising to read that some conservative commentators have greeted the Obama administration efforts to more effectively implement the AFFH duty with alarm bordering on panic.

In a 2015 National Review article entitled “Attention America’s Suburbs: You Have Just Been Annexed,” Stanley Kurtz professes amazement at the lack of media attention to the “breath-taking radicalism” embodied by HUD efforts to enforce Affirma-

30. *Id.* at 2515.

31. In 2006, the Greater New Orleans Fair Housing Center sued St. Bernard Parish over its zoning ordinance prohibiting property owners, 93% of whom were white, from renting to anyone not related to them by blood, marriage, or adoption and forced the county government to repeal the blatantly racist law. *Time Runs Out for St. Bernard Parish*, N.Y. TIMES (Mar. 29, 2011), <http://www.nytimes.com/2011/03/30/opinion/30wed3.html>.

32. 42 U.S.C §§ 3601–3619 (2012).

tively Furthering Fair Housing.³³ Kurtz claims the Federal government will confront wealthy suburban governments with the facts of regional housing inequality and then they would be “obligated to nullify their zoning ordinances and build high-density, low-income housing at their own expense.”³⁴ Comparing the obligations that these local governments have under the “otherwise make unavailable” prohibition and AFFH, it seems plausible that the latter may be the missing piece for federal efforts to strike down barriers to housing choice for protected groups. But, neither the elation nor the panic is justified. The Fair Housing Act does not empower HUD to mandate the spending priorities of state and local governments or to force its funding recipients to abandon their duly adopted policies or laws, even if they clearly run counter to a mission of affirmatively furthering fair housing. Instead, federal law explicitly prohibits HUD from conditioning its funding on the abolition of any state or local government law, policy, or practice that does not itself violate federal law.³⁵

AFFH is not a wholesale Congressional revision of local land use law, however crucial that might be to ending patterns of residential discrimination in certain parts of the country. Instead, AFFH creates the basis for a discussion between HUD and its recipients about what those recipients are doing “to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination.”³⁶ HUD cannot require a suburban county government to repeal its exclusionary zoning practices as a condition of continued funding. HUD can, however, insist that it acknowledge that such duly adopted laws create barriers to affordable housing, the lack of which disproportionately harms racial minorities and perpetuates

33. Stanley Kurtz, *Attention America's Suburbs: You Have Just Been Annexed*, NAT'L REVIEW (July 20, 2015, 10:01 AM), <http://www.nationalreview.com/corner/421389/attention-americas-suburbs-you-have-just-been-annexed-stanley-kurtz>.

34. *Id.*

35. 42 U.S.C.A. § 12711 (West 2015). A jurisdiction that has violated the law may negotiate a settlement of the related charges that may include its commitment to make specific changes in its laws and/or fund, at its own expense, the development of affordable housing, but that is a mutually acceptable form of punishment.

36. 24 CFR § 5.150 (2015).

racial segregation.³⁷ Moreover, HUD can insist that the same local government explain how its priorities and goals are designed to “overcome the effects” of those contributing factors and related fair housing issues.³⁸

Under the system of fair housing reporting that existed prior to the adoption of the Final Rule on AFFH last year, state and local jurisdictions, as well as public housing authorities, that received Community Planning and Development Formula Grant Program funds³⁹ were required to submit an annual certification that each had prepared an Analysis of Impediments (“AIs”) to the achievement of fair housing in its program or jurisdiction.⁴⁰ Each was also required to articulate steps taken to overcome those impediments and document information related to the impediments and/or the remedial actions.⁴¹ A 2010 study of AIs by the Government Accountability Office, however, found that many of them were outdated or lacked plans for responding to fair housing barriers.⁴² The same report criticized HUD’s own efforts to promote AFFH pointing out that funding recipients lacked guidance as to the content and format of AIs and that funding recipients had little reason to fear enforcement actions by HUD related to AFFH.⁴³

With the issuance of the Final Rule in July 2015,⁴⁴ HUD has responded to each of these problems. Instead of certifying the existence of a fair housing analysis, recipients of HUD funds will now be required to submit an Assessment of Fair Housing to HUD

37. See *infra* notes 59–60 and accompanying text.

38. *Westchester v. U.S. Dep’t of Hous. & Urban Dev.*, 802 F.3d 413, 434 (2d Cir. 2015) (citing 24 C.F.R. § 91.225(a)(1) (2015)).

39. 24 C.F.R. § 5.162(b)(1)(ii)(B) (2015).

40. Timothy M. Smyth, Michael Allen & Marisa Schaith, *The Fair Housing Act: The Evolving Landscape for Federal Grant Recipients and Sub-Recipients*, 23 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 231, 235 (2015).

41. *Id.* at 236.

42. U.S. GOV’T ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS 1 (2010), <http://www.gao.gov/products/GAO-10-905>.

43. *Id.* at 1–2.

44. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272-01 (to be codified at 24 C.F.R. pt. 5).

for review and acceptance.⁴⁵ By creating this new reporting approach to fair housing, HUD is setting the stage for a broader and more consistent enforcement of the duty to Affirmatively Further Fair Housing. The Final Rule takes an expansive approach to the subject matter and geography of fair housing. While some commenters objected during the rulemaking process that HUD's new reporting system would require analysis of governmental functions not funded by HUD or even controlled by state and local agencies funded by HUD,⁴⁶ HUD insisted that a thorough analysis of barriers to fair housing had to include all of the factors affecting the availability of housing opportunities for statutorily protected groups.⁴⁷ Nothing in the statute or in the case law restricts the discussion of AFFH compliance to those areas of state and local government function that are administered by housing and community development agencies. If local tax policies within the control of local jurisdictions have an impact on fair housing in a metropolitan area, then the reporting grant recipient cannot merely disclaim any responsibility just because control of those functions have been assigned to the finance department. The housing and community development agency is reporting on behalf of the entire city or county and must articulate how that unit of government is complying with AFFH.⁴⁸

Similarly, analysis of barriers to housing opportunities cannot be compartmentalized within a single set of municipal or county boundaries. Housing markets are metropolitan in their overall scope and the analysis of fair housing barriers must be regional as well.⁴⁹ Here, however, the AFFH duty does not become a collective duty. Each participating jurisdiction has its own AFFH duty. But, the Final Rule encourages reporting fund recipients to collaborate with other participating jurisdictions in the same metropolitan area to produce reports that systematically analyze segregation in the area and offer collaborative integration strategies.⁵⁰

45. 24 C.F.R. § 5.154 (2015).

46. *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. at 42,278, 42,281, 42,284–85.

47. *Id.* at 42,282, 42,285.

48. *Id.* at 42,285.

49. *Id.* at 42,286.

50. 24 C.F.R. § 5.156 (2015).

The Final Rule also combats compartmentalization in the understanding of fair housing objectives. The quality of housing opportunities for racial minorities and the disabled is not judged exclusively by the physical condition and suitability of the housing unit itself. An analysis of housing availability must also look to the neighborhood environments associated with the possible residential options. Certainly, the level of crime, especially burglaries and home invasions, is relevant to evaluating the adequacy of a housing opportunity. But, AFFH is not limited to those aspects of life associated with actual physical presence in the home.

Appropriate housing type and physical quality of structure are important, but, increasingly, residence location is key to a variety of developmentally essential public goods. Frequently, a family's access to strong primary and secondary schools is determined by where that family lives. For people of limited means, public transportation may be essential to connecting with good jobs and/or training and education resources. Even access to quality food, health, and recreation resources are often dependent on the neighborhood one lives in. Even as racial segregation has moderated over the last three decades, isolation of poor households has intensified.⁵¹ The result is that the typical poor African-American or Hispanic family was more likely to live in area with high concentration of poverty in 1990 than it was twenty years earlier.⁵² Thus, HUD's AFH process requires analysis of and strategies responsive to "significant disparities in access to opportunity."⁵³

The redesign of the reporting process provides for clearer accountability by making submission to and acceptance by HUD a prerequisite of continued funding. But, the process also requires that reporting entities listen to their citizens and base their analysis on the quantitative indicators most relevant to an assessment of fair housing in a particular geographic area. HUD has taken it upon itself to provide this "data related to education, poverty, transit access, employment, exposure to environmental health hazards,

51. Douglas S. Massey, Jonathan Rothwell, & Thurston Domina, *The Changing Bases of Segregation in the United States*, 626 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 77, 82 (2009).

52. PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS AND THE AMERICAN CITY* 40 (1996).

53. 24 C.F.R. § 5.154(d)(2)(iii) (2015).

and other critical community assets, as well as nationally uniform local and regional data on patterns of integration and segregation; racial and ethnic concentrations of poverty; disproportionate housing needs based on protected class; and outstanding discrimination findings.”⁵⁴ HUD’s communication of the data is not itself a judgment by HUD as to the severity of segregation and housing inequality in the region. On the other hand, the fact that the Fair Housing Act has been held by the U.S. Supreme Court to embrace disparate impact arguments clears the way for HUD to make a strong connection between affordable housing availability and fair housing goals.⁵⁵

Enforcement of AFFH would have been significantly limited if the Supreme Court in *Inclusive Communities* had ruled that the Fair Housing Act itself and/or the 5th Amendment’s guarantee of equal protection excluded consideration of disparate impact showings in adjudicating Fair Housing Act violations.⁵⁶ Although the immediate consequence of such a ruling would have been to protect all policies that could not be shown to be the products of deliberate discrimination, the argument could have then been made that the only kind of segregation that could be the legitimate concern of AFFH was segregation that was deliberately created. If so, then even clear statistical demonstration of the lack of affordability in opportunity areas and the lack of opportunity in areas with plenty of low-cost housing would not be enough to put local governments to the question as how they would respond as required by AFFH. As it is, the high court’s confirmation of disparate impact allows HUD to supply data that raises compelling AFFH questions simply by showing the spatial mismatch of affordable housing and important community goods. Doing so requires that HUD’s evi-

54. *Affirmatively Furthering Fair Housing*, 78 Fed. Reg. 43,710, 43,731 (July 19, 2013) (to be codified at 24 C.F.R. pt. 5).

55. *See infra* note 58 and accompanying text. For an analysis of the “robust causality” required by *Inclusive Cmty. Project*, see William J. Callison, *Inclusive Communities: Geographic Desegregation, Urban Revitalization, And Disparate Impact Under The Fair Housing Act*, 46 U. MEM. L. REV. 1039, 1048–50 (2016).

56. HUD cited the Supreme Court ruling in response to comments about the use of disparate impact theories in the articulation of the Final Rule. 80 Fed. Reg. 42,272-01, 42,283 (citing *Texas Dept’ of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 132 S. Ct. 2507, 2525–26 (2015)).

dence shows that certain protected groups, usually the disabled as well as economically disadvantaged racial minorities, are disproportionately harmed by the lack of affordable housing in desirable neighborhoods. The data provided by HUD is not the only source of information to which reporting jurisdictions must respond.

The AFH process also facilitates citizen participation by requiring participating jurisdictions to seek input from those wishing to address local fair housing issues.⁵⁷ Community groups will confront reporting jurisdictions with accusations of deliberate discrimination and challenge the justifications of policies that disproportionately harm protected groups. They, along with civil rights and affordable housing advocates, will offer their own views on what are the most important fair housing issues and the best ways to address them. As seen from the Final Rule's description of the AFH report's structure, local governments must be prepared not only to relate these messages on to HUD, but also to state whether or not they agree and why.

The Final Rule on Affirmatively Furthering Fair Housing provides the following breakdown of the Assessment of Fair Housing Report:

(1) Analysis: Identification of integration and segregation patterns, racially or ethnically concentrated areas of poverty, significant disparities in access to community assets for all protected classes, and disparities in access to housing for all protected classes.

(2) Fair Housing Priorities and Goals: A prioritized list of fair housing issues, a list of the most significant factors in shaping the fair housing situation, and goals for addressing them.

(3) Community Input: Process for and content of community input as well as the reporting jurisdiction's responses.⁵⁸

57. 24 C.F.R. § 5.158(a) (2015).

58. *Id.* § 5.154.

After it has been submitted, HUD has sixty days to reject the AFH report.⁵⁹ Obviously, if the report's summary of community input reveals substantiated allegations that the reporting jurisdiction deliberately discriminates against protected groups or "otherwise . . . make[s] unavailable"⁶⁰ their housing options, HUD can reject the report and require any future funding be contingent on compliance with the basic obligations of the Fair Housing Act.⁶¹ Likewise, an AFH report will be required to relay information from civil rights advocates that the reporting entity's policies reinforce or aggravate segregation by preventing the creation of affordable housing in desirable neighborhoods or by frustrating revitalization efforts. The legitimate land use or fiscal objectives behind these policies may prevent them from being invalidated under the Fair Housing Act.⁶² But, the question remains as to whether or not the duty to AFFH is not somehow increased by a reporting jurisdiction's policies being shown to be a contributing factor to the reinforcement of segregation. An argument could be made that, in prioritizing the contributing factors to segregation, a reporting jurisdiction has an obligation to elevate the harms it has caused through its own policies.⁶³ The AFH would also then name among its top goals responses to these contributing factors. Following this logic through the integrated reporting process, the consolidated plan of that jurisdiction would articulate strategies and actions that give special attention to remedying those negative effects caused by the jurisdiction's own actions.

More than anything, the AFH should explain how a reporting jurisdiction is overcoming any spatial mismatch between opportunity and affordable housing. HUD was challenged on its fo-

59. *Id.* § 5.162.

60. 42 U.S.C. §3604 (2012).

61. *See supra* notes 42–43 and accompanying text.

62. *See supra* notes 6–8, 25–31 and accompanying text.

63. The Supreme Court has recognized the relevance of a local history of de jure segregation to the imposition of desegregation remedies by federal courts and the adoption of affirmative action mechanisms where such responses would be problematic legally in the absence of past deliberate discrimination. *See Milliken v. Bradley*, 418 U.S. 717, 745–47 (1974); *Parents Involved v. Seattle School Dist. No. 1*, 551 U.S. 701, 721 (2007) (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

cus on concentration of poverty with the argument that “[p]overty is not a protected class.”⁶⁴ In response, HUD stated:

it is entirely consistent with the Fair Housing Act’s duty to affirmatively further fair housing to counteract past policies and decisions that account for today’s racially or ethnically concentrated areas of poverty or housing cost burdens and housing needs that are disproportionately high for certain groups of persons based on characteristics protected by the Fair Housing Act. Preparation of an AFH could be an important step in reducing poverty among groups of persons who share characteristics protected by the Fair Housing Act. The focus and purpose of the AFH is to identify, and to begin the process of planning to overcome, the causes and contributing factors that deny or impede housing choice and access to opportunity based on race, color, religion, sex, national origin, familial status, and disability. In addition, a large body of research has consistently found that the problems associated with segregation are greatly exacerbated when combined with concentrated poverty. That is the legal basis and context for the examination of RCAPs/ECAPs [Racially & Ethnically Concentrated Areas of Poverty], as required by the rule.⁶⁵

Many of the fair housing advocates urging increased attention to the problems associated with overconcentration of poverty have championed mobility strategies over revitalization investments to overcome the spatial mismatch between affordable housing and economic opportunity. They have fought for the development of subsidized housing in areas that lack affordable housing opportunities, even when such siting costs additional time and money. Inclusive Communities, the plaintiff in the recent landmark Supreme Court case, has directly opposed the diversion of

64. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272-01, 42,283 (July 16, 2015) (to be codified at 24 C.F.R. pt. 5).

65. *Id.*

affordable housing subsidy from areas of opportunity to neighborhoods that are already home to many low-income households.⁶⁶ As AFFH made its way through the rulemaking process, advocates for investment in distressed neighborhoods expressed concern that HUD was discouraging recipients from developing affordable housing opportunities in or near areas of concentrated poverty.

With the issuance of the Final Rule, HUD made clear that “strategically enhancing access to opportunity include[d] . . . : Targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing” in addition to “promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity.”⁶⁷ HUD added this clarification in response to comments it received about earlier versions of the rule.⁶⁸ Commenters argued that, as originally framed, the AFFH rule “appears to prohibit program participants from using Federal resources in neighborhoods of concentrated poverty.”⁶⁹ HUD responded that “[t]he duty to affirmatively further fair housing does not dictate or preclude particular investments or strategies as a matter of law. . . . HUD’s rule recognizes the role of place-based strategies, including economic development to improve conditions in high poverty neighborhoods”⁷⁰

HUD’s commitment to recognizing both the revitalization of dilapidated neighborhoods and the facilitation of the voluntary relocation of the low-income households to opportunity areas is critical for cities and counties struggling with vacant and abandoned properties. These communities depend greatly on the funds they receive from HUD in the form of HOME funds, Emergency Solutions Grants and, particularly, Community Development Block Grants (“CDBG”). Their softer real estate markets make housing affordability less of a concern than in higher-demand regions. But, the older, post-industrial cities of the Rust Belt also exhibit some of the most severe and intractable patterns of racial

66. See *Texas Dept’ of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 132 S. Ct. 2507 (2015).

67. 24 C.F.R. § 5.150 (2015).

68. *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272, 42,277–79 (July 16, 2015) (to be codified at 24 C.F.R. pt. 5).

69. *Id.* at 42,278.

70. *Id.* at 42,279.

segregation in the country. As such, these jurisdictions need to be especially attentive to recent developments in AFFH and make sure that their revitalization programs that depend on HUD funding support their AFFH goals.

III. DISCUSSING MARKET-SENSITIVE VACANT PROPERTY STRATEGIES IN ASSESSMENTS OF FAIR HOUSING AND CONSOLIDATED PLANS

Local governments seeking to make their distressed neighborhoods attractive to potential residents choosing new homes must be able to express these revitalization goals as consonant with the promotion of fair housing even as they contend with accusations their market-sensitive approaches to vacant properties reinforces segregation patterns. They must be able to respond to any allegations from the community that their vacant property strategies are deliberately discriminatory or that they disproportionately and unjustifiably impair the housing opportunities of racial minorities. Even if the market-sensitive approaches are justifiable, the local governments still need to be attentive to any disparate impact they may have on the access that minority households have to decent, affordable housing and key community goods. Most importantly, county and municipal agencies that embrace market-sensitive approaches to code enforcement and land banking must show how these strategies will achieve the AFFH goal of promoting stable, inclusive communities.

At first it would appear that HUD's acceptance, as a legitimate fair housing goal, of revitalization of concentrated areas of poverty would end the discussion there. But, the importance of attracting private capital to these distressed areas puts vacant property revitalization strategies in apparent conflict with the goal of promoting the housing prospects of low-income families of color. In chasing households who already have housing choices, these older cities seem to be casting aside those with limited options. A superficial understanding of the market-sensitive approach to code enforcement would not only disqualify the market-sensitive approach to vacant properties as an AFFH strategy but would cast doubt on its compatibility with the anti-discrimination provisions of the Fair Housing Act. Only a thorough exploration of the logic that animates market-sensitive code enforcement and land banking can illustrate its true worth as a mechanism for affirmatively fur-

thering neighborhood choice as well as pointing out genuine areas of concern with regard to fair housing compliance.

An appreciation of the place of vacant property revitalization in the larger struggle for housing justice begins with an understanding of how vacant properties ruin neighborhoods. When left completely unsecured and open to casual entry, vacant properties attract criminal activity and unauthorized occupancy and pose a significant fire danger. Both vacant houses and abandoned lots can harbor rats and other vermin as well as pose dangers for neighborhood children.⁷¹ Because abandoned houses can inflict fire and water damage on adjacent houses, neighboring property owners have encountered, sometimes insurmountable, difficulties in obtaining casualty and liability insurance for their own properties.⁷² The lack of such basic protection can make mortgage financing unavailable or even cause a current mortgage loan to be declared in default despite the owner being current on his or her monthly payments.⁷³ Given the variety of serious spillover effects, one can easily imagine how a lone vacant house can diminish the value of compliant houses within a block or two by 1.5% to 3%.⁷⁴

Given the severity of the impact of abandonment, local governments would apparently be well-served to aggressively pursue enforcement of any relevant code in all cases. And indeed, addressing vacant properties has become an urgent priority for many older cities. But, the market conditions of a neighborhood dramatically impact the ability of code enforcement authorities to compel the rehabilitation of dilapidated houses.

71. Brian Nordli, *Boy Killed in Fire was Playing with Brother Inside Vacant Home*, LAS VEGAS SUN (May 2, 2013, 5:15 PM), <http://www.lasvegas.com/news/2013/may/02/house-fire-claims-life-las-vegas-child>.

72. MARGARET BASS ET AL., *VACANT PROPERTIES: THE TRUE COST TO COMMUNITIES* 11 (2005).

73. See e.g., *Federal National Mortgage Association Indiana Mortgage Form*, FANNIE MAE §5, <https://www.fanniemae.com/singlefamily/security-instruments> (last visited Apr. 11, 2016); *Federal National Mortgage Association Multistate Fixed-Rate Note*, FANNIE MAE § 10, <https://www.fanniemae.com/singlefamily/notes> (last visited Apr. 11, 2016).

74. Stephan Whitaker & Thomas J. Fitzpatrick IV, *The Impact of Vacant, Tax-Delinquent, and Foreclosed Property on Sales Prices of Neighboring Homes* 35 (Federal Reserve Bank of Cleveland Working Paper 11-23R).

An example will illustrate the impact of neighborhood real estate markets. Imagine a freestanding wood-frame house with 1,500 square feet of interior space. If this house has been unoccupied and neglected for more than a year or two, it may have sustained significant damage to the exterior doors and windows exposing its interior to the elements. At \$50 per square foot, a conservative, full-scale attempt to bring this vacant house into full code compliance would cost \$75,000. Even properties that can be made ready for occupancy for substantially less nearly always require more cash than a typical owner would have on hand for ordinary repairs.⁷⁵ Since elimination of a vacant house nuisance always involves a major capital investment, no sensible response strategy can ignore the importance of the return on that investment. Even if an owner is willing to make repair expenditures that cannot be recaptured through increased use, income, or resale value, no lender may be willing to provide the necessary funds. With so much money involved, the financial feasibility of that capital investment often dictates whether or not it goes forward, the owner's obligations under local codes notwithstanding.

Nothing limits the ability of a property to make a return on rehabilitation investment more than the weakness of the surrounding real estate market. If nearby houses, even ones not impacted directly by the abandoned property, are not selling for more than \$50,000, it is unlikely that a \$75,000 investment will pay off for the renovating owner of the vacant house. In many Rust Belt inner-city neighborhoods, inhabitable homes can be purchased for less than \$25,000. But, if such properties are allowed to fall into severe disrepair, their rehabilitation will not necessarily be achievable for less than \$25,000. As such, their owners may simply walk away from them rather than throw good money after bad.

Local building codes allow authorities to impose fines and even seek court orders against owners that fail to bring vacant properties into basic code compliance.⁷⁶ But, even these powerful

75. Leila Atassi, *Cleveland's Glut of Vacant Housing Could Cost Billions to Eliminate at Current Pace*, CLEVELAND PLAIN DEALER (Sept. 25, 2011, 3:02 PM), http://www.cleveland.com/metro/index.ssf/2012/09/clevelands_glut_of_vacant_hous.html.

76. See e.g., INT'L BLDG. CODE § 116.1 (2012); IND. CODE §36-7-9-1 (2015).

remedies will have limited impact on an owner that lacks the cash to return the property to productive use. They certainly will not induce a third party to buy the property and make a clearly bad bet by rehabbing the house. Likewise, no court order or fines will induce a bank to lend the desperate owner money on such a property, even if it happens to be free and clear of any preexisting mortgages. For those relatively few owners with the available resources to bring the property up to code, coercion may make all the difference. Even here though, courts may be reluctant to require them to make the property habitable if more modest means of mitigating the nuisance effects on surrounding properties are available.

For those vacant properties, however, located in neighborhoods with stronger real estate markets, the prospects are quite different. Once renovated, a formerly vacant property should be able to command the same rent or sale price as comparable properties on the same block. If those values are sufficient to justify the cost of the renovation, then the question shifts from whether, when or how the repairs are to be made to why not immediately, especially when code enforcement looms as an additional inducement. Many times, a financially prudent renovation of a vacant house is delayed indefinitely by an owner's unwillingness or ability to carry out the repairs. Coercion by code enforcement remedies functions to force such an owner to internalize the costs imposed on the neighborhood. If the owner is incapable of bringing about the repairs, then a voluntary sale may be the best solution. If the owner's obstinacy, total absence, or title problems with the property limit the prospects of market transfer, then a more innovative code enforcement procedure may be needed.

In the early 1990's, the City of Baltimore amended its Building Code to create a special proceeding that authorized a court to appoint a receiver for an unoccupied residential property with serious, long-standing code violations.⁷⁷ Like receivership remedies for occupied multifamily buildings that had been enacted in large cities, this vacant house receivership proceeding authorized the receiver to place a super-priority lien against the property for any code-related expenses incurred. Unlike those preexisting approaches, however, the Baltimore version of receivership al-

77. BUILDING, FIRE, AND RELATED CODES OF BALTIMORE CITY §121 (2013).

lowed for an almost immediate foreclosure on that lien, if the owner or one of the affected mortgagees did not step forward and commit to immediate elimination of the code violations.⁷⁸ The ordinance provided for a special auction process that required the foreclosing receiver to ensure that all bidders were ready, willing, and able to bring the property into full code compliance.⁷⁹ Although this pre-renovation sale remedy is far from universal, Ohio and Indiana have also enacted similar vacant building receivership provisions.⁸⁰ As more jurisdictions see the benefit of being able to “fire” an owner unwilling or incapable of renovating his or her property, neighborhoods still strong enough to support renovations of their vacant properties will have the legal means to achieve them.

Comparing the truly distressed areas with stronger neighborhoods, we see that vacant properties virtually identical in their defects may have completely different futures depending on the values of the occupied properties around them. Neighborhood market strength so strongly determines the economic feasibility of major repairs that even equally aggressive code enforcement in each situation will not significantly improve the rehabilitation prospects for the vacant house in the deteriorated neighborhood. Those houses will not be fixed up one at a time. Rather, investment in them needs to be coordinated. For this reason, cities dealing with large, concentrated inventories of vacant houses have turned to land banking.

Land banking is nothing more than the large-scale acquisition of vacant properties for subsequent return to productive use. Tax foreclosure of delinquent houses and lots allows for land assembly and a bundled disposition process. Land banking strategies can work in tandem with demolition of vacant houses to create usable open space in severely undercrowded neighborhoods. Newly created vacant lots can be made available to neighboring homeowners as side yards and to community greening groups as vegeta-

78. *Id.*; see James J. Kelly, *Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUS. & CMTY. DEV. L. 210, 217 (2004).

79. BUILDING, FIRE, AND RELATED CODES OF BALTIMORE CITY §121.

80. OHIO REV. CODE ANN. § 3767.41 (2015); IND. CODE §36-7-9-20 (2015).

ble gardens and pocket parks. By gaining control and taking responsibility for vacant properties right now, land banks can set the stage for a grounded move forward for communities contending with decades of demographic decline. But, while land banking may offer a viable future to the distressed neighborhood, it does so on a much more extended timetable than the revitalization offered to the healthier neighborhoods receiving targeted, aggressive code enforcement.

One neighborhood receives immediate renovation of its remaining vacant properties while another receives demolitions and long-term plans for future revitalization. The Fair Housing Act implications of the stark difference, at least in the short run, between these governmental responses becomes more clear when we recognize that the truly distressed neighborhoods, especially in older cities in the Northeast and the Midwest, are overwhelmingly occupied by African-Americans. On the other hand, the healthier neighborhoods, even in cities with large African-American populations, tend to be a mix of majority-white and majority-black areas. Rather than closing the gap between Racially Concentrated Areas of Poverty and more viable neighborhoods, market-sensitive code enforcement and land banking seem to be reinforcing and, possibly, expanding it.

Scholars have argued about whether choices made to save those neighborhoods that can be saved while letting others slip away constitute “planned abandonment” of African-American communities.⁸¹ While such academic discussions have continuing

81. In *Planned Abandonment: The Neighborhood Life-Cycle Theory and National Urban Policy*, 11 HOUSING POL’Y DEBATE 7 (2000), John Metzger attacked Anthony Downs “[t]riage planning [as] the synthesis of the redlining thesis and the postriot FHA [greenlining to promote neighborhood stability] antithesis.” *Id.* at 24. Metzger defined triage planning as the “target[ing of] federal funds to neighborhoods where there was a moderate decline in property values but not yet a clear downward trend of population loss, housing abandonment, and increasing poverty.” *Id.* at 17. For a response by Downs and others, see Anthony Downs, *Comment on John T. Metzger’s “Planned Abandonment: The Neighborhood Life-Cycle Theory and National Urban Policy,”* 11 HOUSING POL’Y DEBATE 41 (2000); George C. Galster, *Comment on John T. Metzger’s “Planned Abandonment: The Neighborhood Life-Cycle Theory and National Urban Policy”*(2), 11 HOUSING POL’Y DEBATE 61 (2000), and Kenneth Temkin, *Comment on John T. Metzger’s “Planned Abandonment: The Neighborhood*

relevance, jurisdictions depending on CDBG and other HUD funds for their community development programs will certainly be more focused on the recriminations that may come their way as part of the AFH-required community comment process. As market-sensitive vacant property strategies are facially race neutral, they will be as safe from accusations of deliberate discrimination as nearly all local government policies are. Code enforcement strategies, however, that deliver immediate results in many white-majority neighborhoods while offering only distant hope for poor, black areas would seem to raise serious disparate impact issues. But, the case outlined above for market-sensitive code enforcement addresses not only justification but also causation. That is, the argument for not pursuing repair orders as aggressively in the distressed neighborhoods as in healthier blocks is not based on the contention that the resulting renovations would not be enough to significantly improve the more deteriorated communities. Rather, the reality is that more aggressive prosecution of repair orders would not produce any meaningful number of full-scale rehabilitations at all. When it is known that diligent effort will produce only failure, the decision not to even try cannot be said to be the cause of the lack of success.

Nevertheless, it is true that targeting code enforcement resources on the relatively few vacant properties in healthy neighborhoods will not only keep those areas from becoming unable to support individual, uncoordinated renovations but also set them on a path to a decidedly brighter immediate future than the more distressed communities. To the extent that these resurgent neighborhoods have smaller proportions of African-American residents, these revitalization efforts will disproportionately benefit a city's white residents. For this reason, it is vital that market-sensitive code enforcement be accompanied by meaningful land banking efforts so that the gap between a distressed neighborhood and a healthy one can eventually be diminished rather than increased.

Substantive land banking efforts require publicly funded resources. A city housing agency or a specially created land bank authority has been given by the state legislature the ability to obtain the right to foreclose on tax-delinquent vacant houses and lots

without having to pay the full amount of taxes owed on the properties.⁸² Even so, there will be substantial costs in obtaining the necessary information about the titles to these properties and notifying the various stakeholders of their final chance to redeem their interests by paying off the tax debts completely. Once the property is acquired, the land bank will need to spend money to minimize any nuisances associated with the property and to market it for return to productive use. City officials can hope that the sale or rental of properties owned by the land bank might fund these activities, but it is unlikely that land banks focusing on distressed neighborhoods will be self-sustaining. If the value to be gained from assembling dilapidated properties and bundling them for sale clearly produced short-term gain, then there would be little need in the first place for public intervention. Leading national experts call upon land banking advocates to argue for public funding for a land bank “by showing that its activities provide a significant return to the local treasury, either in the form of revenues from property sales or tax revenues generated from properties being placed back in productive use.”⁸³

HUD acknowledges that AFFH cannot be used to mandate specific spending priorities. Local governments engaged in market-sensitive vacant property strategies retain the discretion as to when, if at all, they pursue land banking in their distressed neighborhoods. If, however, jurisdictions use CDBG funds to aggressively pursue repair orders in viable neighborhood real estate markets and do nothing to stabilize the markets in more distressed neighborhoods, then those jurisdictions will face great difficulties in showing their overall approach to neighborhood revitalization mitigates rather than aggravates racial segregation and the relative lack of decent, affordable housing options for their residents of color.

A local government’s commitment to land banking may allow it to argue very persuasively in its AFH report that it has a long-term plan to promote the viability of its racially concentrated areas of poverty. But two aspects of land banking may alienate members of the community anxious to see their neighborhood re-

82. Frank S. Alexander, Ctr. for Cmty. Progress, *Land Banks and Land Banking* 76–77 (2011).

83. MALLACH, *supra* note 16, at 141.

stored to its former vitality: the message of defeat communicated by house demolition and the common land-banking practice of selling properties in bundles rather than in single lots. The dangers associated with long-term abandonment of vacant properties⁸⁴ require that land banks seriously consider demolishing the houses rather than continuously securing them against entry and the elements. Tearing down these houses sends a clear signal that rehabilitation of these and similar properties in the neighborhood is not feasible. In February 2014, the Mayor of South Bend announced that the City would transform 1,000 vacant houses in 1,000 days. Even though the overwhelming majority of the properties were located in severely distressed neighborhoods,⁸⁵ the City was able to renovate 378 of those properties while the rest were demolished.⁸⁶ While some might see this as an unexpectedly positive result, some of the owners of the demolished properties feel that they were deprived of the opportunity to fix up the houses they owned. Regina Williams-Preston lost to demolition three such houses that she and her husband had recently purchased after he unexpectedly fell ill.⁸⁷ They wanted to be part of a grassroots effort but were unable to convince the City to give them the time they needed to complete renovations. It is not clear whether the City's decisions were based on the weakness of the neighborhood market or on the owners' inability to bring the properties into code compliance right away or some combination of both. What is clear is that Ms. Williams-Preston, as a newly elected member of the South Bend Common

84. See *supra* notes 76–77 and accompanying text.

85. CITY OF SOUTH BEND, VACANT AND ABANDONED PROPERTIES TASK FORCE REPORT 10 (2013), http://southbendin.gov/sites/default/files/files/Code_FinalVATF_Report_2_red.pdf.

86. Erin Blasko, *City Reaches its Vacant and Abandoned Housing Goal*, SOUTH BEND TRIBUNE (Sept. 23, 2015), http://www.southbendtribune.com/news/local/south-bend-reaches-vacant-and-abandoned-housing-goal/article_9ec592d9-efec-52e4-b1ed-45f892ac18ae.html.

87. Erin Blasko, *Candidate: House Issues Due to Illness*, SOUTH BEND TRIBUNE (April 12, 2015), http://www.southbendtribune.com/news/local/candidate-house-issues-due-to-illness/article_f1c751bb-a348-5ace-8545-955815c068d2.html.

Council, wants to explore the racial justice issues raised by the aggressive use of demolition orders in distressed neighborhoods.⁸⁸

Apart from its reliance on demolition, land banking can also frustrate grassroots advocates of revitalization when it advocates that vacant properties be sold in bundles rather than one at a time. When repair orders on vacant houses were not aggressively pursued because the neighborhood market was found to be too weak, those responsible for disposing of these same vacant houses and lots may be skeptical of a development proposal limited to just one property. Land bank staff may determine that it is in the long-term interest of the neighborhood to make sure the properties go to a developer that can create or renovate several houses together and achieve a return that would be unlikely in the case of a much smaller change in the neighborhood. Such developers may have significant resources and be relatively unknown to the long-time members of the community. With both the demolition and bundled disposition aspects of land banking work, local governments committed to the long-term viability must work to involve members of the community in these decisions or be prepared to face widespread backlash after inviting community comments about the fair housing aspects of their land banking efforts. Because the challenges that the AFH process presents to a local government taking innovative approaches to vacant properties arise from the AFH community input component, it is critical that land banks not only practice social equity but also communicate with and involve those most affected by their work.

Even success in land banking can raise racial justice concerns. Once a distressed neighborhood has gained traction with people shopping for places to live, the history and lore of gentrification recast residents from their previous roles as disregarded persons into their new identities as potentially displaced persons. After decades of enduring urban renewal and revitalization efforts, inner-city residents of color have come to believe that if the neighborhood they live in is being improved by money from outside the community, then the intention is to improve it for someone other than them. As a form of urban revitalization that seeks to reestab-

88. *District 2: Regina Williams-Preston*, CITY OF SOUTH BEND, INDIANA, <https://www.southbendin.gov/government/content/district-2-regina-williams-preston> (last visited Apr. 11, 2016).

lish market activity in distressed neighborhoods, land banks do in fact seek to make these communities attractive to households that have an array of choices of where they can live. Achieving these goals can raise property taxes and rents for residents and small businesses in the community. Since land banks bring potential sites for decent, affordable homes into government ownership, it is entirely reasonable for housing advocates to insist that all, or at least some, of those properties be dedicated to the needs of low- and moderate-income residents. The Community Land Trust (“CLT”) model has been put forward as an ideal solution especially in cities such as Philadelphia and Baltimore, where large-scale abandonment exists side-by-side with very exclusive residential development.⁸⁹ Community Land Trusts are democratically controlled, nonprofit organizations dedicated to holding land for the benefit of local communities.⁹⁰ They typically focus on creating and stewarding permanently affordable owner-occupied homes.⁹¹ The legal mechanisms they use to allow homes to be affordable not only to the original owners but also to future owners as well are uniquely effective with single-family homes.⁹² Advocates of equitable development have argued that it is never too soon to plan for high land values and the attendant lack of affordable housing.⁹³ While a CLT can play a key role in insuring that a reinvigorated real estate market does not drive out the very people who revitalized the community, other measures may also further the goal of

89. Jill Feldstein, *Winning a Land Bank We Can Trust*, SHELTERFORCE (Oct. 2, 2014), http://www.shelterforce.org/article/3910/winning_a_land_bank_we_can_trust2/; BALTIMORE HOUSING ROUNDTABLE, COMMUNITY + LAND + TRUST: TOOLS FOR DEVELOPMENT WITHOUT DISPLACEMENT 24–35 (2015), https://d3n8a8pro7vhm.cloudfront.net/unitedworkers/pages/239/attachments/original/1453986068/C_L_T_web.pdf?1453986068.

90. James J. Kelly, Jr., *Land Trusts that Conserve Communities*, 59 DEPAUL L. REV. 69, 79–81 (2009).

91. *Id.* at 82.

92. James J. Kelly, Jr. *Homes Affordable for Good: Covenants and Ground Leases as Long-Term Resale Restriction Devices*, 29 ST. LOUIS U. PUB. L. REV. 9, 38 (2009).

93. SHELTERFORCE, THE ANSWER: WHAT’S THE POINT OF SHARED-EQUITY HOMEOWNERSHIP IN WEAK MARKET AREAS (2015), <http://cltnetwork.org/wp-content/uploads/2014/04/CLTs-and-Land-Banks-Article1.pdf>.

community conservation.⁹⁴ Long-time homeowners, especially the elderly, or others living of fixed incomes, may be pressured to sell if rising land values in their neighborhood dramatically increase their property tax burdens.⁹⁵ Broad or targeted protections against such increases may promote the socioeconomic diversity in an increasingly attractive neighborhood that can be a core goal of an AFFH strategy.⁹⁶

Whether responding to charges of redlining or making the case for their own AFFH efforts, local governments involved in land banking not only need to get those reading their AFH reports to think in the long term, they must do so themselves. Land banks cannot be just an excuse for not deploying more code enforcement resources to a distressed neighborhood. There must be a long-haul commitment not only to mitigating vacant property nuisances here and now but also reconnecting these communities to the good, services and housing consumers of the metropolitan area. Until this point, this Article has looked at the AFH as a challenge for any community wishing to justify market-sensitive vacant property strategies. But this mechanism for fair housing accountability can also deliver real benefits to cities struggling to get their land banking activities underway.

As noted above,⁹⁷ land banks depend largely on tax foreclosure to acquire clear title to the hundreds and thousands of vacant houses and lots in their designated territories. In most states, property tax collection processes are controlled by county governments. Municipal land banks that wish to acquire vacant properties through tax foreclosure often need to go “hat in hand” asking the county for the ability to acquire those vacant properties without having to pay the full balance of the outstanding liens. Sometimes, tax foreclosure reforms enacted at the state level, often as part of push to implement land banking, will give the cities the ability to purchase the tax liens at or below the actual value of the property rather than at the, often much higher, total amount of the public liens on the abandoned property.

94. James J. Kelly, Jr., *Sustaining Neighborhoods of Choice: From Land Bank(ing) to Land Trust(ing)*, 54 WASHBURN L. J. 613, 621-22 (2015)

95. *Id.* at 623.

96. *Id.* at 622-24.

97. *See supra* note 84 and accompanying text.

In slow-growth regions with entitlement jurisdictions cities, the surrounding counties themselves not only receive but depend upon Community Development Block Grant funds for their own economic development and neighborhood stabilization work. Their obligation to deal with regional fair housing issues in their AFFH reporting can be an opportunity for cities to exert pressure on them to collaborate in stabilizing inner-city neighborhoods through tax foreclosure reforms that allow land banks to acquire clear title over vacant properties. But, these reforms are far from universal and, where they are lacking, cities remain beholden to counties in their efforts to reconnect distressed neighborhood vacant properties to a functioning real estate market.

As already described,⁹⁸ HUD cannot use AFFH to invalidate a policy or practice that is not itself prohibited by law. But, when a county government refuses to release liens or lower the minimum tax sale bid on a vacant property in a city and has no valid reason for doing so, the consequences of that decision for the city's AFFH efforts to create a community with sustainable socio-economic diversity makes the county's refusal an AFFH issue. Even if the county and the city do not submit a joint AFH, the community input process may allow for several ways for the county to be confronted with its obstruction of revitalization efforts within the municipal boundaries.

98. See *supra* note 37 and accompanying text.