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WHITE PICKET FENCES & SUBURBAN GATEKEEPING: HOW LONG ISLAND'S LAND USE LAWS CEMENT ITS STATUS AS ONE OF THE MOST SEGREGATED PLACES IN AMERICA

JESSICA MINGRINO[†]

INTRODUCTION

The average wealth of Black families is one-seventh that of white families in the United States today.¹ Homeownership—the primary avenue through which Americans accumulate personal and generational wealth—is the leading driver of the wealth disparity between white and Black American families,² known as the “racial wealth gap.”³ The systematic and intentional exclusion of Black people from developing communities during the twentieth century largely excluded people of color from the housing boom and denied them the opportunity afforded to white people to multiply their assets.⁴ Contrary to widespread belief, however,

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¹ Janelle Jones, *The Racial Wealth Gap: How African-Americans Have Been Shortchanged Out of the Materials to Build Wealth*, ECON. POL'Y INST. (Feb. 13, 2017, 12:01 PM), <https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth> [https://perma.cc/825M-TFG3].

² Tanvi Misra, *Why America's Racial Wealth Gap Is Really a Homeownership Gap*, BLOOMBERG CITYLAB (Mar. 12, 2015, 3:41 PM), <https://www.bloomberg.com/news/articles/2015-03-12/a-new-report-finds-that-eliminating-the-racial-homeownership-gap-will-greatly-reduce-the-wealth-gap> [https://perma.cc/FM36-7DY7]. See generally Matthew Desmond, *How Homeownership Became the Engine of American Inequality*, N.Y. TIMES MAG. (May 9, 2017), <https://www.nytimes.com/2017/05/09/magazine/how-homeownership-became-the-engine-of-american-inequality.html>.

³ Tanvi Misra, *Instead of the Income Gap We Should Be Talking About the Wealth Gap*, BLOOMBERG CITYLAB (Feb. 19, 2015, 10:26 AM), <https://www.bloomberg.com/news/articles/2015-02-19/instead-of-the-income-gap-we-should-be-talking-about-the-wealth-gap> [https://perma.cc/5VN3-7QQM] (“The average white person also accumulates \$2 million in wealth over a lifetime, versus \$1.5 million for a typical African American”). White individuals also have “3 times as much [average wealth as Black individuals] in their thirties,” and “11 times more average wealth . . . in their sixties.” *Id.*

⁴ See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

legislation-backed oppression of Black Americans did not end in the twentieth century.⁵ Many current land use and housing policies unnecessarily drive up home prices and make it difficult for traditionally disadvantaged individuals like low-income Black Americans to move into traditionally white communities, prolonging segregation in the United States. As one of the most segregated areas in the United States, Long Island, New York serves as a perfect example of how land use regulation disparately impacts people of color, cements the Racial Wealth Gap, and drastically reduces opportunity for economic and community mobility.

This Note examines the enduring segregation of Long Island and proposes solutions to counteract the regulations that perpetuate it. Part I of this Note reviews the pervasive role racism has played in shaping Long Island's historical land use framework. Part II examines common land use regulations utilized on Long Island and their disparate impact on historically disadvantaged communities like Black Americans. Part III discusses barriers to the modification of these regulations. Finally, Part IV demands that New York State enact comprehensive legislation to catalyze desegregation and incentivize equitable community development on Long Island.

I. WEALTH, RACE, AND SEPARATION—LONG ISLAND'S PAST AND PRESENT

A. *Large Portions of Long Island Were Developed with Intent To Create a White Enclave*

Long Island was an agricultural area for much of its history.⁶ However, following World War II, it experienced significant population growth and quickly became a symbol of both post-war suburbanization and racist housing policy.⁷ Though the sprawling farmland had undeniable appeal after the war, only certain demographics were allowed to enjoy what it had to offer.⁸ In the late 1940s, William J. Levitt built 8,000 housing units on Long

⁵ See generally *id.*

⁶ *About Long Island*, LONGISLAND.COM, <https://www.longisland.com/long-island.html> [https://perma.cc/2XA3-558Q] (last visited Feb. 10, 2022).

⁷ *Id.*

⁸ *Id.* (“Nassau County experienced the largest growth in the United States between 1950 and 1970, setting off a chain reaction of suburbanization and economic development across Long Island.”).

Island to create what would come to be known as Levittown—a community of inexpensive suburban homes marketed to soldiers returning from war.⁹ The Nassau County town, which contains thousands of identical homes away from the fast-paced life of Manhattan, is often regarded as the nation’s first suburb.¹⁰ The original deeds of each of these homes, however, contained racially restrictive covenants limiting their ownership to white people.¹¹ Though these types of discriminatory restrictive covenants were invalidated by the Supreme Court in 1948,¹² they were still enforced in Levittown through the late 1960s, severely impacting the area’s modern racial composition.¹³ Indeed by 1960, not one of Levittown’s 82,000 residents was Black.¹⁴ Today, the Black population of Levittown has yet to exceed 2%.¹⁵

In addition to being excluded from housing opportunities on Long Island, Black people were also barred from enjoying local public recreational areas. Robert Moses, former New York City Parks Commissioner, intentionally modeled the overpasses of Long Island parkways to be so low that public transit buses could

⁹ Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L. J. 699, 782 (1993).

¹⁰ See, e.g., Noah Sheidlower, *The Controversial History of Levittown, America’s First Suburb*, UNTAPPED N.Y., <https://untappedcities.com/2020/07/31/the-controversial-history-of-levittown-americas-first-suburb> [https://perma.cc/WWN4-8HLR] (last visited Feb. 10, 2022).

¹¹ Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 157–58 (2020) (footnote omitted) (“Though the legislation in 1968 and 1977 curbed federally backed housing discrimination, the results were longstanding and irreversible. . . . [I]n Levittown, New York, Blacks were denied access to the neighborhood through redlining and other color-coded maps. . . . [W]hite working-class families who bought those homes in 1948 with significant government assistance have gained over \$200,000 in wealth over three generations. Houses that were similarly valued in 1948—but existed in redlined areas nearby—currently sell for \$90,000 to \$120,000.”). See generally ROTHSTEIN, *supra* note 4.

¹² *Shelley v. Kraemer*, 334 U.S. 1, 21–23 (1948).

¹³ Bruce Lambert, *At 50, Levittown Contends With Its Legacy of Bias*, N.Y. TIMES (Dec. 28, 1997), <https://www.nytimes.com/1997/12/28/nyregion/at-50-levittown-contentends-with-its-legacy-of-bias.html>.

¹⁴ ERASE RACISM, CIVIL RIGHTS ROLLBACK: U.S. GOVERNMENT ACTIONS TO REDUCE CIVIL RIGHTS IN HOUSING (2019), http://www.eraseracismny.org/storage/documents/Reports/rollback_report_HOUSING_FINALREPORT.pdf [https://perma.cc/2BWW-BE2V].

¹⁵ Today Levittown is 82.8% white and 1.2% Black (accounting for those who listed themselves as only one race). *Quickfacts Levittown CDP, New York*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/levittowncdpnewyork#qf-headnote-a> [https://perma.cc/TW6J-B9CP] (last updated Dec. 21, 2021); see also Lambert, *supra* note 13.

not access his Long Island parks.¹⁶ He did so with the outright intent to exclude Black people and other minorities who often relied on such transportation.¹⁷ Moses also prohibited the Long Island Railroad from constructing a route to Jones Beach and prevented transportation companies that were owned by Black people or served Black patrons from acquiring permits to operate charter buses to the beach.¹⁸ These examples of racist policymaking are reflective of the general biases that influenced Long Island's overall development and transformation from an agricultural mass into suburbia.¹⁹

B. *Long Island Remains Anachronistically Segregated Today*

Unsurprisingly, Long Island is now the tenth most segregated metropolitan region and the most segregated suburb in the United States.²⁰ According to the 2010 Census, Nassau County was the most segregated county in America within its population bracket, and Suffolk County was the tenth most segregated among similarly sized counties.²¹ As of 2017, 50% of Long Island's Black population was concentrated in only 11 out of 291 communities on the island.²²

Over time, segregation on Long Island has become progressively worse. In particular, school segregation reveals the significance of residential shifts on Long Island. One study found that over the course of ten years, the number of minority students attending Long Island schools where the student body was over 90% students of color (and less than 10% white) tripled from 5% to

¹⁶ Christopher J. Tyson, *From Ferguson to Flint: In Search of an Antisubordination Principle for Local Government Law*, 34 HARV. J. ON RACIAL & ETHNIC JUST. 1, 31–32 (2018).

¹⁷ *Id.*

¹⁸ Regina Austin, "Not Just for the Fun of It!": Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space, 71 S. CAL. L. REV. 667, 696 (1998).

¹⁹ See, e.g., Olivia Winslow, *Dividing Lines, Visible and Invisible*, NEWSDAY (Nov. 17, 2019), <https://projects.newsday.com/long-island/segregation-real-estate-history>.

²⁰ *Id.*; Bruce Lambert, *Study Calls L.I. Most Segregated Suburb*, N.Y. TIMES (June 5, 2002), <https://www.nytimes.com/2002/06/05/nyregion/study-calls-li-most-segregated-suburb.html>.

²¹ Winslow, *supra* note 19. See generally FISCAL POL'Y INST., THE RACIAL DIMENSION OF NEW YORK'S INCOME INEQUALITY (2017), <http://fiscalpolicy.org/wp-content/uploads/2017/03/Racial-Dimension-of-Income-Inequality.pdf> [<https://perma.cc/PE59-7RFK>]. Note that Long Island is made up of only two counties: Nassau and Suffolk.

²² The study also found that 90% of Long Island's Black population was concentrated in 62 of 291 communities. Winslow, *supra* note 19.

15% due to residential shifts.²³ The same study found that “[t]hree out of every four [B]lack students . . . attend a majority-minority school district”—one which is composed of between 50 and 100% minority students.²⁴

Homebuyers are not the only reason for these patterns, however. Realtors all over Long Island were investigated as recently as 2019 for racial steering and discriminatory financial scrutiny in direct violation of The Fair Housing Act.²⁵ These violations were a predictable and unfortunate follow-up to nationwide investigations following the 2008 housing market crash, which had revealed the mortgage industry’s predatory lending schemes targeting low-income, middle-class, and even some high-income Black Americans.²⁶

C. *Black Residents of Long Island Fall Victim to a Significant Racial Wealth Gap*

Nationwide, Black families on average have significantly less wealth than white families, and “median white wealth . . . is *twelve times* higher than median [B]lack wealth.”²⁷ Worse, more than 25% of Black households have “zero or *negative* net worth,” while less than 10% of white households are similarly situated.²⁸ This statistic is especially troubling considering only about 13.4% of the nation’s population is Black, thus indicating that America’s poor are disproportionately Black.²⁹ This disparity is often referred to as “the Racial Wealth Gap” and is especially prominent in New York State.³⁰ While measures of income inequality only consider annual earnings of certain groups, measures of wealth are more indicative of overall financial success because they

²³ The study examined residential changes from about 2003–2004 to 2015–2016. ERASE RACISM, A DECADE OF CHANGE: GROWING SCHOOL SEGREGATION ON LONG ISLAND 3 (2017), http://eraseracismny.org/storage/documents/A_Decade_of_Change_Growing_School_Segregation_on_LI_2017_Report_Final.pdf [<https://perma.cc/6MNF-A3BU>].

²⁴ *Id.*

²⁵ Ann Choi et al., *Long Island Divided*, NEWSDAY (Nov. 17, 2019), <https://projects.newsday.com/long-island/real-estate-agents-investigation>.

²⁶ See generally JANIS SARRA & CHERYL L. WADE, PREDATORY LENDING AND THE DESTRUCTION OF THE AFRICAN-AMERICAN DREAM (2020).

²⁷ Jones, *supra* note 1.

²⁸ *Id.* (emphasis added).

²⁹ *Quickfacts United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/7RJE-K6FD>] (last updated Dec. 21, 2021).

³⁰ See FISCAL POL’Y INST., *supra* note 21.

consider the entire “value of a household’s property and financial assets,” less “the value of its debts.”³¹ Additionally, while discourse over the wage gap tends to focus on employment or wage discrimination, the Racial Wealth Gap is a product of centuries of discrimination and its intergenerational effects.³²

The most significant drivers of the Racial Wealth Gap nationally are disparities in homeownership, wages, employment, and college education.³³ These factors are troublingly self-enforcing; it is not hard to see how wage discrimination might lead to difficulty purchasing a home or financing higher education.

Each of these “drivers” of the Racial Wealth Gap results from the historical exclusion and exploitation of Black people within American society. Black people in the United States were forced into 250 years of unpaid slave labor, until slavery was finally abolished in 1865.³⁴ Though some believe racial discrimination ended with the fall of the Jim Crow era, Black Americans continued to be denied opportunities to accumulate wealth through government-sponsored wealth-building efforts, including the Homestead Act, Social Security, and the GI Bill.³⁵ When they attempted to do so anyway despite such exclusion, Black Americans were violently targeted in incidents like the Tulsa Massacre.³⁶ Today, Black individuals endure wage discrimination, employment discrimination, higher mortgage costs, and higher property taxes than their white counterparts, in addition to the

³¹ CHAD STONE ET AL., CTR. ON BUDGET & POL’Y PRIORITIES, A GUIDE TO STATISTICS ON HISTORICAL TRENDS IN INCOME INEQUALITY (2020), https://www.cbpp.org/sites/default/files/atoms/files/11-28-11pov_0.pdf [<https://perma.cc/LHN2-YQUH>].

³² See generally *id.*

³³ OFF. OF THE NASSAU CTY. COMPTROLLER POL’Y & RESEARCH UNIT, THIS IS NASSAU: BLACK ECONOMIC EQUITY UPDATE 11 (2020), <https://www.nassaucountyny.gov/DocumentCenter/View/28555/This-is-Nassau-Black-Economic-Equity-2020-Update> [<https://perma.cc/4ZMH-3B3K>].

³⁴ See generally SHAWN D. ROCHESTER, THE BLACK TAX: THE COST OF BEING BLACK IN AMERICA (2017).

³⁵ Mariette Williams, *Racism Has Cost Black Americans \$70 Trillion Since the Start of Slavery—Here’s How That Cost Breaks Down*, BUSINESS INSIDER (Sept. 14, 2020, 12:09 PM), <https://www.businessinsider.com/personal-finance/what-racism-has-cost-black-americans-black-tax-2020-9> [<https://perma.cc/4XXL-UHFD>]; see also ROCHESTER, *supra* note 34.

³⁶ See *Tulsa Race Massacre*, HISTORY.COM (Mar. 8, 2018), <https://www.history.com/topics/roaring-twenties/tulsa-race-massacre> [<https://perma.cc/G7UA-7YU6>] (last updated May 26, 2021).

general and pervasive racial discrimination many are forced to suffer regularly.³⁷

Despite the complexity of systemic racism and its impact on the Racial Wealth Gap, income measures should not be altogether disregarded. In 2015, the United States Census Bureau found that the average income of white families in New York exceeded that of Black families by 77%.³⁸ In that year, the average white family in New York earned \$122,200, while the average Black family earned only \$69,100.³⁹ On Long Island, median income for white households in Nassau County was \$117,594 in 2018, but for Black households only \$94,498, likely exacerbating the Racial Wealth Gap in the area.⁴⁰

The Racial Wealth Gap is not only particularly prominent on Long Island but also incredibly damaging to residents. The racial disparities on Long Island are stark: “Black Long Islanders are three times as likely as [w]hite Long Islanders to live below [the] poverty [line].”⁴¹ Additionally, 49.5% of Black homeowners on Long Island expend over 30% of their income on housing costs, while only 39.4% of white Long Islanders do the same.⁴² Much of this inequity persists from the area’s intentionally racially segregated beginning. For example, the original homes of Levittown, which legally excluded Black residents, were sold for about \$8,000 each, amounting to “\$100,000 more or less in today’s currency.”⁴³ Though working class “African-Americans . . . could have [afforded] those homes,”⁴⁴ only white families were allowed to invest in them, thereby gaining two- to three-hundred thousand

³⁷ *Id.*; Andrew Van Dam, *Black Families Pay Significantly Higher Property Taxes Than White Families, New Analysis Shows*, WASH. POST (July 2, 2020, 6:00 AM), <https://www.washingtonpost.com/business/2020/07/02/black-property-tax>.

³⁸ FISCAL POL’Y INST., *supra* note 21, at 1.

³⁹ *Id.*

⁴⁰ OFF. OF THE NASSAU CTY. COMPTROLLER POL’Y & RESEARCH UNIT, *supra* note 33, at 4.

⁴¹ POLICYLINK & UNIV. S. CAL. PROGRAM FOR ENVTL. & REG’L EQUITY, AN EQUITY PROFILE OF LONG ISLAND 44 (2017), https://www.policylink.org/sites/default/files/LongIslandProfile_final.pdf [<https://perma.cc/GR4A-MP8L>]. “One in four Black Long Islanders live[s] below 200[%] of the federal poverty line.” *Id.* at 45.

⁴² *Id.* at 94.

⁴³ Alanna Schubach, *How Did Long Island Become So Segregated—and What Can Be Done About It?*, BRICK UNDERGROUND (June 13, 2017, 8:59 AM), <https://www.brickunderground.com/live/long-island-history-segregation> [<https://perma.cc/S6BU-VDYF>].

⁴⁴ *Id.*

dollars in equity appreciation over two generations—an opportunity denied to Black Long Islanders.⁴⁵

II. CONTROLLING THE LANDSCAPE—LAND USE LEGISLATION AND ITS EFFECT

A. *Black Homeowners Are Significantly Outnumbered by White Homeowners Due to the Persistence of the Racial Wealth Gap and the Policies That Preserve It*

Recent research studies have attributed much of the Racial Wealth Gap to disparities in homeownership. A 2011 report found that if homeownership rates were equal across all races nationwide, the Racial Wealth Gap would decrease by 31% between Black and white Americans.⁴⁶ Instead, in the fourth quarter of 2019, 73.7% of white Americans owned homes, compared to only 44% of Black Americans.⁴⁷ Much of the homeownership gap is due to the mass exclusion of Black people from the housing market historically,⁴⁸ described above.⁴⁹ Moreover, minorities typically receive a lower return on their investment as homeowners than white individuals, making purchasing a home less economically worthwhile.⁵⁰ Additionally, wage discrimination reinforces income disparity, thereby perpetuating exclusion from the housing market. The problem, therefore, is cyclical—Black people were historically excluded from the housing market, which hindered their development of generational wealth, which in turn excluded many of their children from today's housing market, thereby stunting their geographic and economic mobility now.⁵¹

While Long Island's use of openly racist policies has come to an end, structural discrimination is not always as apparent as earlier de jure approaches. States and municipalities have instead implemented regulations which disparately impact Black

⁴⁵ *Id.*

⁴⁶ LAURA SULLIVAN ET AL., THE RACIAL WEALTH GAP: WHY POLICY MATTERS 2 (2015), https://www.demos.org/sites/default/files/publications/RacialWealthGap_2.pdf [<https://perma.cc/Q39J-7DFQ>].

⁴⁷ OFF. OF THE NASSAU CTY. COMPTROLLER POL'Y & RESEARCH UNIT, *supra* note 33, at 6.

⁴⁸ *See generally* ROTHSTEIN, *supra* note 4.

⁴⁹ *See supra* Section I.A.

⁵⁰ SULLIVAN ET AL., *supra* note 46, at 12–14. *See generally* SARRA & WADE, *supra* note 26.

⁵¹ *See generally* SULLIVAN ET AL., *supra* note 46; SARRA & WADE, *supra* note 26.

individuals and people of color, often without drawing much attention.⁵² In particular, land use laws tend to artificially drive up suburban home prices, which in turn excludes low-income, working class Black Americans who are priced out of these opportunities due to the persistence of the Racial Wealth Gap.⁵³ Even so, more affluent Black Americans are financially capable of moving into these communities but often prefer not to subject themselves to the discrimination and racial bias experienced by those who pioneer the movement of Black people into primarily white areas.⁵⁴

B. Many Land Use Policies Have a Disparate Negative Impact on Low-Income Individuals, and Thus, Disproportionate Numbers of Black Americans

State and municipal land use policies disparately impact low-income individuals and disproportionately hurt homebuyers of color due to historical discrimination and economic exploitation.⁵⁵ In fact, many scholars argue that zoning is, and has always been, motivated by class and racial biases.⁵⁶ However, even if historical

⁵² See Elliot Anne Rigsby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, CENTURY FOUND. (June 23, 2016), <https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty/?agreed=1> [<https://perma.cc/74HV-NU6R>].

⁵³ See, e.g., ROTHSTEIN, *supra* note 4.

⁵⁴ See, e.g., Lisa Finn, *Black LI Family on 'Subtle' Racism: It's Not Just the N-Word*, SOUTHAMPTON PATCH (July 15, 2020, 5:33 PM), <https://patch.com/new-york/southampton/long-island-family-speaks-out-reality-subtle-racism> [<https://perma.cc/SQL7-BDKA>] (last updated Jul. 17, 2020, 6:22 AM); *Black Woman Says NY Neighbors Racially Harass Her by Leaving Feces, Toting Guns*, NBC N.Y. (July 14, 2020, 7:36 AM), <https://www.nbcnewyork.com/news/local/black-woman-says-long-island-neighbors-racially-harass-her-by-leaving-feces-toting-guns/2512471> [<https://perma.cc/LF2K-JLEU>]. For a discussion of twentieth-century violence against Black people moving into homogenously white communities, see ROTHSTEIN, *supra* note 4, at 139–51.

⁵⁵ See Rigsby, *supra* note 52.

⁵⁶ For instance, Martha Lees states:

[S]cholars have recognized the roots of exclusionary zoning in the early part of this century, when laws barring industry, businesses, and multiple dwellings from private residential areas were first enacted and later definitively upheld by the Supreme Court in *Village of Euclid v. Ambler Realty Company* [in 1926]. They have noted that early twentieth-century proponents of laws protecting private residential districts were motivated by class, racial, and ethnic bias and by economic interests such as the desire to protect property values. Kenneth Jackson, for example, has suggested that the main purpose of zoning . . . was to “preserv[e] residential class segregation and property values.” Similarly, Yale Rabin has written that by the time of *Euclid*, zoning was a “device for protecting property values and

motivations for zoning were not primarily racial, land use legislation's impact is inherently discriminatory because one of its primary goals is to protect property value.⁵⁷ Perceptions of property value have been known to be drastically affected by race: homes of Black Americans have been historically under-appraised, and property values drop when white neighborhoods become more racially integrated.⁵⁸ Today, "[l]ocal governments" often protect the interests of current—often white—homeowners by "ignor[ing] the interests of first-time home buyers, renters, real estate developers and investors . . . and others in favor of preserving incumbent homeowners' property values."⁵⁹

As a result of years of redlining and discriminatory practices by private entities and the federal government, Black people were historically deemed a financial burden on existing property owners in middle-class and upper-class neighborhoods.⁶⁰ Because many land use restrictions were created prior to the condemnation of redlining and have not been changed, these regulations inherently favor white people regardless of their class because white people were never considered a financial risk.⁶¹ The effects of the historical designation of Black Americans as a financial risk created, and continue to deepen, the Racial Wealth Gap,⁶² which is further exacerbated by widespread restrictions on land use. The negative effects of exclusionary zoning and restrictive land use

excluding the undesirable," and that zoning was widely accepted "only after its potential for enforcing separation and protecting established privilege was understood and appreciated."

Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate Over Zoning for Exclusively Private Residential Areas, 1916–1926*, 56 U. PITT. L. REV. 367, 368–69 (1994) (footnotes omitted).

⁵⁷ *Id.*

⁵⁸ Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES (Aug. 27, 2020), <https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html>; Robin Young & Serena McMahon, *Biracial Couple Gets Lower House Appraisal with Black Family Member Present*, WBUR (Sept. 23, 2020), <https://www.wbur.org/hereandnow/2020/09/23/home-appraisal-bias-racism> [<https://perma.cc/WV8H-XMZP>].

⁵⁹ Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 295 (2019).

⁶⁰ Redlining was a racially discriminatory lending tactic where lenders mapped out neighborhoods by their racial composition and attached high risk ratings to Black neighborhoods (coloring them red). Loans were denied to those residing within "red" neighborhoods. See ROTHSTEIN, *supra* note 4, at 64–65.

⁶¹ See Michael H. Wilson, *The Racist History of Zoning Laws*, FOUND. FOR ECON. EDUC. (May 21, 2019), <https://fee.org/articles/the-racist-history-of-zoning-laws> [<https://perma.cc/2G3D-WM6F>].

⁶² See generally ROTHSTEIN, *supra* note 4.

regulations are not speculative; indeed, these polices have been shown to “decrease mobility and hinder economic growth by inflating housing prices.”⁶³ Additionally, these policies create an artificial scarcity in the housing market that serves to “driv[e] up prices beyond what the market would naturally dictate.”⁶⁴

C. *New York State Places Little Limitation on Municipal Zoning and Land Use Regulation*

The New York State Constitution delegates power to control land use to municipal governments, including cities, towns, and villages.⁶⁵ Zoning, a common form of land use regulation, dictates permissible uses of land by designating certain areas of land on a map as different zones, in which specific types of use are allowed.⁶⁶ This “zoning map” divides communities into distinct land use districts and categories such as “high, medium and low density residential, neighborhood commercial, central business district, or highway commercial, light industrial, heavy industrial, or agriculture.”⁶⁷ Zoning regulations then outline permissible uses for each zone.⁶⁸ They may also provide quantitative restrictions called area standards, which can include “dimensional standards for each district, such as the height of buildings, minimum distances (setbacks) from buildings to property lines, and the density of development” permitted.⁶⁹

⁶³ Singh Lemar, *supra* note 59, at 295. Additionally, these regulatory schemes create other problems by contributing to the “growing severity of undersupplied housing markets [which] jeopardiz[es] housing affordability for working families, increasing income inequ[ity] by reducing less-skilled workers’ access to high-wage labor markets, and stifling GDP growth by driving labor migration away from the most productive regions.” *Id.* (quoting THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 2 (2016), <https://perma.cc/9UMS-TFVQ>).

⁶⁴ Richard D. Kahlenberg, Opinion, *The Walls We Won’t Tear Down*, N.Y. TIMES SUNDAY REV. (Aug. 3, 2017), <https://www.nytimes.com/2017/08/03/opinion/sunday/zoning-laws-segregation-income.html>.

⁶⁵ See *The Local Government Handbook: Land Use Planning and Regulation*, N.Y. ST., https://video.dos.ny.gov/lg/handbook/html/land_use_planning_and_regulation.html [<https://perma.cc/KQN9-RBNR>] (last visited Feb. 16, 2022). Land use regulation is a function of the police power delegated to the states and recognized by the Supreme Court. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

Because New York State broadly delegates this power to local municipal governments, the suburbs of Long Island are plagued by hyper-specific local legislation regulating nearly every aspect of what can be done with one's land.⁷⁰ As of 2008, nearly every village, town, and city on Long Island had implemented at least one type of land use regulation.⁷¹ Though there are many different regulatory schemes, this Note specifically discusses minimum lot sizes, setback restrictions, minimum parking requirements, single-family designations, and each of their respective impacts.

D. Many Land Use Policies Disproportionately Harm Black Individuals

One of the most common quantitative land use policies responsible for inaccessible home prices is minimum lot size. Many municipalities only allow homes to be built when the surrounding lot exceeds a certain size.⁷² Though these size requirements are often excessive, the regulations have received little internal scrutiny or modification. For example, the Villages of Sands Point and Upper Brookville, both situated on the north shore of Long Island, require at least five acres of lot for every home in one of its residential districts.⁷³ These two affluent areas are not outliers on the island—for example, the Town of East

⁷⁰ ELIZABETH MOORE, LONG ISLAND INDEX, THE LONG CAMPAIGN: WHAT IT TAKES TO BUILD APARTMENTS ON LONG ISLAND 5, 7 (2016), <http://www.longislandindex.org/wp-content/uploads/2015/12/Long-Campaign.pdf> [<https://perma.cc/VDH8-QP6L>] (“[D]evelopment is complex anywhere, but it becomes truly arcane on Long Island, where multiple layers of government exercise authority but information about the process and its rules is often difficult to uncover. . . . [Z]oning falls under the jurisdiction of 69 different governments in Nassau County alone. Each jurisdiction has its own ordinances, procedures, and . . . its own, all-important ‘approval culture.’”).

⁷¹ The land use tools considered included written comprehensive plans, zoning, subdivision regulations, site plan reviews and planning boards. N.Y. ST. LEGIS. COMM’N ON RURAL RES., LAND USE PLANNING AND REGULATIONS: A SURVEY OF NEW YORK STATE MUNICIPALITIES B-8 (2008), <https://dos.ny.gov/system/files/documents/2019/05/ruralresourcesurvey.pdf> [<https://perma.cc/TK9F-GPJJB>].

⁷² See, e.g., SANDS POINT, N.Y., ZONING CODE § 176-33.6 (1994), <https://ecode360.com/11100005>; BROOKVILLE, N.Y., ZONING CODE § 218-24.1(A) (1962), http://www.villageofbrookville.com/uploads/2/7/0/5/2705391/zoning_code_with_local_1_aws_included_rev_5-21-13.pdf [<https://perma.cc/3743-GEF9>].

⁷³ SANDS POINT ZONING § 176-33.6; BROOKVILLE ZONING § 218-24.1(A).

Hampton requires 9.75 acres of open land before a home can be built in one of its residence districts.⁷⁴

These excessive requirements may be fueled by the widespread belief that the landmark Supreme Court zoning decision in *Euclid v. Ambler Realty Co.* explicitly approved large minimum lots.⁷⁵ In reality, however, these regulations were “not the focus of the constitutional inquiry.”⁷⁶ Even so, the minimum lot size mentioned in *Euclid* was only 5,000 square feet, just over one-tenth of an acre and a far cry from today’s minimum lot sizes.⁷⁷ Because land is a fixed and scarce resource, the current excessive restrictions imposed on lot sizes reduce the supply of available homes, thus artificially driving up the cost of existing homes and increasing suburban sprawl.⁷⁸

Similarly, setback laws—which require a minimum distance between a marker, such as a curb or property line, and a home’s front, side, or rear foundation—decrease accessibility of homeownership.⁷⁹ These laws often serve aesthetic purposes but are also championed as safety measures that protect buildings and their residents from fire and other safety hazards associated with overcrowding.⁸⁰ There is little uniformity in how setback laws are assigned and applied, however. For example, Long Island’s Town of Brookhaven imposes front yard setback requirements ranging from thirty feet to eighty feet depending on the residential district in which the home lies.⁸¹ Most Long Island towns and villages distribute setback requirements in the same way: they impose

⁷⁴ EAST HAMPTON, N.Y., COMPREHENSIVE ZONING CODE § 255-11-10 (2008), https://www.tarbetlester.com/wp-content/uploads/2014/12/EH_Town_Code_-_Setbacks.pdf [<https://perma.cc/A7TD-G68K>].

⁷⁵ Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1, 7 (2016) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

⁷⁶ *Id.* The court instead applied the nuisance doctrine to resolve the case. *Id.* at n.32.

⁷⁷ *Id.* at 7.

⁷⁸ *Id.* at 9–11.

⁷⁹ For more information on setback restrictions, see generally 1 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 9:58 (5th ed. 2021).

⁸⁰ 1 PATRICIA E. SALKIN, *NEW YORK ZONING LAW AND PRACTICE* § 7:37 (2020). For example, in Port Washington North, a village in Nassau County, a building in a residential district may not exceed 30% of the lot area upon which it is built. PORT WASHINGTON NORTH, N.Y., ZONING CODE § 176-8 (2020), <https://ecode360.com/10919257>.

⁸¹ TOWN OF BROOKHAVEN, N.Y. ZONING CODE § 85-117 (2014), <https://ecode360.com/attachment/BR0012/BR0012085a%20Residential%20Dimensional%20Regulations.pdf>.

setback requirements that are proportional to minimum lot size, but do not justify the chosen numerical values or explain the process used to calculate them.⁸² Like minimum lot size requirements, setback restrictions require an increased amount of land in order to create a home, thus reducing the available supply of homes and increasing their cost. These rules and regulations consistently drive real estate prices up, consequently welcoming white people who have accumulated generational wealth, and in turn pricing out lower income individuals, who are disproportionately Black.

Zoning boards also drive up property prices and hurt housing supply by imposing minimum parking requirements for the construction of multi-unit dwellings or apartment buildings. Parking is considered a necessity by many, but the number of parking spots required often exceed the needs of the home's occupants and unnecessarily drive up the cost of creating these dwellings.⁸³ For example, in the Town of Islip on Long Island, accessory apartments require at least four off-street parking spaces despite the fact that each of those apartments only contain two single bedrooms.⁸⁴ This requirement, enacted in 2000, has remained untouched for over twenty years.⁸⁵ In crafting these requirements, many zoning boards seem to impose blanket parking requirements on apartments regardless of location or proximity to public transportation.

Suburbs are not only molded and modeled using quantitative restrictions, but also through qualitative characterizations that inherently value certain lifestyles above others. As discussed, comprehensive zoning plans divide areas into districts categorized by acceptable use.⁸⁶ Moreover, homes within residential districts are further divided by the types of household permitted to use each

⁸² See, e.g., *id.*

⁸³ See, e.g., ISLIP, N.Y., ZONING CODE § 68-608 (2010), <https://ecode360.com/7707373>; *id.* § 68-612 (2020), <https://ecode360.com/7707379>.

⁸⁴ *Id.* § 68-608; *id.* § 68-612. An accessory dwelling unit or apartment (ADU) is an independent unit which shares a lot with a stand-alone single-family home. *Accessory Dwelling Units*, AM. PLAN. ASS'N, <https://www.planning.org/knowledgebase/accessorydwellings> [<https://perma.cc/8U5M-FNE3>] (last visited Feb. 16, 2022). ADUs may be attached or detached from the stand-alone primary unit on the lot. *Id.* ADUs are praised by progressive planners as they can increase housing availability and affordability and maximize land use, in addition to serving a wealth of other beneficial purposes. See *id.*

⁸⁵ ISLIP ZONING § 68-612; see *Review of Islip Town Code, Hearing #2*, Dep't of Plan. and Dev. & the Off. of Att'y (2020), <https://islipny.gov/documents/town-clerk/1098-amendments-to-islip-town-code/file> [<https://perma.cc/UVY4-PLGT>].

⁸⁶ See *supra* Section II.C.

one.⁸⁷ That being said, the single-family household remains a highly valued suburban ideal.⁸⁸ Many suburban residential districts, including the vast majority of districts on Long Island, are zoned for occupancy by single-families only and utilize a particular and narrow definition of family.⁸⁹

In some cases, single-family restrictions limit home occupancy to only people of blood or legal relation.⁹⁰ Surprisingly, these ordinances are often legal.⁹¹ In 1974, in *Village of Belle Terre v. Boraas*, the Supreme Court upheld a village zoning ordinance on Long Island which only allowed homes zoned for single-family use to be occupied by “traditional families,” or by two unrelated individuals, after its challengers claimed the law violated their rights to equal protection, association, travel, and privacy.⁹² The Court analyzed the ordinance under equal protection precedent for economic and social legislation, which allows an exercise of legislative discretion to be upheld if it is “reasonable, not arbitrary,” and “bears a rational relationship to a (permissible) state objective.”⁹³

Evaluating the legitimacy of the legislature’s purpose, the Court opined, “It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”⁹⁴ This statement implies that family units which do not fit the mold required by the ordinance do not abide by “family values” and are unfit for suburban life. Ultimately, the Court held that the ordinance was a valid exercise of legislative power because it bore a reasonable relationship to the legitimate government purpose of preserving the particular character desired by the town and its residents.⁹⁵ This decision disproportionately harmed low-income Black individuals, many of whom lived in arrangements that did not conform to the “traditional [definition of] family.” Ordinances like

⁸⁷ See *supra* Section II.C.

⁸⁸ See Katia Brener, Note, *Belle Terre and Single-Family Home Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity*, 74 N.Y.U. L. REV. 447, 447 (1999).

⁸⁹ *Long Island Index Map*, LONG ISLAND INDEX, <http://www.longislandindexmaps.org> (last updated Jan. 2019).

⁹⁰ *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974).

⁹¹ *Id.* at 8–9.

⁹² *Id.* at 7–9, 11.

⁹³ *Id.* at 7–10 (first quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 212 (1920); then quoting *Reed v. Reed*, 404 U.S. 71 (1971)).

⁹⁴ *Id.* at 9–10.

⁹⁵ *Id.*

the one disputed in *Belle Terre* have the cruel consequence of “zon[ing] out low-income individuals who cannot afford to live without roommates or extended family.”⁹⁶ Since historically ethnic minorities are disproportionately represented in America’s poor population, these restrictions “tend to perpetuate class and racial segregation.”⁹⁷

E. Communities with Different Racial Compositions on Long Island Have Drastically Different Zoning Regulations

Regulations including minimum lot sizes, setback laws, and restrictive zoning requirements cause the racial composition of established communities to stay fixed over time. Because of Long Island’s racist and elitist past, the effects of this stagnation are exacerbated. Often cited as an example of segregation on Long Island, the neighboring villages of Garden City and Hempstead are so divided that they anachronistically resemble the Jim Crow era.⁹⁸ Their division cannot be understated: the 2019 Census estimates show the population of Garden City was 89.3% white and 1.8% Black as compared to the population of Hempstead, which was 14.9% white and 45.4% Black.⁹⁹ These demographics become even more troubling when one considers minority populations as a whole—Hempstead’s population is estimated to be 92.5% Black and Hispanic/Latino, excluding those of mixed race.¹⁰⁰

These numbers become more alarming when considering the general population of each village—Garden City is home to only 22,000, while Hempstead houses 55,000 people.¹⁰¹ Hempstead has a medium household income of about \$63,000, which is less than the overall median wealth in New York State, while median income in Garden City is about \$175,000, making it one of Long

⁹⁶ Brener, *supra* note 88, at 448.

⁹⁷ *Id.*

⁹⁸ *Residential Segregation in the United States: Still a Huge Problem*, ANTI-DISCRIMINATION CTR., <http://www.antibiaslaw.com/mediapopup?content=node/3761> [<https://perma.cc/948J-9T3E>] (last visited Feb. 18, 2022).

⁹⁹ *QuickFacts Hempstead Village, New York; Garden City, New York*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/hempsteadvillagenewyork,gardencityvilagenewyork,US/PST045219> [<https://perma.cc/N6WS-D8C5>] (last updated Dec. 21, 2021). Note that these populations include those who only identify as Black and do not include those of mixed race.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Island's wealthiest communities.¹⁰² While Garden City is well known for being the playground of the affluent, "Hempstead, in parts, resembles an inner city—with bodegas, laundromats, [and] low-rise apartment buildings."¹⁰³ When traveling between the two, the visual transition is noticeably stark. However, the visual and financial disparities between these neighborhoods come as no surprise to anyone familiar with their respective legislative schemes.

Garden City's zoning map and comprehensive plan clearly prioritize the wealthy—nearly all of the village's residential space, and consequently the vast majority of the village, is zoned for single-family homes.¹⁰⁴ The village has five different single-family residential districts, each requiring different minimum lot sizes ranging from 6,000 to 40,000 square feet.¹⁰⁵ Residential setback requirements in Garden City range from twenty to seventy-five feet, and all homes have a lot size requirement in excess of 20,000 feet, demanding a front yard setback of at least fifty feet.¹⁰⁶ The Village does allow for accessory uses on single-family properties,¹⁰⁷ but restricts any sort of residential accessory to use by two boarders or lodgers at most.¹⁰⁸ New one-family dwellings in Garden City must include at least two parking spaces.¹⁰⁹

In addition, the Village contains two minuscule townhouse zones—the first encompassing only nine homes on Raymond Street and the second including no homes at all—and two multifamily group zones that can barely be detected on the official

¹⁰² *Id.*

¹⁰³ Brian Resnick et al., *The State of Segregation in the Suburbs*, ATLANTIC (Jan. 7, 2015), <https://www.theatlantic.com/politics/archive/2015/01/the-state-of-segregation-in-the-suburbs/453987> [<https://perma.cc/4L7F-VFU8>].

¹⁰⁴ GARDEN CITY, N.Y., ZONING CODE § 200, attachment 2 (2006), <https://ecode360.com/attachment/GA0634/GA0634-200b%20District%20Map.pdf>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 200-31 (2006), <https://ecode360.com/9148735>; *see also id.* [https://ecode360.com/attachment/GA0634/GA0634-200c Setback Map_2020.pdf](https://ecode360.com/attachment/GA0634/GA0634-200c%20Setback%20Map_2020.pdf) (image of the Setback Map referenced in § 200-31).

¹⁰⁷ For background information regarding accessory uses in zoning generally, see Gary D. Taylor, *Accessory Uses in Zoning*, COMMUNITY PLANNING & ZONING (July 25, 2019), <https://community-planning.extension.org/accessory-uses-in-zoning> [<https://perma.cc/Y38V-5MU8>] ("Accessory uses are uses of land that are found on the same parcel as the principal use but are subordinate and incidental. . . . One common controversy associated with accessory use is the question of whether such a use can be built on a lot before a principal use is established.").

¹⁰⁸ GARDEN CITY ZONING § 200-16A(10)(a)(1) (1991), <https://ecode360.com/9148502>.

¹⁰⁹ *Id.* § 200-16 (C)(2).

zoning map.¹¹⁰ Even harder to spot are the three areas of Garden City zoned for multifamily apartments, spanning only about four blocks altogether and two of which are located on village outskirts.¹¹¹ These small townhouse, multifamily, and apartment zones are subject to strict regulation, restricting their potential development or growth.¹¹²

The Village of Hempstead, on the other hand, offers more variety in terms of available land use and possible construction projects. Here, residential zones are characterized into ten different categories, seven of which permit multiple dwellings.¹¹³ In all zones allowing for single-family homes, the minimum required lot size ranges from 4,000 to 10,000 square feet—the largest of which being one quarter that of Garden City's minimum lot size.¹¹⁴ The residential districts determine front yard setback in reference to existing homes rather than by arbitrary measure; the front of a building cannot have a lower setback than the average of existing buildings on its block within 200 feet on each of its sides.¹¹⁵ In cases where this measure cannot be applied, the minimum required front yard setback ranges from only twenty to twenty-five feet.¹¹⁶ Hempstead also only requires one parking space per family occupying a premises.¹¹⁷ These differences in permitted flexibility likely account for at least some of the disparity between Hempstead and its neighboring community—the average home in Hempstead as of January 2022 is valued at about \$485,876, while the average home in Garden City is more than double that, at about \$982,538.¹¹⁸

¹¹⁰ *Id.* § 200, attachment 2 (2006), <https://ecode360.com/attachment/GA0634/GA0634-200b%20District%20Map.pdf>.

¹¹¹ *Id.*

¹¹² *Id.* § 200-16.1(A)(3)(2006), <https://ecode360.com/9148552>; *id.* § 200-17(B)(1)(1989), <https://ecode360.com/9148568>.

¹¹³ HEMPSTEAD, N.Y., ZONING CODE § 139-3 (2012), <https://ecode360.com/7218894>.

¹¹⁴ *Id.* § 139-74, <https://ecode360.com/7219094>.

¹¹⁵ *Id.* § 139-80(A), <https://ecode360.com/7219104>.

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 139-36(A), <https://ecode360.com/7218949>.

¹¹⁸ *11550 Home Values*, ZILLOW, <https://www.zillow.com/hempstead-ny-11550/home-values> [<https://perma.cc/2U6C-BGJC>] (last updated Jan. 31, 2022); *Garden City Home Values*, ZILLOW, <https://www.zillow.com/garden-city-ny/home-values> [<https://perma.cc/U24V-MWKB>] (last updated Jan. 31, 2022).

III. BARRIERS TO SOLUTION—WHY LAND USE LAWS REMAIN UNCHANGED

To begin dismantling Long Island's web of discriminatory land use regulations, it is imperative to first consider the barriers which have prevented solutions for so long. First, courts at all levels have provided little to no help battling laws that disparately impact marginalized groups. For example, in 1976, the Supreme Court held in *Washington v. Davis* that the disparate impacts of laws or official acts alone are not sufficient evidence of discriminatory intent or a constitutional violation per se.¹¹⁹ This case erected a major roadblock for constitutional challenges to racist legislation and policies, because racist intentions are not always plainly evidenced, but are often instead difficult to prove.¹²⁰ Therefore, the Court's demand for clear proof of discriminatory intent practically gave, and continues to give, ill-willed legislators a green light to do as they please, so long as they do not get caught, leaving them free to pass racially oppressive laws at will.¹²¹ In particular, *Washington v. Davis* laid a foundation for ongoing judicial deference to zoning decisions, with the court holding zoning regulations could be upheld so long as a "rational" reason was offered as justification.¹²²

The effects of *Washington v. Davis* were felt immediately. One year later, in 1977 in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, a real estate developer alleged that a village's refusal to rezone a specific tract of land from single to multifamily residential space was racially motivated.¹²³ The petitioner wished to develop the land, which was in a

¹¹⁹ *Washington v. Davis*, 426 U.S. 229, 246–48 (1976).

¹²⁰ Charles R Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) ("Improper motives are easy to hide. And because behavior results from the interaction of a multitude of motives, governmental officials will always be able to argue that racially neutral considerations prompted their actions. Moreover, where several decisionmakers are involved, proof of racially discriminatory motivation is even more difficult."). Furthermore, intentional racism is not a isolated threat, as unconscious racism is abundant in the United States. *Id.* at 322 ("Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism.").

¹²¹ *Id.* at 319.

¹²² Boudreaux, *supra* note 75, at 20.

¹²³ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977).

predominately white area, into low income housing.¹²⁴ The zoning board refused, preventing him from doing so.¹²⁵ In its opinion, the Supreme Court observed that 40% of the individuals who would be eligible for the proposed housing, and were now prevented from living there, were Black.¹²⁶ Even so, the Court insisted that under *Washington v. Davis*, disproportionate impact could not serve as the “sole touchstone of [] invidious racial discrimination.”¹²⁷ Therefore, the developer’s constitutional claim was rejected on the grounds that disparate impact was not enough to prove sufficient evidence of discriminatory intent.¹²⁸

The Supreme Court’s requirement of proof of discriminatory intent creates an incredibly high threshold for petitioners to meet in a constitutional challenge to legislation that disparately impacts Black Americans. Given that overt racism is no longer accepted as consensus in the United States, racists in power are likely to take measures to hide their true intentions, making it almost impossible to prove their ill-will.

However, the Court’s decisions have not been exclusively harmful to those looking to repeal discriminatory regulations. Recently, in 2015 the Supreme Court held in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* that disparate impact is a valid basis for a claim under the Fair Housing Act.¹²⁹ This decision created a course of action for those seeking to invalidate certain housing and land regulations, a path later leveraged against re-zoning initiatives in Garden City in 2014.¹³⁰ In *MHANY Management, Inc. v. County of Nassau*, the Second Circuit held that the Village of Garden City’s 2004 decision to rezone public land to prevent construction of affordable housing was made with discriminatory intent in violation of the Fair Housing Act and remanded the issue of whether the characterization disparately impacted African Americans to the trial court.¹³¹

While *Texas Department of Housing* did finally open a path to relief for the victims of racially discriminatory housing policies, it

¹²⁴ *Id.* at 259–60.

¹²⁵ *Id.* at 252.

¹²⁶ *Id.* at 259.

¹²⁷ *Id.* at 264–65.

¹²⁸ *Id.* at 270–71.

¹²⁹ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 545–546 (2015).

¹³⁰ *MHANY Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 581, 587 (2d Cir. 2016).

¹³¹ *Id.* at 624.

could not eradicate racially biased housing law altogether. The decision's holding has been criticized as ineffective in practice thus far because lower courts, left to interpret the decision, have set a high threshold for proof of disparate impact.¹³² Individuals hoping to eradicate discriminatory zoning laws under this theory must have proper standing to file a lawsuit, then hope that their proof of disparate impact will be sufficient to meet the respective judge's expectations.

Striking down each of Long Island's many harmful land use laws would likely be an insurmountable feat. Achieving widespread change and mass legislative reform through the courts would be nearly impossible because Long Island is broken down into many political subdivisions, each of which implements its own carefully crafted land use regulations¹³³: Nassau County comprises two cities, three towns, sixty-four incorporated villages, and one hundred unincorporated areas,¹³⁴ and Suffolk County comprises ten towns, two Indian reservations, and thirty-two villages, each with their own laws and policies.¹³⁵ Moreover, many homeowners in suburban communities resist change because they are concerned with retaining their own property value.¹³⁶ Often, these homeowners justify harmful regulations with claims of commitment to keeping the "character" of suburban neighborhoods intact.¹³⁷

Generally, homeowners are known to "dominate local land use politics."¹³⁸ Land use experts generally conclude that "[b]ecause most homeowners concentrate their wealth in a single asset, their home, they are extremely motivated to oppose any development that might decrease the value of that asset, even if the risk is low."¹³⁹ Incredibly risk-averse, existing homeowners are unlikely

¹³² Bourdeaux, *supra* note 75, at 11–12, 12 n.62.

¹³³ Lambert, *supra* note 20.

¹³⁴ *Cities, Towns & Villages*, NASSAU CTY, N.Y., <https://www.nassaucountyny.gov/3406/Cities-Towns-Villages> [<https://perma.cc/FM83-3CZX>] (last visited Feb. 18, 2022).

¹³⁵ *Suffolk: Overview*, N.Y. ST., <https://www.ny.gov/counties/suffolk> [<https://perma.cc/CNE6-W6G9>] (last visited Feb. 18, 2022).

¹³⁶ See, e.g., *Huntington Enacts C-6 Zoning Regulations on Mixed-Use Development, Addresses LIPA Proposal*, TOWN OF HUNTINGTON (July 23, 2020), https://www.huntingtonny.gov/news/?FeedID=4490&fbclid=IwAR01-DAMZH_EZ0TfIJQ5-NXk8a1FJWFOOIXrlzB4ndfUStXk4xdkpuDcYfM [<https://perma.cc/X5YB-M5UT>].

¹³⁷ *Id.* ("[We have] tackl[ed] inappropriate development concerns that have been a looming threat to the suburban charm of Huntington for far too long.")

¹³⁸ Singh Lemar, *supra* note 59, at 346.

¹³⁹ *Id.*

to respond to equity-driven changes to local land use policies with anything less than widespread opposition.¹⁴⁰ In disproportionately white areas, these risk-averse and powerful homeowners create a troubling stalemate: they are unwilling to make compromises or adjustments which will alter the character of neighborhood in any way, including racially. Thus, they have no incentive to argue for or approve plans to desegregate their community despite their social or political views.¹⁴¹ Therefore, the collective bargaining power of homeowners concerned with prospective decreased property values is likely to outweigh the influence of a small town's zoning board.

IV. PROPOSED SOLUTIONS—MOVING TOWARDS EQUITY TO CREATE BETTER COMMUNITIES

A. *New York State Must Enact a Comprehensive Legislative Package Clawing Back Its Delegation of Zoning Power to Municipalities*

The practically insurmountable barriers to significant change to land use regulation on Long Island demand an aggressive course of action: the New York State Legislature itself must address racial segregation with comprehensive legislative reform. In doing so, the State could improve the quality of life in New York while saving both resources and time that it might otherwise expend if activists were to instead challenge the legality of laws in every municipality on Long Island for disparate impact under the FHA.

New York State has the power to enact lasting legislation through its constitutionally granted police power. Though each state may zone through their police power, all fifty states have delegated the authority to local governments through zoning enabling acts.¹⁴² Even so, some states have interfered in land use planning before and maintain the ability to retract the delegation

¹⁴⁰ *Id.* at 346 (“Because homevoters are numerous, it is difficult for lobbyists to reach them. And because homevoters are highly and self-interestedly risk averse, it is difficult for lobbyists to persuade them, even when those lobbyists are armed with otherwise convincing data and facts.”).

¹⁴¹ See generally William Marble & Clayton Nall, *Where Self-Interest Trumps Ideology: Liberal Homeowners and Local Opposition to Housing Development*, 83 J. POL. 1747 (2021); Benjamin Schneider, *Liberal America's Single-Family Hypocrisy*, NATION (May 8, 2019), <https://www.thenation.com/article/archive/zoning-housing-homeless-segregation> [<https://perma.cc/Q9AR-5RTS>].

¹⁴² Singh Lemar, *supra* note 59, at 297.

of authority altogether should they find that local governments have undermined state interests.¹⁴³

States have engaged in four different types of land use planning intervention: “procedural, double veto, clawback, and deregulatory.”¹⁴⁴ Procedural interventions, which “impose conditions on the exercise of local zoning authority,” are the most common.¹⁴⁵ Double veto interventions “add a second or third veto to the approval process [of regulations], exercised by a regional authority, the state government, or the federal government.”¹⁴⁶ Clawback interventions “take back land use regulatory authority, typically on the grounds that local decision-making undermines a state interest,” and deregulatory interventions “limit the type, volume, or intensity of the regulations local governments are permitted to impose.”¹⁴⁷

New York should use clawback regulations to repossess land use regulatory authority where necessary. It should also use deregulatory interventions to place limitations on the “type, volume, or intensity” of regulations that local governments may create, on the grounds that local decision-making has undermined the state’s interests in racial equity and affordable housing.¹⁴⁸ Clawback regulations could also be justified by pointing to the state’s interest in economic prosperity, since racial equity on Long Island could add \$24 billion to the region and thus to the state’s economy.¹⁴⁹

Furthermore, the State Legislature is better equipped to account for the interests of prospective homebuyers who “cannot compete at the local level due to the entrenched power of [existing] homeowners.”¹⁵⁰ Ideal legislation would combat overregulation of housing on Long Island and across New York state, thereby catalyzing new construction, increasing utilization of available

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 299–300.

¹⁴⁵ *Id.* at 300.

¹⁴⁶ *Id.* at 301.

¹⁴⁷ *Id.* at 302, 304.

¹⁴⁸ *Id.* at 304. In crafting their own bill, the New York legislature should examine successful clawback regulations like Massachusetts’ “anti-snob” zoning law, which allowed state officials to change zoning laws in areas where less than ten percent of housing was considered affordable. See Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 551–52 (1992).

¹⁴⁹ POLICYLINK & UNIV. S. CAL. PROGRAM FOR ENVTL. & REG’L EQUITY, *supra* note 41, at 3.

¹⁵⁰ Singh Lemar, *supra* note 59, at 296.

land, and encouraging racial integration and socio-economic mobility. Additionally, a clawback regulation and subsequent reform to land use and zoning laws would combat the existing complex and multi-layered regulatory structure that developers and homeowners must battle when their property is located within the jurisdiction of both a village and town or other municipality.

B. The Legislation Must First Adjust Existing Land Use Law To Eradicate the Unnecessary Harm It Creates

To remove barriers to racial equity on Long Island, New York lawmakers must address each type of land use regulation separately—while some need only be modified, others must be repealed altogether for maximum benefit to New Yorkers. First and foremost, the American idealization of large sprawling lots surrounding the home must be counteracted. Minimum lot sizes should be re-evaluated and revised using a formulaic approach, rather than imposed arbitrarily by a community's zoning board. A comprehensive legislation package would impose a strict upper limit on minimum lot size restrictions, which should be expressed not by percentage of the home's size, but exclusively in acreage or square footage. Implementing solid numerical or tiered quantitative restrictions on lot size will help to shrink the disparity between visibly wealthy communities and lower income neighborhoods, as larger homes will not be entitled to special treatment. Including a range of allowances will offer compromise to citizens of neighborhoods most concerned about preserving a location's character, while still reducing sprawl and removing barriers to affordable housing. Reducing minimum lot sizes will not eliminate sprawling homes for those who can afford to create them, as no maximum lot size would be imposed.

Reducing minimum lot requirements will not immediately or intensely affect the home market. Because of existing American ideals, there will always be individuals willing to pay more for a single-family home with lots of land.¹⁵¹ However, a reduction in minimum lot sizes is nonetheless likely to increase both the availability and existence of homes on Long Island by allowing homes to be built without demand for vast amounts of land, a scarce resource, to accompany them.

¹⁵¹ See Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L. J. 1667, 1683 (2013).

Similarly, setback requirements need significant reevaluation and revision. Since these regulations serve not only aesthetic purposes, but also allow light into a home and prevent fire hazards, they need not be completely eliminated.¹⁵² Instead, setback requirements must be revisited and made proportional to the size of a home and the homes around it. They should be re-evaluated regularly by a properly trained zoning board, so that environmental and safety-related needs are met without disproportionately and artificially inflating the cost of homes.

Minimum parking requirements should be limited overall, and in walkable areas and areas close to public transportation, must be greatly minimized.¹⁵³ These restrictions significantly reduce land for housing construction, as parking space requires a specific amount of the limited land available. Moreover, current parking requirements often lead to empty, underutilized space in their overlap.¹⁵⁴ For example, requiring two parking spaces for every studio apartment in a building with twenty units would require the building developer to obtain forty spaces worth of land to proceed. Thus, forty spaces would exist for twenty homes, though it is highly unlikely that every individual in the building would be home *and* entertaining guests simultaneously, leaving a wealth of empty spaces.

These additional empty parking spaces are wasteful and significantly reduce the amount of land available to new housing developers, preventing new and more affordable construction. Limiting allowable parking restrictions or regulating them to be proportionate to a home's allowed occupancy could increase the amount of affordable housing available to lower income individuals and families, and thus, to a significant number of Black individuals. Doing so could also encourage use of public transportation or more environmentally friendly options, like walking or biking, for those who are able. A wealth of parking simply is not necessary in communities which are generally walkable or are adjacent to public transportation. Moreover, excessive on-site parking makes communities *less* walkable, as

¹⁵² See *supra* Section II.D.

¹⁵³ See *supra* Section II.D.

¹⁵⁴ CTR. FOR NEIGHBORHOOD TECH., STALLED OUT: HOW EMPTY PARKING SPACES DIMINISH NEIGHBORHOOD AFFORDABILITY 3 (2016), http://www.cnt.org/sites/default/files/publications/CNT_Stalled%20Out_0.pdf [<https://perma.cc/BLV9-GK LX>].

large vacant lots located between more popular destinations can lead to safety concerns for those walking alone or at night.¹⁵⁵

Qualitative occupancy restrictions and limitations on what may constitute a “single-family” must be eliminated altogether. So long as there are numerical occupancy limits on a household for safety purposes, restrictions on who may inhabit a residence are a blatant social control on homeowners and neighborhood character. The strict single-family zone ought to be removed altogether and accompanied by a prohibition on ordinances that ban multifamily homes in these residential districts. Alternatively, policymakers could opt to demand reformed and limited options for zone classification, including low-occupancy residential and high-occupancy residential. Doing so would allow for a more mixed stock of available homes in all areas and would be an important step towards class integration, which would inherently lead to more racial integration since a disproportionate number of low-income individuals are Black.

C. The State Should Use New, Innovative Approaches to Counteract Segregation on Long Island

In addition to addressing existing issues consequential to local control of land use regulation, the state should also implement new solutions that would not only catalyze integration and community development, but would also proactively prevent the disparate impact that zoning legislation so often creates. Most importantly, it should require “impact training” as a prerequisite to serving on a zoning board in all villages, towns, cities, and counties.¹⁵⁶ While New York currently requires four hours of general training for those who serve on these boards, the state leaves the curricula to the complete discretion of each municipality.¹⁵⁷ Instead, New York should add a required course to the training to familiarize prospective board members with the

¹⁵⁵ Paul Hesse, *Rethinking Parking Requirements: Does Your Community Really Have a Parking Problem?*, 12 PLAN ON IT (Dutchess Cnty. Plan. Fed'n, Dutchess Cnty., N.Y.), no. 3, 2018, at 1, 6.

¹⁵⁶ Cf. SEQR [State Environmental Quality Review Act], N.Y. ST.: DEPT OF ENVTL. CONSERVATION, <https://www.dec.ny.gov/permits/357.html> (last visited Feb. 18, 2022) [<https://perma.cc/2R5S-CWUJ>]. This Act requires state and local government agencies to fully consider and submit evaluations of the environmental consequences of their decisions, a useful model for the considerations local board members should entertain when taking action that affects entire communities.

¹⁵⁷ *Training Requirements*, N.Y. ST.: DEPT OF ST., <https://dos.ny.gov/training-requirements> [<https://perma.cc/X8BV-QG6H>] (last visited Feb. 18, 2022).

impact zoning can have on the local area, external economy, and larger community. In planning this curriculum addition, the state could consult with diversity and inclusion experts, but should prioritize speaking with anti-racism and anti-discrimination activists and academics so that it can avoid implementing inclusion techniques which are merely performative.¹⁵⁸ In order to stop the harms of exclusionary zoning, it is imperative to educate those who create the regulations on the impacts those regulations have.

In order to avoid future exclusionary policies, lawmakers should self-impose a procedural requirement for new zoning legislation—a disparate impact test. This requirement could be modeled on New York’s State Environmental Review Act (SEQR), which requires local governments to identify and mitigate any significant environmental impact of the activity being proposed or allowed.¹⁵⁹ Instead, local governments would have to require identification and mitigation of disparate impact on certain groups, especially on specific races, prior to the passage of new zoning ordinances and land use restrictions.

The New York State Legislature should also drive the creation of *new* affordable homes for purchase within wealthy neighborhoods by incentivizing construction of units well-suited for purchase by families who may be lacking in wealth. In particular, new legislation should encourage construction of accessory dwelling units, conversion of single-family homes to multifamily homes, and creation of missing middle housing in walkable communities.¹⁶⁰ The state should explore several

¹⁵⁸ Cheryl L. Wade, “*We are an Equal Opportunity Employer*”: *Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541, 1545 (2004) (emphasis added) (“[D]iversity discussions make people of color supplicants, and whites become their benefactors. Employees and suppliers of color must *ask* for inclusion, equal opportunity, and diversity. As supplicants, people of color risk the possibility that whites will choose not to diversify and include them. . . . [but, b]ecause of the law prohibiting discrimination, this element of choice does not exist if the focus is on antidiscrimination measures”); see generally PAMELA NEWKIRK, DIVERSITY, INC.: THE FAILED PROMISE OF A BILLION-DOLLAR BUSINESS (2019).

¹⁵⁹ N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 2021); *SEQR*, *supra* note 156.

¹⁶⁰ “Missing [m]iddle [h]ousing” is “a range of house-scale buildings with multiple units . . . located in a walkable neighborhood,” characterized as missing because in many areas it is currently illegal to construct. See MISSING MIDDLE HOUSING, <https://missingmiddlehousing.com> [<https://perma.cc/3KT4-8SS6>] (last visited Feb. 18, 2022). Ideally, a well-accommodated area would feature easy access to public transportation or would have common amenities accessible on foot. A high opportunity area might have high performing schools and other positive indicators of opportunity for economic and personal growth.

different options for doing so, including new construction subsidies, underutilization penalties for lots that exceed a threshold percentage of vacancy, or tax breaks for developers of this housing.

Alternatively, New York could use deregulatory intervention to place much-needed limitations on the type, volume, and intensity of regulations local governments may create. Should the State exercise this option, it should create a series of model zoning plans that allow for only a small degree of variation. Over-variation could be punishable by monetary penalty or by withdrawal of zoning power from a municipality. Ideally, all zoning plans and ordinances would also have to pass a local disparate impact test identical to that proposed above.¹⁶¹

Opponents may attack this proposal as being unlikely to completely remedy housing inequity on Long Island. They may point out that change to zoning code and land use regulation, no matter how drastic, will be unable to solve the deep-seated problem of racial inequity. Those who do so miss the objective entirely—racism and its effects are so deeply interwoven into American society that these proposed changes are not a sufficient, but *necessary* step to begin undoing the harm. While the regulations addressed above are not the sole cause of racial inequity on Long Island, they are a significant contributor, and a roadblock to progressive change. Undoing their restrictive grip on Nassau and Suffolk County neighborhoods is a much-needed step towards integration and eventual equity.

CONCLUSION

Enacting a comprehensive legislation package to deregulate land use and zoning would not only help to integrate Long Island but would also provide a multitude of additional benefits for its residents. In leading Long Island towards racial equity, catalyzing community mobility, and incentivizing new construction, policymakers will greatly stimulate and expand the area's economy.¹⁶² Increased integration also leads to heightened

¹⁶¹ See *supra* Section IV.C.

¹⁶² POLICYLINK & UNIV. S. CAL. PROGRAM FOR ENVTL. & REG'L EQUITY, *supra* note 41, at 1. "The growing severity of undersupplied housing markets [in America] is jeopardizing housing affordability for working families, increasing income inequality by reducing less-skilled workers' access to high-wage labor markets, and stifling GDP growth by driving labor migration away from the most productive regions." THE

academic success for students in public schools, ensuring the region's future competitive edge.¹⁶³ Most importantly, however, deregulation of Long Island's regulatory zoning and land use scheme would be an unequivocal and necessary step toward dismantling the longstanding effects of racism and subsequent systems of oppression which have disadvantaged Black Americans for hundreds of years.

WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 2-3 (2016), [<https://perma.cc/9UMS-TFVQ>].

¹⁶³ See generally *The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms*, CENTURY FOUND. (Apr. 29, 2019), <https://tcf.org/content/facts/the-benefits-of-socioeconomically-and-racially-integrated-schools-and-classrooms/?agreed=1> [<https://perma.cc/8TTV-GSHJ>].