CHALLENGING GROWTH-RESTRICTIVE ZONING IN MASSACHUSETTS ON A DISPARATE IMPACT THEORY

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I. INTRODUCTION

Residential racial segregation is high throughout the United States, and the Boston area is more segregated than the average American community.[1] On the Dissimilarity Index, a measure of segregation used by social scientists, black-white segregation and Asian-white segregation in the Boston area exceed national averages, and Hispanic-white segregation exceeds the national average significantly.[2]

Many believe local zoning laws contribute to residential segregation.[3] Density-restrictive zoning contributes to high home prices by discouraging new construction and reducing the supply of new homes.[4] With high demand and low supply, home prices rise.[5] High suburban home prices may contribute to segregation because white families own significantly more wealth than minority families in the Boston area, creating a smaller pool of minority households who can afford homes in expensive suburbs.[6] This trend may be particularly acute in the Boston-Cambridge-Quincy MA-NH Metropolitan Statistical Area ("Boston Metro Area"), since the Boston

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[1] John R. Logan, *Separate and Unequal: Residential Segregation*, BOSTONFED.ORG (Dec. 1, 2015), https://www.bostonfed.org/publications/communities-and-banking/2016/winter/separate-and-unequal-residential-segregation.aspx.

[2] *Id.* at 21 (showing that at .615, the Boston area's Black-white segregation exceeds the national average of .596; at .434, Asian-white segregation exceeds the national average of .409; and at .596, Hispanic-white segregation significantly exceeds the national average of .485).

[3] *See* Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston,* 65 J. URB. ECON. 265, 269 (2009).

[4] *See* EDWARD L. GLAESER, JENNY SCHUETZ & BRYCE WARD, REGULATION AND RISE OF HOUSING PRICES IN GREATER BOSTON 4–5 (2006) (noting that in the 1960s, municipalities in the Boston area permitted 172,459 units, in the 1980s, 141,347 while only permitting 84,105 in the 1990s).

[5] *See id.* at 1, 4–5 (arguing that if housing supply had increased by 27% between 1990 and 2005, as it did between 1960 and 1975, housing prices in Greater Boston would have been 23-26% lower in 2005, so that median house price would have been about $276,100 rather $431,900).

[6] *See* Tatjana Meschede et al., *Wealth Inequalities in Greater Boston: Do Race and Ethnicity Matter?,* BOSTONFED.ORG (Feb., 2016), https://www.bostonfed.org/-/media/Documents/cddp/cddp1602.pdf (noting that in a 2014 study of Boston Metropolitan Statistical Area, white families' median wealth was $247,500, while US-born black families' median wealth was $8, Caribbean black families $12,000, Puerto Rican $3,020, Dominican $0 and "Other Hispanic" $2,700).

Metro Area remained 77.2% white in 2012.[7] In 2005, the Pioneer Institute for Public Policy Research and Harvard University's Rappaport Institute for Greater Boston created the most comprehensive data-set to date of zoning regulations and housing prices around Boston (the "Pioneer/Rappaport Study"), analyzing zoning laws in the 187 municipalities within 50 miles of Boston but not including Boston (the "Boston Area") between the 1960s and 2004.[8] Based on this data, Edward Glaeser, Harvard Economics professor and then-head of the Rappaport Institute, found that a one-acre increase in minimum lot size correlated with a 12% increase in home price.[9] Additionally, Glaeser notes that where "substantially equivalent" towns adjoin each other, as in the Boston Area, higher prices "spill over" to neighboring towns, so high prices in one town contribute to higher prices in the region.[10]

Segregation, however, cannot be explained by income and wealth alone.[11] In the Boston Area, density-restrictive zoning appears to perpetuate segregation independent of housing prices, suggesting preferences also perpetuate segregation.[12] Glaeser found that towns with large minimum lot sizes and low housing densities were associated with higher-income, older and more educated populations, while denser towns with smaller minimum lot sizes were associated with higher populations of foreign born and non-white citizens.[13] When Glaeser controlled for these demographics, he found that higher housing density did not predict lower home prices; instead, he found higher housing density predicted higher

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[7] *Table B02001: Race, American FactFinder*, U.S. CENSUS BUREAU (2012), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_5YR_B02001&prodType=table.

[8] *See* AMY DAIN, RESIDENTIAL LAND-USE REGULATION IN EASTERN MASSACHUSETTS: A STUDY OF 187 COMMUNITIES 11 (2005) ("The database covers a total of 187 cities and towns, every municipality in Massachusetts within 50 miles of Boston. They reach from the coast to beyond Worcester, north to the New Hampshire border, and south to Plymouth. The coverage does not correspond to U.S. Office of Management and Budget definitions of the metropolitan statistical area [MSA], or other regional definitions; rather, it extends beyond the Boston MSA into communities that only recently have begun facing development pressures. Massachusetts has 351 cities and towns; this sample represents more than half of them. The City of Boston was not included in the study because it does not operate under the state zoning enabling legislation."); GLAESER, SCHUETZ & WARD, *supra* note 4, at 7.

[9] Glaeser & Ward, *supra* note 3, at 275.

[10] *Id*. at 276.

[11] *See* Logan, *supra* note 1, at 20 (noting that nationally, the average black family earning $75,000 lives in a higher-poverty census tract than the average white family earning $40,000).

[12] *See* Glaeser & Ward, *supra* note 3, at 269.

[13] *Id.*

populations of non-white, minor, and less-educated citizens.[14] Thus, Glaeser suggests that homes are more expensive in less dense suburbs not because housing supply is low, but because these towns have whiter, older and more educated populations, and homes are in greater demand in towns with these demographics.[15] Thus, growth-restrictive zoning laws may contribute to segregation by maintaining the low housing densities associated with older, whiter, and more educated populations.[16]

The Fair Housing Act (the "FHA") was passed in 1968 to combat housing discrimination.[17] The FHA, which established the Department of Housing and Urban Development ("HUD"), is best known for prohibiting discrimination in housing, but it also mandates that the government take action to "affirmatively further fair housing" and reduce segregation.[18] This second mandate has gone largely unenforced, but HUD renewed its commitment to affirmatively fight segregation under the Obama administration.[19] In 2013, HUD proposed the Affirmatively Furthering Fair Housing rule (the "AFFH" rule), which required municipalities to track and report patterns of segregation every three to five years, and submit plans to reduce segregation.[20] Emboldened by the Supreme Court's decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities. Project, Inc.*, which held that policies that caused disparate impact on minorities violated the FHA even if they lacked discriminatory intent ("disparate impact"), HUD instituted the AFFH rule.[21] This rule is now under attack, with proposals pending in the House and the Senate to nullify it,[22] but *Inclusive Communities* remains good law and disparate

[14] *Id.* at 269, 276 (finding that after controlling for several demographic indicators – percent of population that is non-white, under 18, and holding less than a college degree, density failed to predict housing prices; these demographic factors, which were associated with higher housing densities, however, did predict lower housing prices).

[15] *Id.*

[16] *Id.*

[17] ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 1:1 (July 2016).

[18] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972) (holding that segregation, and the "loss of important benefits from interracial associations" it causes, is an injury cognizable under the FHA); SCHWEMM, *supra* note 17, at § 7:1; Tanvi Misa, *Fair Housing Faces an Uncertain Fate*, CITYLAB (Feb. 3, 2017), https://www.citylab.com/equity/2017/02/fair-housing-faces-an-uncertain-fate/515133/.

[19] Misa, *supra* note 18 (noting that when HUD's first secretary, George Romney, tried to withhold federal funding from municipalities that sanctioned segregation, President Richard Nixon blocked him).

[20] *Id.*

[21] *Id.;* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

[22] Misa, *supra* note 18.

impact claims remain cognizable under the FHA. Following *Inclusive Communities,* the Supreme Judicial Court of the Massachusetts (the "SJC") also held disparate impact claims cognizable under Massachusetts law.[23]

To prevail on a disparate impact claim against a zoning law in Massachusetts, the plaintiff must bring evidence of a statistical disparity on a protected class and additional evidence of disparate impact. The plaintiff must also prove the zoning law caused the disparity. To overcome the presumption that zoning laws are constitutional, the plaintiff must show the town's justification is not legally sufficient, or show a regional interest articulated by the Legislature outweighs the town's local interests. To do this in Massachusetts, the plaintiff should sue a suburban community close to a city in a region with a housing shortage, and bring evidence that the Legislature has articulated a need for more primary housing. Even if the town proves its justification is sufficient, the plaintiff can still prevail by showing that a less discriminatory policy is feasible. On balance, it will be difficult to overturn a zoning law under the disparate impact analysis, but the SJC's 1997 decision in *Johnson v. Edgartown* left the door ajar for such a challenge, and a careful plaintiff could build a non-frivolous case.[24]

II. LEGAL BACKGROUND

A. *Historically, all levels of United States Government have contributed to housing segregation.*

Federal, state, and local government policies, have contributed to segregation since the turn of the 20th century.[25] In the late 19th century, municipalities and city neighborhoods tended to be fairly racially integrated, especially in the South.[26] In the early 1900s, municipalities passed laws explicitly separating racial groups, though such laws were ruled unconstitutional in 1917.[27] From the 1910s until the late 1960s, private citizens enforced segregation by including racially restrictive covenants in deeds, prohibiting owners from selling to non-white buyers.[28] The federal government's loan policies, enacted through Federal Housing Administration and Servicemen's Readjustment Act loans, also contributed

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[23] Burbank Apartments Tenant Ass'n v. Kargman, 48 N.E.3d 394, 399 (Mass. 2016).

[24] See Johnson v. Edgartown, 680 N.E.2d 37, 42 (Mass. 1997).

[25] Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court's Recent Interest in the Fair Housing Act*, 79 Mo. L. Rev. 539, 550 (2014).

[26] Schneider, *supra* note 25; Josh Whitehead, *Using Disparate Impact Analysis to Strike Down Exclusionary Zoning Codes*, 33 REAL ESTATE L.J. 359, 362 (2005).

[27] Whitehead, *supra* note 26, at 363 (citing a 1911 Baltimore ordinance prohibiting any black person from moving into a house on the same block as a white person).

[28] *Id.* at 363–64.

to racial segregation.[29] Between 1946 and 1959, only 2% of federal loans went to African American homeowners,[30] and Federal Housing Administration's guidelines encouraged extending loans on segregated basis.[31] Until the practice was ruled unconstitutional in 1976, the Federal government and private lenders "redlined" neighborhoods, refusing to lend to or only lending to members of certain racial groups within those neighborhoods.[32]

Since its passage in 1968, the FHA has provided the main tool to fight residential segregation.[33] Congress passed the FHA in response to the pressure from the Civil Rights Movement, urban riots, white flight, the Kerner Report of March 1968, and Martin Luther King Jr.'s assassination on April 4, 1968.[34] In a revolutionary finding at the time, the Kerner Report found that black citizens rioted to protest racist institutions, including discrimination in housing policy, and that segregation threatened the country's welfare.[35] Congress passed the FHA after Martin Luther King, Jr.'s assassination, and President Lindon Johnson signed it on April 11, 1968.[36] The FHA makes it unlawful to "refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, [handicap], familial status, or national origin."[37] Its purpose was to "provide, within constitutional limitations, for fair housing throughout the United States."[38]

B. *Disparate Impact Liability under the FHA – Griggs to Inclusive Communities*

Clearly, the FHA prohibited intentional discrimination.[39] But, it also prohibited making housing "otherwise . . . unavailable" because of race, and it was contested whether this language required discriminatory intent or encompassed disparate impact without intent.[40]

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[29] *Id.* at 368

[30] *Id.*

[31] Schneider, *supra* note 25, at 550.

[32] *Id.* at 551–552; Whitehead, *supra* note 26, at 370.

[33] Schneider, *supra* note 25, at 553–54.

[34] *Id.* at 552–53

[35] *Id.* at 553.

[36] *Id.*

[37] 42 U.S.C. § 3604(a) (2018) (emphasis added); SCHWEMM, *supra* note 17, at § 11D:1 (explaining handicap is stated later in the statute but imputed to this section).

[38] *Id.* § 3601.

[39] *Id.* § 3604(a).

[40] *Id. See* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135

The language of the FHA was modelled on the language of Title VII of the Civil Rights Act of 1964 and the Supreme Court's interpretation of Title VII in *Griggs v. Duke Power Co* in 1971 informed later interpretation of the FHA.[41] Title VII makes it unlawful to enact policies that "would deprive . . . any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of . . . race, color, religion, sex, or national origin."[42] In *Griggs,* black employees sued Duke Power Company, on the grounds that its education requirements – that all employees but manual laborers possess a high-school diploma and pass standardized tests – disproportionately affected black employees.[43] The Supreme Court held that "otherwise affect" prohibited policies that caused disparate impact without discriminatory intent.[44] However, it gave businesses a defense, allowing the policy to stand if the company proved it was justified by "business necessity."[45] The Supreme Court held for the plaintiffs, finding that Duke's policy disproportionately disadvantaged black workers, and Duke failed to prove the policy was necessary to ensure job performance.[46]

After *Griggs*, each of the nine Circuit Courts of Appeals to rule on the question held that discriminatory impact was cognizable under the FHA.[47] Several of the cases added key analyses to FHA jurisprudence: the Eighth Circuit's *United States. v. City of Black Jack, Missouri*[48] in 1975 ("*Black Jack*"), the Seventh Circuit's *Metropolitan Housing Development Corp. v. Village of Arlington Heights*[49] in 1977, on remand from the Supreme Court ("*Arlington II*"), the Third Circuit's *Resident Advisory Bd. v. Rizzo*[50] in 1977 ("*Rizzo*"), and the Second Circuit's *Huntington Branch, NAACP v. Huntington*[51] in 1988 ("*Huntington"*).

In the *Arlington* line of cases, a non-profit developer contracted to buy land in the Village of Arlington Heights, a suburb of Chicago, contingent

S. Ct. 2507, 2511 (2015).

[41] *Inclusive Cmtys. Project* at 2511 ("The [FHA's] results-oriented phrase "otherwise make unavailable" refers to the consequences of an action rather than the actor's intent (citation omitted.) And this phrase is equivalent in function and purpose to Title VII's False 'otherwise adversely affect' language."); Schneider, *supra* note 25, at 555.

[42] 42 U.S.C. § 2000e-2(a)(1)-(2) (emphasis added).

[43] Griggs v. Duke Power Co., 401 U.S. 424, 427–28 (1971).

[44] *Id.* at 431.

[45] *Id.*

[46] *Id.* at 432.

[47] SCHWEMM, *supra* note 17, at § 10:4.

[48] United States v. Black Jack, Mo., 508 F.2d 1179 (8th Cir. 1974).

[49] Metro. Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283 (7th Cir. 1977).

[50] Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977).

[51] Huntington Branch, NAACP v. Huntington, 844 F.2d 926 (2d Cir. 1988).

on the town rezoning the parcel from single-family to multifamily housing.[52] The development secured a federal low income housing subsidy that required the project to be racially integrated.[53] The town refused to rezone.[54] The developer sued, arguing violation of the Equal Protection clause of the Fourteenth Amendment and the FHA.[55] In the original case in 1975, *Metropolitan Housing Development Corp. v. Arlington Heights* ("*Arlington I*"), the Seventh Circuit did not reach the FHA claim because it found an Equal Protection clause violation.[56] The case went to the Supreme Court in 1976 ("*Arlington*"), and the Supreme Court reversed, holding that Equal Protection violations require discriminatory intent and the plaintiff had failed to prove the town's intent.[57] After discussing how to prove discriminatory intent with circumstantial evidence, the Supreme Court remanded to the Seventh Circuit to assess the FHA violation.[58] The Seventh Circuit held, in *Arlington II*, that disparate impact claims are cognizable under the FHA, and the plaintiff could prove disparate impact by showing the policy disproportionately affected the protected class or perpetuated segregation.[59] Thus, *Arlington* analyzes how to prove discriminatory intent, and *Arlington II* offers a two-pronged approach to prove disparate impact.

The *Huntington* line of cases also reached the Supreme Court. At the time the suit was filed, Huntington, New York was 95% white and less than 4% black, and Huntington's zoning laws restricted multifamily development to an "urban renewal area" in the 52% minority Huntington Station neighborhood.[60] A non-profit developer, Housing Help, Inc. ("HHI") had proposed a multifamily development outside the urban renewal area, in a 98% white neighborhood and zoned for one-acre lots, which it committed to lease to 25% minority tenants.[61] HHI bought an option on the lot after Huntington's Director of Community Development assured HHI that the Town Board would rezone the area.[62] The Town

[52] Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 252 (1977).

[53] *Id.* at 257.

[54] *Id.* at 258.

[55] *Id.* at 256–57.

[56] *Id.* at 271.

[57] *Id.* at 270.

[58] *Id.* at 263–66.

[59] Metro. Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283, 1290, 1294 (7th Cir. 1977) (holding that Arlington Heights' refusal to rezone would cause disparate impact and thus violate the FHA if no other parcel in town was appropriate for low-income housing, and remanding to the district court for that finding of fact).

[60] Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 929–30 (2d Cir. 1988).

[61] *Id.* at 930–31.

[62] *Id.* at 932.

Board refused, citing health and safety concerns, and issues specific to HHI's development plans.[63] Huntington also declined HHI's request that it amend the zoning laws to allow multifamily housing outside the urban renewal area.[64] Huntington argued this restriction protected the town's welfare by encouraging developers to invest a run-down part of town.[65] The local NAACP and HHI sued, alleging that the town's refusal to rezone HHI's property specifically, and the town generally, caused a disparate impact on black citizens.[66] The District Court for the Eastern District of New York found for Huntington, holding that the plaintiffs failed to show an adverse effect on minorities and, in any case, the town's justifications for both zoning decisions were sufficient.[67]

The Second Circuit reversed, finding the plaintiffs had shown a disparate impact, and the town's justifications were insufficient.[68] The Second Circuit, like the Seventh Circuit in *Arlington II*, held that a plaintiff could prove disparate impact in two ways: by showing the policy disproportionately disadvantaged minorities or that it perpetuated segregation.[69] It also analyzed the town's justifications, rejecting five out of seven, and found the plaintiff should still prevail because a less discriminatory alternative policy was available.[70] On appeal, the Supreme Court declined to review whether disparate impact was cognizable under the FHA, because Huntington had conceded that the disparate impact test applied.[71] The Supreme Court affirmed the Second Circuit's disparate impact and sufficient justification analysis without elaboration, stating, "without endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the prima facie case was inadequate."[72] Thus, *Huntington* left open the question of whether disparate impact was cognizable under the FHA, and whether the Supreme Court endorsed analysis of segregation to prove a disparate impact.

As noted previously, nine Circuit Courts had already found disparate impact claims cognizable under the FHA.[73] In *Inclusive Communities* in

[63] *Id.* at 931.

[64] *Id.* at 932.

[65] *Id.* at 939.

[66] *Id.* at 928.

[67] *Id.* at 932.

[68] *Id.* at 938–40.

[69] *Id.* at 937.

[70] *Id.* at 939 (citing tax-incentives specifically as an equally if not more effective alternative for revitalizing Huntington Station).

[71] Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 18 (1988).

[72] *Id.*

[73] Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate*

2015, the Supreme Court settled the question affirmatively.[74]

In *Inclusive Communities,* Inclusive Communities Project ("ICP"), a Dallas nonprofit that helped Section 8 recipients find housing in Dallas' predominantly white suburbs, sued the Texas Department of Housing and Community Affairs (the "TDHCA") over its allocation of Low Income Housing Tax Credit ("LIHTC") funding.[75] ICP often located tenants in LIHTC developments because the IRS prohibits owners from discriminating against Section 8 tenants.[76] The IRS awards LIHTC credits through state housing authorities, in Texas the TDHCA, and the TDHCA had awarded 94% of Dallas' LIHTC funding to projects in minority neighborhoods.[77] ICP alleged this policy caused a disparate impact because it effectively restricted Section 8 tenants, who were predominantly black, to segregated neighborhoods.[78]

The TDHCA allocated tax credits by ranking applications based on the IRS' ten "threshold criteria," then awarding additional points for local criteria the TDHCA determined.[79] LIHTC awards are extremely competitive, and federal and state law empowered the TDHCA to choose between highly ranked applications.[80] ICP alleged that TDHCA's use of discretion was a policy, and that policy disproportionately disadvantaged black citizens.[81] The Northern District of Texas agreed, but the Fifth Circuit reversed, ruling that the district court had improperly allotted burdens of proof.[82] The Supreme Court affirmed that disparate impact was cognizable under the FHA, clarified the burdens of proof, and remanded to

Analysis of Forty Years of Disparate Impact Claims under the Fair Housing Act, 63 AM. U. L. REV. 357, 359 (2013).

74 Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2517, 2525 (2015) (holding that the language "otherwise make unavailable" focused on the policy's outcome, not motivation, and "because of" mirrored similar language in Title VII of the Civil Rights Act of 1964 which the court had already interpreted to encompass effect irrespective of actor's purpose).

75 Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 2016 U.S. Dist. LEXIS 114562, at *7 (N.D. Tex. Aug. 26, 2016).

76 *Id.* at *7.

77 *Id.* at *10–11.

78 *Id.* at *16 ("Between 1999 and 2008, applications for 9% tax credits for units located in minority tracts had a 41% approval rate, while applications for units located in Caucasian tracts had a 21% approval rate.").

79 *Id.* at *10–11.

80 *Id.* at *10, *12, *16.

81 *Id.* at *16 ("Between 1999 and 2008, applications for 9% tax credits for units located in minority tracts had a 41% approval rate, while applications for units located in Caucasian tracts had a 21% approval rate.")

82 Texas Dep't. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2514 (2015).

the Northern District of Texas ("*Inclusive Communities Remand*") to determine whether ICP had proven the FHA violation.[83]

C. *Litigating disparate impact claims under Inclusive Communities.*

After holding that disparate impact was cognizable under the FHA in *Inclusive Communities,* the Supreme Court articulated stringent standards for proving the two elements of the prima facie case – that a disparate impact exists, and the policy in question caused it.[84] The Supreme Court adopted HUD's 2013 burden-shifting framework, affirming that the plaintiff has the burden of pleading the prima facie case, the burden shifts to the defendant to prove a legally sufficient justification, and the plaintiff may still prevail if she proves a less discriminatory and plausible alternative exists.[85]

1. Prima facie case: disparate impact

As noted previously, the Second Circuit ruled in *Huntington* that the plaintiff could prove disparate impact by showing disproportionate effect *or* perpetuation of segregation, and the Supreme Court affirmed the decision.[86] This benefited plaintiffs because sometimes it is easier to prove that a policy perpetuates segregation than that it causes a disproportionate effect.[87] It is not clear, however, that *Inclusive Communities* allows a plaintiff to prove disparate impact on a showing of segregation alone.[88] The Supreme Court adopted HUD's 2013 burden-shifting framework (the "HUD Rule"), which defined disparate impact as a practice that "results in a disparate impact on a [protected class] . . . or *creates, increases, reinforces, or perpetuates segregated housing patterns*," and reiterated the FHA's

[83] *Id.* at 2525–26.

[84] *Id.* at 2523–24 (analyzing how a plaintiff may prove the prima facie case and the defendant a valid countervailing interest); *Inclusive Cmtys. Project,* 2016 U.S. Dist. LEXIS at *12 ("The [Supreme] Court did not disturb the Fifth Circuit's adoption of the HUD burden-shifting regimen, but it prescribed several limitations on disparate impact liability.").

[85] *See Inclusive Cmtys. Project*, 135 S. Ct. at 2514–15; *Inclusive Cmtys. Project,* 2016 U.S. Dist. LEXIS at *13 ("As a result of the Fifth Circuit's decision adopting the HUD regulations, and the Supreme Court's affirmance (without altering the burden-shifting approach), the . . . proof regimen [laid out in 24 CFR § 100.500] now applies to ICP's disparate impact claim under the FHA. . . .").

[86] Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 18 (1988); Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 937 (2d Cir. 1988).

[87] *See* United States v. Black Jack, Mo., 508 F.2d 1179, 1183, 1186 (8th Cir. 1974) (finding disparate impact because Black Jack's home prices would exclude a significantly higher percentage of black than white St. Louis residents, thus perpetuating segregation).

[88] Compare discussion *infra* notes 89 and 90.

purpose to reduce discrimination and segregation.[89] But the Court also described "disparate impact" as a "disproportionate adverse effect on minorities."[90] Thus, *Inclusive Communities* seems to require a showing of disproportionate adverse effect to prove disparate impact.[91]

To prove a disproportionate effect on a protected class, the plaintiff usually starts with statistical evidence.[92] Most plaintiffs show disproportionate effect by comparing the impact of the challenged policy on the protected class with the effect on a non-protected class.[93] The evidence must show a proportional rather than absolute impact, because a "disparate" impact is inherently relative.[94] For example, in *Huntington,* the Second Circuit reversed because the district court had compared the absolute number of black and white Huntington citizens affected, rather than the relative percentages of black and white citizens affected.[95] The plaintiff must show a significant statistical disparity.[96] The Supreme Court found a 22 percentage-point disparity significant in *Griggs,* and a 17 point disparity significant in *Huntington*.[97] Less frequently, plaintiffs have proven disparate impact by showing the policy affected minorities at a higher rate than their proportion of the population.[98] This analysis suggests that if the policy affected all groups equally, it would affect all groups proportionately with their share of the population; thus if the policy affects one group at a higher rate than its representation in the population, that group is disproportionately affected.[99] For example, in *Gallagher v. Magner*, the Eighth Circuit found the city's aggressive enforcement of minor housing

[89] 24 C.F.R § 100.500(a) (2018) (emphasis added). *See Inclusive Cmtys. Project*, 135 S. Ct. at 2414–15.

[90] *Inclusive Cmtys. Project*, 135 S. Ct. at 2513.

[91] *See id.*

[92] *Id.* at 2523–24.

[93] SCHWEMM, *supra* note 17, at § 10:6.

[94] *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (finding in an employment discrimination case that a diploma-requirement had discriminatory effect because 12% of black and 34% white males in North Carolina held high school diplomas, respectively); Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 938 (2d Cir. 1988) (finding disparate impact because 7% of all Huntington families qualified for subsidized housing, while 24% of the black families qualified).

[95] *Huntington Branch, NAACP*, 844 F.2d at 938 (finding a disparate impact because the policy disadvantaged 28% of black citizens and only 11% of white citizens, even though significantly more individual white citizens were affected).

[96] SCHWEMM, *supra* note 17, at § 10:6.

[97] Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 17 (1988); *Griggs*, 401 U.S. at 432.

[98] Gallagher v. Magner, 619 F.3d 823, 834 (8th Cir. 2010); SCHWEMM, *supra* note 17, at § 10.6.

[99] *See Gallagher*, 619 F.3d at 834.

code violations strained landlords of subsidized units, which reduced the subsidized housing stock and disadvantaged subsidized tenants.[100] Because blacks comprised 11.7% of the city's population but 62% of its Section 8 waiting list, the Eighth Circuit found a disparate impact.[101]

Plaintiffs may show that members of a protected class are statistically more likely to be low-income or hold a Section 8 voucher, and thus show that discrimination against low-income or Section 8 tenants discriminated against the protected class.[102] For example, in *Huntington*, the plaintiff showed that Huntington's Section 8 citizens were disproportionately minority, thus Huntington's policy of restricting subsidized housing disproportionately affected minorities.[103] Similarly, in *Avenue 6E Investments, LLC v. Yuma, Arizona*, the plaintiffs showed a 29% income gap between Yuma's white and Hispanic families to prove that Yuma's decision rejecting moderate-income housing would disproportionately affect Hispanics.[104] The Ninth Circuit held this evidence was sufficient to plead the prima facie case and survive summary judgment, a decision the Supreme Court let stand by denying certiorari.[105]

However, plaintiffs cannot prove disparate impact on statistical disparity alone.[106] Still, showing that the policy perpetuated segregation has traditionally bolstered disparate impact claims.[107] Evidence of

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[100] *Id* at 835–35.

[101] *Id.*

[102] *Huntington*, 488 U.S. at 17 (upholding the Second Circuit's finding of disparate impact because a disproportionately high number of minorities in Huntington used subsidized housing and the ordinance restricted subsidized housing); Ave. 6E Invs., LLC v. Yuma, Ariz., 818 F.3d 493, 508, 513 (9th Cir. 2016) *cert. denied*, 137 S. Ct. 295 (2016) (reversing summary judgment finding of no disparate impact from Yuma's rejection of moderately priced housing, because the census showed a 29% disparity between Hispanic and white median-income in Yuma).

[103] *Huntington*, 488 U.S. at 17.

[104] *Yuma*, 818 F.3d at 508, 513 (reversing summary judgment finding of no disparate impact from Yuma's rejection of moderately priced housing, because the census showed a 29% disparity between Hispanic and white median-income in Yuma).

[105] *Id.* (reversing summary judgment finding of no disparate impact from Yuma's rejection of moderately priced housing, because the census showed a 29% disparity between Hispanic and white median-income in Yuma).

[106] Texas Dep't. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015). *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 259 (1977) (endorsing the District Court's assessment that statistical disparity was relevant but not dispositive that the town's decision to block low-income housing caused a disparate impact).

[107] *Huntington*, 488 U.S. at 17 (affirming the Second Circuit's finding of disparate impact "because a disproportionately high percentage of households that use . . . subsidized rental units are minorities, and because the ordinance restricts private construction of low-income housing to the largely minority urban renewal area, which 'significantly perpetuated

discriminatory intent also bolsters disparate impact claims.[108] *Inclusive Communities* notes that disparate impact analysis often "plays a role in uncovering . . . disguised animus."[109] Discriminatory statements by government officials are sufficient to prove animus, but such blatant discrimination is rare.[110] More frequently, animus can be inferred from patterns of action that are hard to explain but for racial animus,[111] such as breaks from established policies, or decisions that contradict available data.[112] Statements by private citizens may contribute to finding government animus if evidence suggests officials acted in response to constituents demands.[113] Facially neutral words associated with common generalizations about protected classes can indicate animus, even if race or protected status is not explicitly mentioned.[114] For example, in *Yuma*, the Ninth Circuit held that a reasonably jury could find that citizens' references to crime, large family sizes, and unattended children could suggest animus against Hispanics.[115]

While showings of segregation and discriminatory intent bolster

segregation in the Town''); *Yuma*, 818 F.3d at 507–08 ("The complaint's statistics on the disparate impact caused by the decision and the historical background of the decision also tend to make the disparate-treatment claims plausible"); Metro. Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283, 1291 (7th Cir. 1977) (noting the policy's statistical impact on the protected group would not have constituted an FHA violation if the policy had not also perpetuated segregation).

[108] *See Arlington Heights*, 429 U.S. at 265–66 (holding judicial deference no longer justified if evidence of discriminatory intent exists, in context of Equal Protection challenge); *Inclusive Cmtys. Project,* 135 S. Ct. at 2522; Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 936 (2d Cir. 1988).

[109] *Inclusive Cmtys. Project,* 135 S. Ct. at 2522. *See Arlington Heights*, 429 U.S. at 265–66 (holding judicial deference no longer justified if evidence of discriminatory intent exists, in context of Equal Protection challenge); *Huntington Branch, NAACP*, 844 F.2d at 936.

[110] *Arlington Heights*, 429 U.S at 267, 269.

[111] *Id.* at 266.

[112] *Id.* at 267, 269 (finding no discriminatory intent in town's rejection of multifamily zoning request because the area was historically zoned single-family, and the town followed normal procedures); *Yuma*, 818 F.3d 493, 508 (9th Cir. 2016) (finding genuine issue of material fact as to discriminatory intent because City Council denied first rezoning request in three years and 76 applications, against advice of its experts).

[113] *See Arlington Heights,* 429 U.S at 267, 269 (finding no proof of discriminatory intent from government officials despite constituents' discriminatory statements because officials acted in accordance with evidence and prior policy); *Yuma*, 818 F.3d at 504–05 (holding private citizens' animus can create circumstantial evidence of official discriminatory intent if evidence suggests city officials acted in response to constituents' animus).

[114] *Yuma*, 818 F.3d at 505–06.

[115] *Id.* at 505–07.

disparate impact claims, several factors weaken such claims. The disparate impact must be "actual or predictabl[e]," not speculative.[116] For example, to show that blocking a project perpetuates segregation, the plaintiff must prove the project will, in fact, be racially integrated.[117] A policy blocking certain housing does not cause a disparate impact if "comparable housing" is available close by.[118] Comparable housing must have access to "similarly or better performing schools, comparable infrastructure, convenience of public transportation, availability of amenities such as public parks and community athletic facilities, access to grocery or drug stores, as well as equal or lower crime levels."[119] Thus, the defendant could undercut the plaintiff's case by showing that housing of similar character and price was available in the neighborhood.[120]

2. Prima facie case: proving causation

Inclusive Communities requires the plaintiff meet a "robust causality requirement" to satisfy its burden of pleading causation.[121] First, the plaintiff must prove the defendant's action was a policy, rather than a one-time decision.[122] While zoning laws are clearly "policies," a private developer may argue that a particular development decision was one-off and project-specific, not a policy.[123] In the *Inclusive Communities Remand*, the Northern District of Texas held that the TDHCA's discretion did not constitute a policy because its results were not sufficiently predictable to establish causation.[124] The court suggested that the *law* giving the TDHCA discretion might constitute a policy, but the TDHCA's *use* of its discretion was not.[125] Next, the plaintiff must show that the policy, not other social or legal factors, caused the disparate impact.[126] Again, in the *Inclusive Communities Remand,* the Northern District of Texas held that even if

[116] 24 C.F.R. § 100.500 (2017). *See* Metro. Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

[117] *Arlington Heights,* 558 F.2d at 1284 (noting that plaintiffs had federal funding requiring the project be integrated, and suggesting they could not have prevailed absent such decisive evidence the project would be integrated).

[118] See Texas Dep't. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015); *Yuma*, 818 F.3d at 512.

[119] *Yuma*, 818 F.3d at 512.

[120] *See id.* at 511–12.

[121] *Inclusive Cmtys. Project*, 135 S. Ct. at 2523.

[122] *Id.* at 2523–24.

[123] *See id.*

[124] Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 2016 U.S. Dist. LEXIS 114562, at *20–21 (N.D. Tex. Aug. 26, 2016).

[125] *See id*. at *21.

[126] *See Inclusive Cmtys. Project*, 135 S. Ct. at 2523–24.

discretion were a policy, the TDHCA did not cause the disparate impact because federal and state law required the TDHCA to allocate more points to applications in low-income areas.[127] Thus, the TDHCA did not cause a disparate impact because federal and state law were equally responsible.[128]

3. Rebutting the prima facie case: legally sufficient justification

If the plaintiff successfully proves the prima facie case, the defendant may justify the disparate impact by proving it had a legally sufficient justification. The HUD Rule defines "legally sufficient justification" as "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent," "supported by evidence and [not] hypothetical or speculative," and which could not be served by a less discriminatory alternative.[129]

Inclusive Communities articulates a looser standard, stating that a policy causing disparate impact may stand if justified by a "valid" or "legitimate" objective rather than a "substantial interest," and does not create "artificial, arbitrary, and unnecessary barriers" to nondiscriminatory and integrated housing.[130] The Supreme Court noted that a town's sufficient justification was akin to the "business necessity" defense in Title VII employment cases.[131] Under *Griggs,* the employer may impose a policy that causes a disparate impact if the policy has a "manifest relationship" to, and "reasonabl[y] measure[s]", job performance.[132] The Supreme Court acknowledged, however, that a town's zoning objectives are likely to be more complex than an employer's goals, and thus the analysis may be more complex.[133] *Inclusive Communities* lists several valid zoning objectives: cost, traffic flow, preserving historic architecture, and protecting

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[127] *Inclusive Cmtys. Project*, 2016 U.S. Dist. LEXIS at *28 ("[Defendant] points to other potential causes of the statistical disparity: the preference under federal law for placement of LIHTC properties in low-income communities and the corresponding "basis boost" received by applications for tax credits for developments in low-income communities; the preference under state law for financial feasibility and community participation; developers' decisions regarding the locations of housing projects; and the decisions and preferences of local governments regarding zoning and approval of specific projects.").

[128] *Id.* at *28.

[129] Hous. & Urban Dev. Rule, 24 C.F.R. 100.500; 100.500 (b) (2017).

[130] *Inclusive Cmtys. Project*, 135 S. Ct. at 2515, 2522–23.

[131] *Id.* at 2522–23 (quoting Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

[132] *Id.* at 2517, 2523 (quoting Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

[133] *See id.* at 2523 (noting the employer seeks only to maximize job performance while a town may enact zoning laws to address a range of health, safety and welfare concerns); Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 936 (2d Cir. 1988).

community quality of life.[134] Lower courts have acknowledged other valid objectives including health concerns, school-overcrowding, and preservation of property values.[135]

For a policy to be found legally sufficient, the defendant must show credible evidence that the town's policy would support the welfare objective the town seeks.[136] The justification must be supported by specific, credible evidence.[137] In *Black Jack,* the Eighth Circuit rejected the town's "traffic control" justification because the city based its traffic projections on incorrect data and questionable assumptions, arguing that the 108-unit apartment building would increase traffic more than an adjacent mall employing 2,500 people.[138] Further, the defendant must prove its policy would tangibly support the objective.[139] In *Black Jack,* the Eighth Circuit rejected the town's justifications – protecting health, school class-sizes and property values – because the town's experts contradicted each other on how the development would affect these objectives.[140] Finally, the justification must be supported by evidence in the record.[141] In *Huntington,* the town alleged a health concern because the project was near a power station, but the Second Circuit rejected the rationale because neither the town's testimony nor its brief addressed the power station.[142]

The Supreme Court and Circuit Courts of Appeals have also rejected various objectives as invalid.[143] Towns may not reject development simply because it is inconsistent with town zoning laws, because towns may change their zoning laws while still protecting health and welfare.[144] The town's objection must be site-specific, not plan-specific, because the

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[134] *Inclusive Cmtys. Project*, 135 S. Ct. at 2523.

[135] *Huntington Branch*, 844 F.2d at 940; United States v. Black Jack, Mo., 508 F.2d 1179, 1187 (8th Cir. 1974).

[136] *Black Jack*, 508 F.2d at 1187.

[137] *Id.* (rejecting traffic and health concerns, school overcrowding and declining property values as valid justifications because the City's experts contradicted each other regarding the effects).

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *See* Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 940 (2d Cir. 1988).

[142] *Id.*

[143] *See, e.g., Huntington Branch*, 844 F.2d at 940; Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148 (3d Cir. 1977). *See* Texas Dep't. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2512 (2015) ("Policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers.").

[144] See Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 17 (1988) (rejecting the town's "sole justification proffered", which the Second Circuit opinion cited as inconsistency with town zoning laws).

developer can amend its plans to meet the town's objectives, but usually cannot change the proposed site.[145] Concerns about the site, however, may be sufficient because the developer cannot change health risks associated with proximity to a power station or a busy road.[146] Towns may not reject potential projects because they fear the projects will bring violence.[147] Post hoc rationalizations, which the town first documents during litigation, are not legitimate because they could not have motivated the original policy.[148]

Finally, an otherwise permissible justification is not legitimate if the town could achieve the same goal using a less discriminatory policy.[149] The Second Circuit and Supreme Court addressed this issue in *Huntington*. In the 1960s, Huntington designated Huntington Station, where 70% of the town's black population lived, the town's sole urban renewal area and restricted multifamily housing to urban renewal areas.[150] The town justified this decision by arguing this policy would encourage developers to invest in this blighted part of town.[151] The Second Circuit found this rationale "inadequate" because less discriminatory policies could promote renewal more effectively.[152] In practice, developers avoided working in Huntington because it would not be profitable to build in a blighted neighborhood, and they instead developed in neighboring towns with less restrictive zoning laws.[153] The Second Circuit held that Huntington could more effectively incentivize developers to build in Huntington Station by extending tax breaks to projects in that area.[154]

D. *Disparate Impact Claims in Massachusetts*

Massachusetts's anti-discrimination law, known as Chapter 151B, is more comprehensive than the FHA.[155] In addition to the seven classes the FHA protects – race, religion, color, national origin, handicap, sex, family status – Chapter 151B protects gender identity, sexual orientation, ancestry,

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[145] *Huntington Branch*, 844 F.2d at 940 (holding that the town could not reject a proposed development for inadequate green space, because it could require the developer to add it).

[146] *Id.*

[147] *Rizzo*, 564 F.2d at 150.

[148] *Huntington Branch*, 844 F.2d at 940 (rejecting the town's concerns about sewage issues because the town raised this justification for the first time in litigation).

[149] *See Huntington*, 488 U.S. at 15, 17.

[150] *Huntington Branch*, 844 F.2d at 937.

[151] *Huntington,* 488 U.S. at 15, 17.

[152] *Huntington Branch*, 844 F.2d at 939.

[153] *Id.*

[154] *Id.*

[155] *See* MASS. GEN. LAWS ch. 151B § 4, (6), (10) (2018).

marital status, veteran status and rental-subsidy status.[156] In its 2016 decision *Burbank Apartments Tenants Ass'n v. Kargman*, which followed *Inclusive Communities,* the SJC held disparate impact claims cognizable under Chapter 151B.[157]

In *Burbank,* the owner of Burbank Apartments ("Burbank") decided to end the building's project-based Section 8 subsidies and instead accept tenant-based Section 8 vouchers, also known as mobile vouchers.[158] Tenants with mobile vouchers may pay up to 40% of their income in rent, while project-based Section 8 tenants may pay no more than 30%.[159] Tenants and prospective tenants sued, alleging the policy had a disparate impact on tenants holding mobile vouchers because it would make Burbank prohibitively expensive for them.[160] The plaintiffs also alleged a disparate impact based on race because the subsidized tenants on Burbank's wait list were disproportionately black and Latino.[161]

The SJC held disparate impact cognizable under Chapter 151B.[162] Like *Inclusive Communities, Burbank* defined disparate impact as "'disproportionate disadvantage' [on] members of a protected class" and recognized that the perpetuation of segregation may indicate disparate impact.[163] It also affirmed that Massachusetts plaintiffs must show more than statistical disparity to prove disparate impact.[164]

The SJC held for Burbank, finding that Burbank's policy did not disproportionately disadvantage subsidized tenants because Burbank still accepted Section 8 vouchers.[165] The SJC suggested that if Burbank had blocked all Section 8 tenants or purposefully raised rents beyond a level the public housing authority was willing to pay,[166] the plaintiffs might have proved a disparate impact.[167] But because Burbank still accepted Section 8, and the plaintiffs did not show discriminatory intent, the plaintiffs failed to meet their burden of proof.[168] The SJC also rejected the disparate impact

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156 *Id.*

157 Burbank Apartments Tenant Ass'n v. Kargman, 48 N.E.3d 394, 407 (Mass. 2016)

158 *Id.* at 400–01

159 *Id.* at 400.

160 *Id.* at 402–03.

161 *Id.* at 413.

162 *Id.* at 414.

163 *Id.* at 406–07.

164 *Id.* at 411.

165 *Id.* at 405.

166 PHAs pay tenant-based Section 8 subsidies – tenants with tenant-based subsidies may pay no more than 40% of their income in rent – and may refuse to subsidize rents the PHA deems "unreasonable." 24 C.F.R. § 982.507 (2014).

167 *Burbank*, 48 N.E.3d at 405, 413–14.

168 *See id.* at 405.

on blacks and Latinos because it was too speculative, since there was no guarantee waitlisted minority tenants would secure an apartment.[169]

The SJC also adopted *Inclusive Communities'* "robust causality requirement."[170] Even if the plaintiffs had proven a disparate impact, the SJC noted, they would not have satisfied the causation requirement because federal policy, not the defendant's policy, caused the difference between project-based and tenant-based vouchers.[171] Thus, like in the *Inclusive Communities Remand*, federal law, not Burbank's policy, made Burbank's apartments affordable to project-based voucher holders but not to mobile voucher holders.[172]

Since the SJC held that the plaintiffs failed to make a prima facie case, it did not analyze legally sufficient justifications at length, but noted a defendant's justification would not be sufficient if it created "artificial, arbitrary, and unnecessary barriers" to nondiscriminatory, integrated housing.[173]

E. *Zoning Law: Purpose, uses and constitutionality*

Zoning law is the regulation of land use.[174] As a police power, zoning authority is reserved to the states, which in turn delegate it to municipalities.[175] Towns are empowered to use zoning law to "protect the health, safety and general welfare" of the community.[176] In practice, towns use zoning laws to regulate externalities such as traffic congestion, noise or other nuisances, preserve aspects of the community such as aesthetics, environmental health or preferred land uses, and to stabilize towns' fiscal base and property values.[177] Often, supporting a town's fiscal base requires reducing population growth.[178] Municipalities employ various zoning regulations to control population growth.[179] The most restrictive include large minimum lot sizes, prohibitions on multifamily housing, and wetland

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[169] *Id.* at 413.

[170] *Id.* at 411.

[171] *Id.* at 413.

[172] *Id.*

[173] *Id.* at 411.

[174] MARK BOBROWSKI, HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW: ZONING, SUBDIVISION CONTROL, AND NONZONING ALTERNATIVES 3 (3rd ed. 2011).

[175] *Id.* at 8–9.

[176] MASS. GEN. LAWS. ANN. ch. 40 § 1A (2017).

[177] Maurice Dalton & Jeffrey Zabel, *The Impact of Minimum Lot Size Regulations on House Prices in Eastern Massachusetts*, 41 REG'L SCI. & URBAN ECON. 571, 573–74 (2011); Bernard K. Ham, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L.J. 577, 582–83 (1997).

[178] Logan, *supra* note 1, at 20–22.

[179] *See* GLAESER, SCHUETZ & WARD, *supra* note 4, at 2–3.

and septic system regulations stricter than state standards, which usually necessitate larger lots.[180]

In *Euclid v. Ambler Realty Co.*, the Supreme Court held zoning laws to be a permissible exercise of municipalities' police power to protect the "health, morals, safety, and general welfare of the community."[181] Under *Euclid*, zoning regulations enjoy a presumption of constitutionality and courts must defer to legislative action if the law's validity is "fairly debatable".[182] The *Euclid* court also held, however, that a zoning law may be impermissible if the town's interests are "far outweigh[ed]" by the "general public interest."[183] In practice, courts rarely invalidate local zoning laws because they contradict regional interests.[184]

1. Zoning Authority in Massachusetts

Massachusetts' Zoning Enabling Act, Chapter 40A, delegates to municipalities the police power to enact "ordinances and by-laws . . . to regulate the use of land, buildings and structures . . . to protect the health, safety and general welfare of their present and future inhabitants."[185] Municipalities may regulate health and welfare because the Legislature's delegated that power, not because of a constitutional right to self-government.[186] This balance of power was challenged after the Home Rule Amendment of 1966, which allowed towns to enact any legislation the state had power to delegate, but in *Board of Appeals of Hanover v. Housing Appeals Committee* in 1973, the SJC interpreted the Amendment to confer only those powers not inconsistent with the Legislature's enactments.[187]

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180 *Id.*

181 Euclid v. Amber Realty Co., 272 U.S. 365, 392 (1926).

182 *Id.* at 365, 388.

183 *Id.* at 390 (cautioning that the Court's deferral to the city's zoning ordinance in *Euclid* did not "exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way").

184 *See, e.g.*, *id.* at 290. *See generally* Jeffrey M. Lehmann, *Reversing Judicial Deference Toward Exclusionary Zoning: A Suggested Approach,* 12-WTR J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 229, 240 (2003). *But see* S. Burlington County NAACP. v. Mount Laurel, 336 A.2d 713 (N.J. 1974).

185 MASS. GEN. LAWS. ch. 40 § 1A (2017); Bd. of Appeals of Hanover v. Hous. Appeals Comm. in the Dep't of Cmty. Affairs, 294 N.E.2d 393, 407 (Mass. 1973).

186 *Id.*

187 *See* MASS. CONST. appendix amend. art. 89 § 6 ("Any city or town may . . . exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court."); *Hanover*, 294 N.E.2d at 407–08 ("What the State gave, it could also take away."). *See generally Hanover*, 294 N.E.2d at 410 (litigating the constitutionality of Mass. Gen. Laws ch. 40B, under which a state appeals board may overturn the decisions of local zoning boards).

Thus, the Legislature retains ultimate authority to set zoning policy.[188]

Municipalities may employ any means "reasonably necessary" to protect health and welfare, and "a zoning by-law whose reasonableness is fairly debatable will be sustained."[189] Still, this power is bounded.[190] Towns may not use zoning law to exclude certain groups,[191] or with the sole intent of maintaining a low tax rate, maintaining property values, or protecting a certain aesthetic.[192] Towns may, however, consider the cost of services when determining how to promote a health, safety or welfare, and may impose health or welfare regulations that also support aesthetics and property values.[193]

A town's zoning law may be invalidated if the law conflicts with state or regional interests that outweigh local interests.[194] A plaintiff is more likely to prove that a state or regional interest outweighs a town's local interest when the Legislature has articulated the state or regional interest.[195] Regional housing shortages may outweigh a town's local interests.[196] This is particularly true for suburban towns in regions with demonstrated

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[188] *Hanover,* 294 N.E.2d at 407–08.

[189] Johnson v. Edgartown, 680 N.E.2d 37, 40 (Mass. 1997); Simon v. Needham, 42 N.E.2d 516, 517–19, 560 (Mass. 1942).

[190] *See Simon*, 680 N.E.2d at 566.

[191] *Id.* at 519 ("A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed.").

[192] *See* 122 Main St. Corp. v. Brockton, 84 N.E.2d 13, 16 (Mass. 1949) ("It is not within the scope of the act to enact zoning regulations for the purpose of assisting a municipality to retain or assume a general appearance deemed to be ideal . . . ."); Tranfaglia v. Bldg. Comm'r of Winchester, 28 N.E.2d 537, 541 (Mass. 1940) (holding that protection of property values alone is not a permissible zoning objective, but upholding town's Euclidian zoning code on health-related justifications).

[193] *Tranfaglia*, 28 N.E.2d at 541 (holding that protection of property values alone is not a permissible zoning objective, but upholding town's Euclidian zoning code on health-related justifications).

[194] *Simon*, 28 N.E.2d at 519 ("The strictly local interests of the town must yield if it appears that they are plainly in conflict with the general interests of the public at large. . ."); Euclid v. Amber Realty Co., 272 U.S. 365, 390 (1926) (holding that in cases where "general public interest would so far outweigh the interest of the municipality" the local law should be invalidated).

[195] *See* Johnson v. Edgartown, 680 N.E.2d 37, 39–40 (Mass. 1997) ("In a challenge to an Edgartown zoning by-law, the Legislature's expression of public interest in the preservation of the qualities of Martha's Vineyard is a relevant factor. [citation omitted]. The Legislature's proclamation also blunts any claim that, in purporting to act to protect its environment, Edgartown is doing so only in support of its parochial interests.").

[196] Sturges v. Chilmark, 402 N.E.2d 1345, 1352 (Mass. 1980) (endorsing need for primary housing as a valid regional interest).

housing shortages.[197] In rural and vacation towns, where the demand for primary housing is lower, the SJC is more likely to defer to a town's local interests.[198]

In the Massachusetts Comprehensive Permit Act of 1969, known as Chapter 40B, the Legislature articulated that regional need for low and moderate income housing may outweigh towns' local concerns.[199] Chapter 40B streamlines the permitting process for developers, and allows them to bypass local zoning laws by appealing directly to the State's three-member Housing Appeals Committee ("HAC").[200] If 10% of the municipality's housing stock is subsidized, the HAC must find the developer's proposal "consistent with local needs."[201] But if less than 10% of the town's housing is subsidized, the HAC presumes that "substantial [regional] housing need" outweighs the town's parochial interests.[202] The Legislature passed 40B in response to a legislative report finding that large-lot zoning, maximum-height requirements and prohibitions on multifamily housing hampered construction of low and moderate income housing, such that "the housing shortage problem had reached crisis proportions."[203] The law's purpose was to "provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing" in the Commonwealth.[204] According to the SJC, the Legislature

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[197] *See Johnson*, 680 N.E.2d at 39–40 (upholding large-lot zoning in Edgartown because Edgartown does not lie "in the path of suburban growth," and the plaintiffs brought no evidence that zoning restrictions contributed to a shortage of primary homes).

[198] *Sturges*, 402 N.E.2d at 1352 ("Regional needs . . . may differ between suburban and rural areas, and the exclusionary impact of a municipality's action may be significant reduced [in a rural area]. Thus, in a rural, as opposed to a suburban, setting, where no showing has been made of regional demand for primary housing, the [town's interests] may outweigh whatever undesirable economic and social consequences inhere in partly "closing the doors" to affluent outsiders primarily seeking vacation homes.").

[199] *See* Bd. of Appeals of Hanover v. Hous. Appeals Comm. in the Dep't of Cmty. Affairs, 294 N.E.2d 393, 405–06 (Mass. 1973) (explaining that the legislative history of Chapter 40B reveals it was intended to allow developers to circumvent local zoning restrictions that hampered development of the low and moderate income housing the Commonwealth critically needed).

[200] *Id. at* 351; Massachusetts Executive Office of Housing and Economic Development, Department of Housing and Community Development, Housing Appeals Committee, *Chapter 40 B - Massachusetts Comprehensive Permit Law Overview*, MASS.GOV, http://www.mass.gov/hed/economic/eohed/dhcd/hac.html [hereinafter *40B Overview*] (allowing developers file for one "Comprehensive Permit" directly with the municipality's zoning board of appeals, instead of applying to various local boards, like the Planning Board, Conservation Board and Historical Commission).

[201] *See*, *40B Overview*, *supra* note 200.

[202] *Id.*

[203] *Hanover*, 294 N.E.2d at 403–04.

[204] *Id.* at 406.

intended to subordinate local interests to regional needs, stating that legislative history "reveal[s] that both proponents and opponents of the redrafted bill realized that the bill would grant the power to override local zoning regulations which hampered the construction of low and moderate income housing."[205] Given similar regional housing shortages today, and data showing zoning laws continue to hamper development, Chapter 40B's legislative purpose would presumably still apply.[206]

2. Large-Lot Zoning

The SJC assesses on a case-by-case basis whether large-lot zoning laws are reasonably necessary to protect health and safety.[207] In its first large-lot zoning case, *Simon v. Needham,* the SJC held towns may reasonably use such zoning to promote permissible health goals such as preventing congestion, overcrowding, fire, and facilitating water or sewer service.[208] *Simon* also held that beautification and harmonization with natural features were permissible purposes.[209] But the SJC's most recent large-lot zoning decision narrows *Simon*, holding that neither protection of plants and animals nor maintenance of open space may justify large-lot zoning unless the Legislature has articulated a state-wide interest in the town's open space.[210] If the town proves one sufficient and permissible purpose, however, the law will not be invalidated simply because the town also considered insufficient purposes.[211] Zoning laws must support specific (not "nebulous") health and safety concerns and will be upheld if the nexus is "fairly debatable."[212] In *Wilson v. Sherborn* in 1975, Sherborn prevailed

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205 *Id.* at 406.

206 *See id.* at 348–49. *See also* discussion *supra*, note 203.

207 *See* Simon v. Needham, 42 N.E.2d 516, 517 (Mass. 1942); Lehmann, *supra* note 184, at 242 (noting the SJC has upheld one, two and three-acre zoning but invalidated 2.32 acre zoning).

208 *Simon*, 42 N.E.2d at 518.

209 *Id.*

210 *Compare id.*, *with* Johnson v. Edgartown, 680 N.E.2d 37, 41 (Mass. 1997); *Johnson*, 680 N.E.2d at 37 ("The Legislature has recognized 'a regional and statewide interest in preserving and enhancing' Martha's Vineyard's 'unique natural, historical, ecological, scientific, cultural, and other values,' values that may be irreversibly damaged by inappropriate uses of land.").

211 Sturges v. Chilmark, 402 N.E.2d 1346, 1352–53 (Mass. 1980); *See Simon*, 42 N.E.2d at 519 ("[I]t [i]s the duty of this court to sustain [the zoning law] if a reasonably construction shows it to be valid even if it appeared that, in the endeavors which suggested the legislation, consideration were presented to the legislature which would not be a sufficient constitutional justification for its enactment.").

212 *Sturges*, 402 N.E.2d at 1352, 1354 (holding the town did not need to prove septic systems actually harmed the soil, but that specific soil conditions existed making the danger a real possibility).

based on evidence that specific topographic and soil conditions made it fairly debatable that two-acre lots were necessary to protect ground water.[213] In *Johnson v. Edgartown* in 1997, the SJC accepted Edgartown's argument that nitrate levels in Edgartown's Great Pond showed a rational relationship between three-acre zoning and protecting the pond's health.[214]

The SJC has also articulated limits on large-lot zoning.[215] Maintaining a low tax rate, protecting property values, or maintaining aesthetics are not sufficient justifications.[216] Lot size requirements of over an acre are particularly suspect, and the SJC may require towns to justify such laws with more "specific justifications" and more "focused and tangible concerns" than required to justify one-acre zoning.[217] In *Aronson v. Town of Sharon*, the SJC struck down 2.23 acre zoning, finding that such large lots were not reasonably necessary to reduce traffic, prevent overcrowding, and ensure adequate access to town services.[218] The SJC also rejected the town's argument that 2.23 acre zoning was necessary to conserve open space, stating that the town could more effectively achieve this goal using eminent domain.[219] In *Johnson*, the SJC suggested a plaintiff may challenge large-lot zoning on the grounds the law causes real estate scarcity or contributes to a regional housing shortage.[220]

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[213] Wilson v. Sherborn, 326 N.E.2d 922, 924 (Mass. App. Ct. 1975).

[214] *See Johnson*, 680 N.E.2d at 41 (noting protection of natural features ordinarily does not justify large-lot zoning, but the Massachusetts Legislature had enacted legislation specifically protecting the Great Pond, which made its welfare an issue of state-wide "general welfare").

[215] *See id.* at 42 (stating that the decision "should not be read as an endorsement of three-acre zoning").

[216] *See* 122 Main St. Corp. v. Brockton, 84 N.E.2d 13, 16 (Mass. 1949); Tranfaglia v. Bldg. Comm'r of Winchester, 28 N.E.2d 537, 541 (Mass. 1940).

[217] *See Johnson*, 680 N.E.2d at 40 ("As residential lot size requirements increase, it becomes more difficult to justify the requirements."); *Sturges*, 402 N.E.2d at 1353 ("[M]ore focused and tangible concerns, such as the effect of soil conditions on sewage disposal and water supply systems, may [be required to] justify large lot zoning."); Simon v. Needham, 42 N.E.2d 516, 520 (Mass. 1942) ("We make no intimation that, if the lots were required to be larger than an acre or if the circumstances were even slightly different, the same result [upholding the zoning law] would be reached."); *Wilson*, 326 N.E.2d at 924 (noting that the *Sharon* Court, which struck down 2.3 acre zoning, required the town to articulate more "specific justification[s]" than the "general advantages" allowed to justify one-acre zoning in *Simon*).

[218] Aronson v. Town of Sharon, 195 N.E.2d 341, 345, 344 (Mass. 1964).

[219] *Id.* at 604.

[220] *See Johnson*, 680 N.E.2d at 39 (noting that plaintiff did not bring evidence that Martha's Vineyard's high home prices were attributable to zoning and did not prove people seeking primary homes were excluded from Edgartown because of its three-acre zoning).

3. Exclusionary Zoning Litigation in New Jersey: the Mount Laurel Doctrine

New Jersey has addressed exclusionary zoning more aggressively than any other state in the *Southern Burlington County NAACP v. Mount Laurel* ("*Mount Laurel*") line of cases starting in 1975.[221] At the time, Mount Laurel restricted 30% of the town's acreage for industrial use though industry used only 100 of the 4,000 acres so zoned, mandated half-acre minimum lots, and prohibited multifamily housing and mobile homes.[222] These restrictions increased the price of housing in Mount Laurel to a level inaccessible to low and moderate income families.[223] In reports to the New Jersey Legislature in 1970 and 1972, the Governor stated that New Jersey faced a housing shortage "crisis," particularly for low and moderate income housing.[224]

Plaintiffs sued the town of Mount Laurel on state law and FHA claims, alleging its zoning laws unlawfully excluded low and moderate income families.[225] The New Jersey Supreme Court found for the plaintiffs on the state claim.[226] The Court held that, in light of New Jersey's constitution and common law, *Euclid's* mandate that towns promote "general welfare" with their zoning laws meant such laws must promote the welfare of *all* New Jersey citizens.[227] The Court held that because municipalities derived their police powers from the state, and the state guaranteed equal protection to all citizens, towns must uphold state interests by providing their "fair share" of low and moderate income housing.[228] Thus, the court held that a town's "parochial" needs must cede to state and regional needs.[229]

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[221] *See* Lehmann, *supra* note 184 at 240.

[222] S. Burlington County N.A.A.C.P. v. Mount Laurel, 336 A.2d 713, 719–20 (N.J. 1975).

[223] *Id.* at 164.

[224] *Id.* at 158–59.

[225] *Id.* at 156.

[226] *Id.* at 174 (declining to reach the federal claim).

[227] *Id.* at 174–75.

[228] *Id.* ("We conclude that every such municipality must, . . . make realistically possible an appropriate variety and choice of housing. More specifically, . . . its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor.").

[229] *Id.* at 179 ("It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable

III. ARGUMENT: CHALLENGING ZONING LAWS IN MASSACHUSETTS ON A DISPARATE IMPACT THEORY

After *Euclid*, zoning laws have enjoyed a presumption of constitutionality, and they have become ubiquitous since many city dwellers began moving to the suburbs in the 1970s.[230] Houston is the only major city in the United States without a formal zoning plan, and all 187 towns within 50 miles of Boston have zoning laws.[231] Thus, overturning zoning laws is difficult.[232] The Supreme Court has invalidated zoning laws, however, when the plaintiff has proven that the policies caused a disparate impact.[233] The SJC has not invalidated a zoning law based on disparate impact, but has overturned zoning laws for lack of legitimate justification.[234] To overturn a zoning law on a disparate impact theory, the plaintiff would need to take the following steps in litigation:

1. Establish standing
2. Identify the specific town zoning law(s) that exclude(s) the project
3. Identify the protected class that has been disproportionately disadvantaged by the law, and allege a disparate impact under the FHA and Massachusetts Chapter 151B
4. Plead facts sufficient to establish the prima facie case, showing:
    a. Disparate Impact
    b. Causation
5. Challenge the town's justification as legally insufficient, or as outweighed by regional interests
6. If the court accepts the town's justification, propose a feasible, less discriminatory alternative

This paper does not address standing. It will assume the plaintiff is a developer that has acquired a property interest in a particular town, because

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opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.").

[230] *See* Vill. of Euclid, Ohio v. Amber Realty Co., 272 U.S. 365, 392 (1926); DAIN, *supra* note 8, at 4; Glaeser & Ward, *supra* note 3, at 270 (noting the steady increase in percentage of Massachusetts town regulating septic systems, wetlands and subdivisions between 1975 and 2004); Patrick J. Kiger, *The City with (Almost) No Limits*, URBAN LAND MAGAZINE (Apr. 20, 2015), http://urbanland.uli.org/industry-sectors/city-almost-no-limits/.

[231] DAIN, *supra* note 8, at 4; Kiger, *supra* note 230.

[232] *See generally Euclid*, 272 U.S. at 365–397.

[233] *See, eg.*, Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 18 (1988)

[234] *See, eg.*, Aronson v. Town of Sharon, 195 N.E.2d 341, 354 (Mass. 1964) (invalidating 2.23-acre zoning because it was not "reasonably require[d]" to secure the town's legitimate objectives).

such plaintiffs have standing.[235] It will further assume the plaintiff-developer plans to build a multifamily project on a lot where such use is prohibited, and the town has refused to rezone.

Ideally, before choosing where to buy property, the plaintiff would consider which towns' justifications would be easiest to undermine, because proving the prima facie case for disparate impact is difficult, but rebutting the town's zoning justifications is even harder.[236] Thus, this paper's analysis will start with rebutting the town's legitimate justifications.

A. *Rebutting Legitimate Justifications*

The plaintiff may rebut the town's justification by showing the town lacks a legitimate justification.[237] In Massachusetts, maintaining a town's aesthetics, property values and tax base are not sufficient justifications standing alone, thus the plaintiff should look for and challenge such justifications.[238] Second, the plaintiff should argue that the zoning law is not reasonably necessary to achieve the stated objective or not particularly likely to achieve that objective.[239] Towns are frequently concerned that building multifamily housing will increase traffic or overburden school systems.[240] Like the plaintiff in *Black Jack*, the plaintiff should challenge this justification by refuting the town's projections that the housing will increase traffic or school populations, or call experts to counter the town's evidence that the increases will affect health or welfare.[241] Towns often argue multifamily housing will threaten wetlands or overburden sewers, and

[235] *See* Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 931 (2d Cir. 1988).

[236] *See, e.g.*, Johnson v. Edgartown, 680 N.E.2d 37 (Mass. 1997). *See* See Texas Dep't. of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522–23. *See generally Euclid*, 272 U.S. at 365–397.

[237] *Huntington Branch, NAACP*, 844 F.2d at 940; United States v. Black Jack, Mo., 508 F.2d 1179, 1187 (8th Cir. 1974).

[238] *See* 122 Main St. Corp. v. Brockton, 84 N.E.2d 13, 16 (Mass. 1949) ("It is not within the scope of the act to enact zoning regulations for the purpose of assisting a municipality to retain or assume a general appearance deemed to be ideal . . . ."); Tranfaglia v. Bldg. Comm'r of Winchester, 28 N.E.2d 537, 541 (Mass. 1940) (holding that protection of property values alone is not a permissible zoning objective, but upholding town's Euclidian zoning code on health-related justifications).

[239] *Huntington Branch, NAACP*, 844 F.2d at 939; *Aronson*, 195 N.E.2d at 345, 344.

[240] *See, e.g.*, *Black Jack*, 508 F.2d at 1186.

[241] *See id.* at 1187 ("The asserted community interest in preventing overcrowding of the schools also was not furthered by the ordinance. The St. Louis County Planning Department had determined that, in the school district which embraced Black Jack, apartments produced approximately one schoolchild for every five families, while single-family houses produced almost three schoolchildren, or fifteen times as many.").

that large lots are necessary to protect groundwater from septic overflow.[242] The plaintiff should counter these arguments with comparisons to less-stringent state requirements and comparisons with other towns that have imposed less stringent requirements safely.[243] The plaintiff should also bring expert evidence that the town's soil and topographic conditions do not require more stringent regulations.[244]

1. Choosing Towns to Challenge Based on Outlier Zoning Laws

The plaintiff's best chance of rebutting the town's justifications may lie in challenging a town with zoning laws that lie outside the norm, because the plaintiff can argue other towns have achieved similar results with less extreme restrictions and thus the restrictions must not be reasonably necessary.[245] Outlier zoning laws include two-acre minimum lots, complete prohibitions on multifamily housing, and septic and wetland requirements that significantly exceed state requirements. Based on SJC precedent, towns with two-acre zoning may be particularly vulnerable.[246]

As of 2005, 14 towns within 50 miles of Boston imposed two-acre zoning on over 90% of their land: Berlin, Bolton, Boxford, Carlisle, Dunstable, Groton, Lincoln, Medway, Paxton, Plympton, Princeton, Rehoboth, Sutton, and Townsend ("90%-two-acre towns").[247] Another 13 towns imposed one-acre zoning on over 90% of town land: Pepperell, Harvard, Mendon, Sudbury, Sherborn, Berkeley, Carver, Norwell, Newbury, Ipswich, Wenham, Topsfield, and Lunenburg ("90%-one-acre towns").[248]

The plaintiff should also target towns with unusually stringent lot-composition, wetland and septic requirements, and particularly such towns that also require large minimum lot sizes. As of 2005, 14 towns excluded all wetland from lot-size calculations, effectively requiring affected landowners to own more than the minimum acreage ("90%-one-acre-plus

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[242] *See, e.g.*, Wilson v. Sherborn 326 N.E.2d 922, 924 (Mass. App. Ct. 1975).

[243] *See Wilson*, 326 N.E.2d at 924 (upholding two acre zoning as necessary for safe septic systems because the town brought evidence of specific soil and topographic conditions that warranted it).

[244] *See id.*

[245] *See* Aronson v. Sharon, 195 N.E.2d 341, 354 (Mass. 1964) (striking down 2.23-acre zoning).

[246] *Aronson*, 195 N.E.2d at 345 (striking down 2.23 acre zoning because it was not "reasonably required" to fulfill the town's health and safety goals); Simon v. Needham, 42 N.E.2d 516, 520 (Mass. 1942) ("We make no intimation that, if the lots were required to be larger than an acre or if the circumstances were even slightly different, the same result would be reached [upholding the town's minimum lot size by-law.]").

[247] DAIN, *supra* note 8, at 19.

[248] *Id.*

towns").[249] The 90%-one-acre towns of Mendon, Norwell, and Wenham exclude all wetlands from minimum lot-size calculations.[250] Boxford, a 90%-two-acre town, requires each lot to have one acre of "continuous buildable land," which excludes land graded at more than 15%, and land within 75 feet of a wetland.[251] Many towns also require certain square footage of street "frontage," ranging from 50 to over 250 feet.[252] Nine towns require more than 250 feet of frontage, including the 90%-two-acre towns of Boxford, Carlisle, and Sutton.[253] Boxford, Carlisle, and Rehoboth, another 90%-two-acre town, also stringently regulate lot-shape.[254]

The plaintiff should also target towns that limit multifamily housing more strictly than the norm, especially if those towns require large lots and restrictive lot-composition requirements. Ten towns entirely prohibit multifamily housing and townhouses: Bolton, a 90% two-acre town, Boylston, Bridgewater, Dighton, Lakeville, Littleton, Mendon, a 90%-one-acre-plus town, Nahant, Seekonk and West Bridgewater.[255] Carver allows only townhouses, and Hanover and Medway, a 90%-two-acre town, allow only townhouses for tenants over 55 years old ("seniors").[256] Another seven towns allow multifamily housing and townhouses only for seniors: Boxford, Carlisle, Paxton, Plympton, all 90%-two-acre towns, Wenham, a 90% one-acre-plus town, Lynnfield, and Marshfield.[257] Finally, six towns prohibit new, freestanding multifamily development, so a developer may develop multifamily housing or townhouses only if part of a mixed use development or converted from a single-family residence. These are Hopedale, Norfolk, Norwell, Sudbury, Swansea, and the 90%-two-acre town of Princeton.[258] Thus, the 90%-two acre towns with unusually stringent multifamily housing restrictions are Bolton, Medway, Boxford, Carlisle, Paxton, Plympton, and Princeton, along with the 90%-one-acre-plus towns Mendon and Wenham.[259]

In summary, this paper argues that the plaintiff should challenge what the

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[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.* at 25.

[253] *Id.*

[254] *Id.* at 25–26 (Rehoboth's by-law states its purpose is to discourage landowners from amassing irregularly shaped lots to "meet the lot size and frontage requirements . . . while evading [their] intent to regulate building density.").

[255] *Id.* at 32.

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.*

paper will call a "Zoning-Outlier Town": one that requires two-acre lots, imposes strict lot-composition requirements, and prohibits multifamily housing. The disparate impact of these laws taken together is likely to be stronger than that of any single law,[260] and the town must bring specific evidence to justify all three sets of laws.[261] Additionally, a court may be sympathetic to a plaintiff's argument that the combination of such stringent laws suggests discriminatory intent. Such Zoning-Outlier Towns include:

1) Bolton, a 90%-two-acre town that prohibits all multifamily housing;
2) Boxford, Carlisle, Medway, and Plympton, 90%-two-acre towns that prohibit multifamily housing except for seniors; and
3) Princeton, a 90%-two-acre town that prohibits new freestanding multifamily development.[262]

2. Challenging legally sufficient justification by arguing regional welfare outweighs local interests.

In addition to undermining the town's specific justifications, the plaintiff should seek to prove that regional interest in increasing housing supply outweighs the town's local interests in controlling growth. This was the plaintiff's winning argument in the *Mount Laurel* line of cases in New Jersey, in which the New Jersey Supreme Court ruled that "general welfare" meant the welfare of the *state's* citizens, not only Mount Laurel's citizens.[263] The plaintiff should start with the language of Chapter 40A, which empowers towns to enact zoning laws to protect "to protect the health, safety and *general welfare* of their present and future inhabitants."[264] In both *Sturges* in 1980 and *Johnson* in 1997, the SJC held that the regional demand for primary housing could outweigh a town's "parochial" interests if the Legislature articulated demand for housing as a state or regional interest.[265] The plaintiff could argue that Chapter 40B articulates such an interest, because its legislative purpose is to increase the

[260] *See* discussion *supra* notes 4–6.

[261] *See* Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 940 (2d Cir. 1988).

[262] DAIN, *supra* note 8, at 19, 32.

[263] *See* S. Burlington County N.A.A.C.P. v. Mount Laurel, 336 A.2d 713, 724–25 (N.J. 1975).

[264] MASS. GEN. LAWS ANN. ch. 40A, § 1A (2017).

[265] *See* Johnson v. Edgartown, 680 N.E.2d 37, 39–40 (Mass. 1997) (upholding large-lot zoning in Edgartown, partially because the plaintiffs brought no evidence that zoning restrictions contributed to a housing shortage or caused citizens to be denied housing); Sturges v. Chilmark, 402 N.E.2d 1346, 1352 (Mass. 1980) (upholding Chilmark's interest in preserving Martha's Vineyard's "natural, historical, ecological, scientific, or cultural values" as a regional, not local, interest because the Legislature established the Martha's Vineyard Commission to protect these interests).

region's short supply of moderately priced and subsidized housing.[266] The plaintiff could also offer evidence of Boston Mayor Martin Walsh's plan to increase housing stock by 53,000 units by 2030 to address Boston's housing shortage.[267] Walsh's plan applies to Boston only, but if the plaintiff could show that many of the town's residents work in Boston, she could argue that the region's "general interests" outweigh the town's "strictly local interests."[268]

The argument that regional housing needs should outweigh strictly local priorities is stronger in towns "lying in the path of suburban growth."[269] The town should contain primary homes, and lie within commuting distance of a city, so that zoning relief would likely lead to development decreasing the housing shortage.[270] To assess locations in the "path of suburban growth," I calculated the distance from the city and the percentage of town citizens who commuted to a city, on the assumption that towns should be considered suburban if a high percentage of their workers commute to the city. I defined "city" to include the twelve most populated cities in Massachusetts – Boston, Worcester, Springfield, Lowell, Cambridge, New Bedford, Brockton, Quincy, Lynn, Fall River, Newton, and Lawrence (collectively, "Local Cities").[271]

Based on these assumptions, the Zoning-Outlier Towns of Princeton, Boxford, Carlisle, and Medway may lie in the path of suburban growth:

- Princeton is about 25 miles from Worcester. Twenty four percent of its commuters work in Local Cities, and 32% if the smaller cities of Leominster and Fitchburg are included.[272]
- Boxford is 25 miles from Boston, and 21% of its commuters

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[266] See discussion *supra*, notes 205 and 206.

[267] *Housing a Changing City: Boston 2030,* CITY OF BOSTON, https://www.boston.gov/finance/housing-changing-city-boston-2030 (last visited Apr. 14, 2017).

[268] *See* discussion *supra*, notes 194–98; Simon v. Needham, 42 N.E.2d 516, 520 (Mass. 1942) ("The strictly local interests of the town must yield if it appears that they are plainly in conflict with the general interests of the public at largeFalse").

[269] *See Johnson*, 680 N.E.2d at 39–40.

[270] *Id.*

[271] *Populations of Massachusetts Cities*, TOGETHER WE TEACH, http://www.togetherweteach.com/TWTIC/uscityinfo/21ma/mapopr/21mapr.htm (last visited Jan. 5, 2018).

[272] *See* U.S. Census Bureau, Commuting Data Table (2009-2013) (including commuters that stay in the town itself) https://www.census.gov/topics/employment/commuting/data/tables.2013.html; Driving Directions from Princeton, MA to Worcester, MA, GOOGLE MAPS, http://maps.google.com (follow "Directions" hyperlink; then search starting point field for "Princeton, MA" and search destination field for "Worcester, MA").

work in Local Cities.[273]

- Carlisle is about 25 miles from Boston, and 20% of its commuters work in Local Cities.[274]
- Medway is about 35 miles from Boston, and has an MBTA shuttle to the Franklin Line Commuter Rail in an adjacent town.[275] Eighteen percent of Medway's commuters commute to Local Cities.[276]

Four other 90%-two-acre towns may also be considered suburban:

- Lincoln is about 20 miles from Boston, has its own commuter rail stop, and 32% of its commuters work in Local Cities.[277]
- Bolton is about 40 miles from Boston, 20 miles from Worcester, and 15% of its commuters work in Local Cities. [278]
- Berlin is about 15 miles from Worcester, and 13% of its commuters work in Local Cities, or 15% if Fitchburg and Leominster are included.[279]

Of the Zoning Outlier Towns and 90%-two-acre towns, Princeton, Boxford, Carlisle, and Lincoln send at least 20% of their commuters to local cities, and this paper will consider them sufficiently suburban that regional needs could be argued to outweigh their local interests.[280]

To prove that regional needs should overcome the town's particular zoning goals, the plaintiff should challenge a town that has failed to meet the Chapter 40B threshold for subsidized housing.[281] Recall that under Chapter 40B, if a town has less than 10% subsidized housing, the HAC presumes that regional housing needs outweigh the town's local interests.[282] If the town has met the 10% goal, however, the developer must

[273] *See* U.S. Census Bureau, *supra* note 272; Driving Directions, *supra* note 272.

[274] *See* U.S. Census Bureau, *supra* note 272; Driving Directions, *supra* note 272.

[275] *Medway T Shuttle,* GATRA.ORG, *http://www.gatra.org/index.php/medway-t-shuttle/ (*last visited Feb. 28, 2018*).*

[276] *See* U.S. Census Bureau, *supra* note 272; Driving Directions, *supra* note 272.

[277] *See* U.S. Census Bureau, *supra* note 272; Driving Directions, *supra* note 272.

[278] *See* U.S. Census Bureau, *supra* note 272; Driving Directions, *supra* note 272.

[279] *See* U.S. Census Bureau, *supra* note 272; Driving Directions, *supra* note 272.

[280] *See* discussion *supra*, note 269.

[281] MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, CHAPTER 40B SUBSIDIZED HOUSING INVENTORY (SHI), https://www.mass.gov/files/documents/2017/10/10/shiinventory_0.pdf (last updated Sept. 14, 2017).

[282] MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, CHAPTER 40 B - MASSACHUSETTS COMPREHENSIVE PERMIT LAW OVERVIEW. *See also* discussion *supra*, notes 199–206.

prove her project meets the town's needs.[283] None of the Zoning-Outlier-Towns have met their Chapter 40B goal, with Boxford, Princeton, and Carlisle each reporting less than 3% subsidized housing.[284] The other 90%-two-acre towns vary in their progress. Lincoln has surpassed 10% and Berlin has nearly reached it, while Sutton, Rehoboth, and Dunstable each have less than 2% subsidized housing.[285]

Thus, the plaintiff will have the strongest argument regional needs should rebut town interests in Carlisle, Princeton, and Boxford because these towns have outlier zoning laws, lie in the path of suburban growth, and have made minimal progress toward their Chapter 40B subsidized housing goal.

3. Proving a less discriminatory alternative is feasible

Even if the town proves its zoning laws are supported by a legally sufficient justification, the plaintiff may still prevail if she shows a feasible, less discriminatory alternative policy.[286] The plaintiff's proposals will depend on the town's justifications, but proposals could include solutions such as septic technology requiring less space, or alternative routing for traffic into developments.[287]

B. *Proving the prima facie case: Disparate Impact*

Inclusive Communities specifically states that zoning laws are policies, and in denying a zoning variance or amendment, officials are carrying out that zoning policy. [288] Thus, as long as the plaintiff challenges a particular zoning law, it challenges a policy within the meaning of *Inclusive Communities*.[289]

Next, the plaintiff must articulate which protected class(es) are disproportionately disadvantaged by the policy. For example, under Massachusetts Chapter 151B, the plaintiff could allege disparate impact on

[283] CHAPTER 40 B - MASSACHUSETTS COMPREHENSIVE PERMIT LAW OVERVIEW, *supra* note 282; discussion *supra*, notes 199–206.

[284] CHAPTER 40B SUBSIDIZED HOUSING INVENTORY, *supra* note 281 (Medway – 6.2%, Plympton – 4.9%, Bolton – 3.6%, Carlisle – 2.9%, Princeton – 2.0%, and Boxford – 1.1%).

[285] *Id.* (Lincoln – 11.2%, Berlin – 9.2%, Groton – 5.5%, Townsend – 4.8%, and Paxton – 3.9%, Sutton – 1.5%, Rehoboth – 0.6%, Dunstable – 0.0%).

[286] 24 C.F.R. § 100.500 (2017).

[287] United States v. Black Jack, Mo., 508 F.2d 1179, 1187 (8th Cir. 1974) (noting that the purported traffic issue could be solved by changing the location of the development's driveway); Aronson v. Sharon, 195 N.E.2d 341, 345 (Mass. 1964) (striking down the zoning law as better achieved by an alternative remedy, eminent domain, and noting that the benefits of large lot sizes may have diminishing returns).

[288] *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2511 (2015).

[289] *Id.*

tenants holding rental subsidies and could allege disparate impact based on race under both Chapter 151B and the FHA.[290] The plaintiff should allege all plausible claims, both federal and state.[291]

To prove a disparate impact, the plaintiff must show a statistical disparity on the protected class.[292] The plaintiff should bring evidence showing that the project would benefit the protected class at a significantly higher rate than the non-protected classes; therefore, disallowing the project would disproportionately hurt the protected class.[293] This requires proving with substantial certainty the percentage of protected-class members who will live in the proposed project.[294] This may be easiest to prove if the developer has already secured federal or state funding requiring a minimum number of subsidized units. Then, the developer could say with certainty the percentage of subsidized tenants who would live in the development. From the number of subsidized units, the developer could predict the percentage of minority tenants using the racial composition of Section 8 recipients in the region, but the town would almost certainly attack this argument as speculative. In *Burbank,* the SJC ruled that predicting future minority occupancy from the race of waitlisted tenants was too speculative.[295] Most federal funding requires the property owner to affirmatively market to all races[296]; therefore, the plaintiff may be able to argue that federal funding will require greater integration than the town's normal housing pattern.

In the alternative, the plaintiff should bring evidence that, because of the zoning law, a smaller percentage of minorities live in the town than their percentage of the regional population. First, the plaintiff must decide what "regional" or "general" population to which to compare the town. The plaintiff is more likely to succeed the more local the "general" population it

[290] 42 U.S.C. § 3604(a) (2017); MASS. GEN. LAWS ch. 151B § 4, (6), (10) (2017).

[291] *See* S. Burlington Cty. N.A.A.C.P. v. Mount Laurel, 336 A.2d 713, 724–25 (N.J. 1975).

[292] *See* discussion *supra*, notes 92, 106.

[293] Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 938 (2d Cir. 1988) (finding disparate impact supported by statistic that while 7% of all Huntington families qualified for subsidized housing, 24% of black families did, thus excluding subsidized housing disproportionately affected black families); SCHWEMM, *supra* note 17, at § 10.6.

[294] *See* Burbank Apartments Tenant Ass'n v. Kargman, 48 N.E.2d 394, 412–13 (Mass. 2016) (refusing to find disparate impact because there was no guarantee the wait-listed minorities would be offered housing in the Burbank apartments).

[295] *See id.* (refusing to find disparate impact because there was no guarantee the wait-listed minorities would be offered housing in the Burbank apartments); Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 2016 U.S. Dist. LEXIS 114562, at *28 (N.D. Tex. Aug. 26, 2016).

[296] *See, eg*., 24 C.F.R. § 200.625 (2012) (requiring an affirmative fair marketing plan for all FHA loans).

chooses.[297] For example, *Huntington's* plaintiff prevailed by comparing the impact on Huntington's black population and Huntington's white population, the most local comparison possible.[298] Thus, comparing Boxford's Section 8 population with metropolitan Boston's Section 8 population would be more persuasive than comparing it with the national statistics.[299] When a town has few minorities, however, and tenants are likely to come from outside the town, regional comparisons are acceptable.[300] Next, the plaintiff must show that the zoning law caused that disparate impact, by showing that the zoning law excludes the type of housing statistically associated with the protected class, for example apartments, or housing of a certain price.[301]

The plaintiff may have difficulty proving a non-speculative harm on a protected class if the proposed project does not include subsidized units, because it will not be able to use correlation between income and protected class status as evidence of disparate impact.[302] Because Metro Boston was 78.2% white and the median income for white families was $80,139 as of 2012,[303] a developer who builds a moderately priced apartment building in a wealthy community would have difficulty proving its tenants would come from protected classes. Boston's situation is different from Yuma's, where the court found income disparity sufficient to plead the prima facie case for disparate impact.[304] Given Yuma's large Hispanic population, it was likely Hispanics would buy homes in a moderately-priced development.[305] Thus, the plaintiff is most likely to prove a non-speculative harm in the Boston

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[297] SCHWEMM, *supra* note 17, at § 10.6.

[298] *See Huntington Branch*, 844 F.2d at 938.

[299] *See* SCHWEMM, *supra* note 17, at § 10.6.

[300] *See* United States v. Black Jack, Mo., 508 F.2d 1179, 1183, 1186 (8th Cir. 1974) (comparing Black Jack's black population with that of neighboring St. Louis to prove that Black Jack's refusal to permit a subsidized housing project caused a disparate impact).

[301] *See supra* Section E.

[302] Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 17 (1988) (upholding the Second Circuit's finding of disparate impact because a disproportionately high number of minorities in Huntington used subsidized housing and the ordinance restricted subsidized housing); Ave. 6E Invs., LLC v. Yuma, Ariz., 818 F.3d 493, 508, 513 (9th Cir. 2016) *cert. denied*, 137 S. Ct. 295 (2016) (reversing summary judgment finding of no disparate impact from Yuma's rejection of moderately priced housing, because the census showed a 29% disparity between Hispanic and white median-income in Yuma).

[303] *Table B19013H Median Household Income in the Past 12 Months (In 2012 Inflation-Adjusted Dollars) (White alone, not Hispanic or Latino Householder)*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_5YR_B19013H&prodType=table.

[304] *See Yuma*, 818 F.3d at 513.

[305] *See id.* at 508–09.

Area if its project includes Section 8 units because Section 8 holders are a protected class and recipients of subsidized housing in Metro Boston are disproportionately minority. As of 2010, 58% of tenants living in privately owned, publicly subsidized housing ("private subsidized housing") in Boston were minority, and 28.6% of tenants living in private subsidized housing in the rest of the metro area were minority.[306]

The plaintiff cannot prove disparate impact by showing a statistical disparity alone,[307] and must bring additional evidence that the policy perpetuates segregation or that town officials acted with animus.[308] The plaintiff should seek to prove both these alternatives. To prove the zoning law perpetuates segregation, the plaintiff should bring evidence that the proposed development would be more integrated than the town's current housing patterns.[309] Proving discriminatory intent is not necessary to establish disparate impact, but plaintiffs who bring evidence suggesting discriminatory intent have been successful.[310] Plaintiffs should bring evidence that town officials treated previous zoning appeals differently than the appeal in question, that town officials deviated from standard procedure, or some town officials supported the project as in line with the town's zoning goals.[311] Additionally, plaintiffs should bring documentation of discriminatory statements citizens made at town meetings and argue town officials rejected the development in response to pressure from these constituents.[312]

C. *Proving the prima facie case: Causation*

In each of these claims, the plaintiff would have to prove that exclusionary zoning laws caused an increase in housing prices that made

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[306] Victoria Williams, *City of Boston Analysis of Impediments to Fair Housing Choice,* BOSTON FAIR HOUSING COMMISSION, at 59 (June 2010), https://www.boston.gov/sites/default/files/boston_ai_press_pdf_version_tcm3-16790.pdf.

[307] *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 259 (1977) (endorsing the District Court's assessment that statistical disparity was relevant but not dispositive that the town's decision to block low-income housing caused a disparate impact).

[308] *See* discussion *supra*, notes 108–15.

[309] SCHWEMM, *supra* note 17, at § 13.12. *See* Metro. Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

[310] SCHWEMM, *supra* note 17, at § 13.12.

[311] *See Arlington Heights*, 429 U.S at 267, 269; Avenue 6E Invs., LLC v. Yuma, 818 F.3d 493, 508 (9th Cir. 2016).

[312] *Yuma*, 818 F.3d at 504–05 (holding private citizens' animus can create circumstantial evidence of official discriminatory intent if evidence suggests city officials acted in response to constituents' animus).

housing unaffordable for a significant proportion of the members of that protected class on the Boston area.[313] This analysis would require the plaintiff to show a causal relationship between density-controlling zoning laws and increased housing prices and that a disproportionately high number of members of the protected class fell into socioeconomic brackets that made housing in that town unattainable.

The plaintiff could bring a claim alleging disparate impact on tenants with rental subsidies under Massachusetts Chapter 151B, alleging that zoning laws caused rent prices in most affluent suburbs that excluded holders of mobile Section 8 vouchers.[314] Local Public Housing Agencies ("PHAs") allocate Section 8 vouchers using HUD funding, and PHAs may not pay more than the maximum allowable rent ("MAR") HUD designates for each metro area, which is based on the fair market rent ("FMR") HUD designates for that area.[315] In 2016, HUD's FMR for a two-bedroom apartment in the Boston area was $1,567, while the Boston Globe reported that the average two-bedroom apartment in Boston cost $2,821.[316] Thus, rent in the Boston area is often out of reach for holders of mobile Section 8 vouchers. Because subsidy status is tied to economic status, this claim would allow plaintiffs to establish disparate impact based on economic data alone, without linking economic data to race or family status.

In the alternative, the plaintiff could allege disparate impact based on race under Massachusetts Chapter 151B and the FHA.[317] In this analysis,

[313] Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 17 (1988) (upholding the Second Circuit's finding of disparate impact because a disproportionately high number of minorities in Huntington used subsidized housing and the ordinance restricted subsidized housing); *Yuma*, 818 F.3d at 508, 513 (reversing summary judgment finding of no disparate impact from Yuma's rejection of moderately priced housing, because the census showed a 29% disparity between Hispanic and white median-income in Yuma).

[314] *See* MASS. GEN. LAWS ch. 151B § 4, (6) (10) (2018).

[315] Department of Housing and Urban Development, HOUSING CHOICE VOUCHER FACT SHEET, https://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/about/fact_sheet; ANN VERRILLI, CITIZENS' HOUSING AND PLANNING ASSOCIATION, CHAPA BRIEFING PAPER, THE MASSACHUSETTS RENTAL VOUCHER PROGRAM: MAINTAINING THE STATE'S PRIMARY HOMELESSNESS PREVENTION TOOL 19 (June 2009).

[316] *FY2016 FMR and IL Summary System,* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, https://www.huduser.gov/portal/datasets/fmr/fmr_il_history/data_summary.odn?inputname=METRO14460MM1120*Boston-Cambridge-Quincy%2C+MA-NH+HUD+Metro+FMR+Area%2B2502178972&data=2014&fmrtype=%24fmrtype%24&fmr_year=2016&il_year=2016&area_choice=hmfa&hmfa=Yes (last visited Apr. 7, 2018); Megan Turchi, *This is the salary needed to afford a typical apartment in Boston*, BOSTON.COM REAL ESTATE (May 17, 2016), http://realestate.boston.com/news/2016/05/17/salary-rent-afford-typical-apartment-boston/.

[317] 42 U.S.C. § 3604(a) (2018); MASS. GEN. LAWS ch. 151B, § 4 (2018).

the plaintiff would bring evidence showing the significant wealth and income disparity between white and non-white families in the Boston area, and allege zoning laws caused minorities to be excluded from the suburb in question. Additionally, the plaintiff would bring data showing the high levels of segregation in the Boston area, then endeavor to show zoning laws caused this segregation.[318]

The plaintiff must rule out alternative factors contributing to the disparate impact.[319] In the case of large-lot zoning, the plaintiff must prove that zoning primarily drives high home prices, not other factors like lack of buildable land, desirability of the location or school district, or other factors.[320] There is consensus that density-restrictive zoning increases home prices because it constricts supply.[321] But the plaintiff likely would have to prove the zoning law caused housing prices to rise a particular amount. For example, the plaintiff would need to bring data and modelling showing zoning laws increased housing prices so as to move prices from attainable for Section 8 tenants to unattainable for Section 8 tenants. The plaintiff likely would have to bring data from an extended period of time. Fortunately, such modeling does exist. Glaeser's data in the Journal of Urban Economics suggested that a one-acre increase in minimum lot size correlated with a 12% increase in home price.[322] Glaeser, Schuetz, and Ward's modeling in their Rappaport Policy Brief showed that if housing supply had increased by 27% between 1990 and 2005, as it did between 1960 and 1975, housing prices in Greater Boston would have been 23-26% lower in 2005 – thus median house price would have been around $276,100 in 2005 rather than the actual median of $431,900.[323] Still, the plaintiff would face a significant challenge definitively proving that zoning laws caused the prohibitively high housing prices, and that other factors did not contribute. In *Burbank*, the SJC refused to find the defendant's policy caused disparate impact because the SJC found the alleged disadvantage to the protected class too speculative and that the plaintiff had failed to rule

[318] Tatjana Meschede et al., *Wealth Inequalities in Greater Boston: Do Race and Ethnicity Matter?*, Federal Reserve Bank of Boston Community Development Discussion Paper No. 2016-2, 5 (February, 2016).

[319] Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 2016 U.S. Dist. LEXIS 114562, at *28 (N.D. Tex. Aug. 26, 2016); Burbank Apartments Tenant Ass'n v. Kargman, 48 N.E.3d 394, 412 (Mass. 2016).

[320] Johnson v. Edgartown, 680 N.E.2d 37, 39 (Mass. 1997) (noting that plaintiff failed to bring credible evidence showing the extent to which "zoning factors contribute to the availability (or unavailability) of real estate, and more importantly, whether or not the determinative factor of the equation is large lot zoning").

[321] Glaeser & Ward, *supra* note 3, at 275–76.

[322] *Id.* at 275.

[323] GLAESER, SCHUETZ & WARD, *supra* note 4, at 4–5.

out other factors that may have contributed to the disparate impact.[324]

1. Proving the Prima Facie Case in Boxford, Princeton and Carlisle

To prove zoning laws caused a disparate impact on subsidized tenants, the plaintiff should argue that the combination of two-acre zoning and prohibitions on multifamily housing make it all but economically infeasible to build subsidized housing, resulting in an extremely small number of units in these towns.

To prove zoning laws have a disparate impact on minorities, the plaintiff must undertake the analysis linking zoning laws to rising prices and rising prices to excluding minorities, as outlined above.[325] The plaintiff can use census data to support its claim zoning laws have perpetuated segregated housing patterns. As of 2010, Boxford was 96.4% white, 1.5% Asian, 0.5% Black, 1.8% Latino, and 1.2% mixed race.[326] Princeton was 97% white, 1.2% Asian, 0.5% Black, 1.4% Latino, and 1.1% mixed race.[327] Carlisle was 89.2% white, 7.9% Asian, 0.4% Black, 2.1% Latino, and 2% mixed race.[328]

When challenging the town's justification, the plaintiff should look for statements from government officials that suggest animus. For example, the Pioneer/Rappaport researchers spoke to one director of community development who said the town restricted housing to seniors because of the "cost of schools and infrastructureFalse We don't have money to build schools. We feel zoning for 55 and older will not impact the schools as much as something with younger people in it. We have high taxes here."[329] Statements such as these would suggest purposeful exclusion of families with children, which is not permissible under Massachusetts 151B or the FHA.[330] The plaintiff should also look for statements suggesting zoning was enacted primarily to preserve the town's tax base because the SJC has held that preserving the town's tax base is not a sufficient justification, alone, to justify a zoning law.[331] The Pioneer/Rappaport researchers spoke with another official who stated: "It may technically say that you can build

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[324] *Burbank*, 48 N.E.3d at 412–13.

[325] *See* discussion *supra* Section III(c).

[326] *Quick Facts*, UNITED STATES CENSUS BUREAU (2010), https://www.census.gov/quickfacts/table/RHI125215/2500907420,25.

[327] *American Factfinder, Community Facts*, UNITED STATES CENSUS BUREAU (2010), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF.

[328] *Quick Facts, supra* note 326.

[329] DAIN, *supra* note 8, at 39.

[330] 42 U.S.C.A. § 3604(a) (2018); MASS. GEN. LAWS Ann. 151B, § 4 (2018).

[331] *See* Tranfaglia v. Bldg. Comm'r of Winchester, 28 N.E.2d 537, 541 (Mass. 1940) (holding that protection of property values alone is not a permissible zoning objective, but upholding town's Euclidian zoning code on health-related justifications).

multi-family, but the bar is so high that you can't build under it," noting that multifamily housing had not been built in that town for a long time.[332] Such a statement is not clearly discriminatory, but paired with other evidence it could suggest officials knowingly perpetuated a by-law that excluded a type of housing that in turn excluded a protected class. The plaintiff should also look for transcripts of town meetings at which constituents made discriminatory statements, and look for evidence town officials acted in response to pressure from these constituents.[333]

For each of these claims, the plaintiff's biggest challenge likely will be proving that zoning laws are the primary cause of increased housing prices. Additionally, each claim would require evidence of some additional disadvantage to the protected class beyond evidence of statistical disparity, because *Inclusive Communities* does not allow a showing of disparate impact on statistical disparity alone.[334] Thus, the plaintiff appears most likely to prevail on a disparate impact theory on the basis of race, because in addition to showing that zoning laws price most minority families out of the wealthy suburbs, the plaintiff can show evidence that zoning contributed to levels of segregation in these communities, both historically and currently.[335]

IV. CONCLUSION

To prevail on a disparate impact challenge to large-lot zoning, prohibitions on multifamily housing or other growth-restrictive zoning in Massachusetts, the plaintiff-developer should target suburban towns in regions with housing shortages, because the plaintiff can argue that state and regional interests outweigh local interests. The plaintiff will be most likely to undermine the town's justifications successfully if it targets a town with abnormally restrictive zoning laws that has made minimal progress toward its 10% 40B goal. To prove a disparate impact based on race or subsidy status, the plaintiff should target towns marked by significant racial segregation with property values unattainable for tenants with mobile Section 8 vouchers. Finally, the plaintiff must be ready to show evidence suggesting a causal relationship between restrictive zoning laws, high property values, and segregation. Based on the data from the Pioneer Study, plaintiffs should consider targeting Boxford, Carlisle and Princeton.

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[332] *Id.*

[333] Avenue 6E Invs., LLC v. Yuma, 818 F.3d 493, 504–05 (9th Cir. 2016) (holding private citizens' animus can create circumstantial evidence of official discriminatory intent if evidence suggests city officials acted in response to constituents' animus).

[334] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015).

[335] *See* Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 17 (1988)

In reality, the most effective strategy would be a legislative one. As the New Jersey Legislature did after Mount Laurel, the ideal solution would be for the Legislature to recognize as a statewide priority increasing housing supply and reducing housing prices and to require towns to furnish their fair share of low and moderate income housing. As New Jersey's experiment taught, however, towns are unlikely to give up their autonomy unless forced by the Legislature, and the Legislature will not pass legislation unpopular with homeowners unless forced by the courts. Thus, a judicial solution is almost certainly necessary to achieve the legislative solution.