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## DENSITY, AFFORDABLE HOUSING AND SOCIAL INCLUSION: A MODEST PROPOSAL FOR CAPE TOWN

Colin Crawford\*

### I. INTRODUCTION: IS A DENSER, MORE INCLUSIONARY CAPE TOWN POSSIBLE?

Cape Town, those of us who attended the splendid Study Space seminar there learned in the last week of June 2016, is a city where housing remains spatially segregated by race, a direct function of historical planning patterns.<sup>1</sup> While there is some lateral movement between the areas in which the three dominant racial groups – whites, coloreds and Africans, to use the local categories – live, the former townships remain poor and mostly black African, while the coastal zones of the city, abutting the city's majestic mountains and wedged along the unforgettable coastline, continue to be mostly white.<sup>2</sup> To some extent, as in other countries – the U.S. and Brazil, to cite just two other examples – this separation is a function today of economic power as much as of deliberate discrimination,<sup>3</sup> although as both the U.S. and the South African experiences tell us, one should never underestimate the force of unspoken but conscious discrimination.<sup>4</sup>

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<sup>1</sup> Stephen Berrisford, *Unravelling Apartheid Spatial Planning Legislation in South Africa: A Case Study*, 22 *Urban Forum* 247-248 (2011), available at <http://link.springer.com/article/10.1007/s12132-011-9119-8> (doi:10.1007/s12132-011-9119-8) (last accessed March 3, 2017).

<sup>2</sup> Presentation of Tristan Görgens (Western Cape Government) to the Study Space XI seminar, July 1, 2016.

<sup>3</sup> See, e.g., in the U.S. context, Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 *San Diego L. Rev.* 295, 318-319 (1999). For a comparison of all three countries, see *Beyond Racism: Race and Inequality in Brazil, South Africa, and the United States* (Charles V. Hamilton et al. eds., 2001).

<sup>4</sup> See, e.g. Kimberlé Williams Crenshaw, *The Court's Denial of Racial Social Debt*, 40-DEC *Hum. Rts.* 12 (2011); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *Harv. L. Rev.* 1331(1988) (on the political importance of retaining consciousness of historical racial subordination); see generally McFarlane, *supra* note 3.

Another aspect of the situation we learned about in Cape Town, like most South African cities, has serious housing needs.<sup>5</sup> To this outsider's eye, somewhat paradoxically, despite the housing needs, land use patterns in Cape Town are also remarkably *un*-dense.<sup>6</sup> The resulting sprawl is of particular concern because of the city's and the region's notable environmental resources, which merit care and protection.<sup>7</sup> So, it seemed to me, one way to address all of these concerns with a focused strategy would be to seize upon the lack of density, and specifically to focus on creating opportunities to build denser, more vertical housing construction and spatial development practices.

Now one who lives in a glass house, so goes the saying, should not throw stones. So, it is with some trepidation that I – from a glass house – offer some suggestions about ways to achieve housing in Cape Town that is both denser and more inclusionary. The glass house I inhabit, in this case, is of course, the one of segregated housing. Although some gains have been made to provide for more inclusionary housing in the United States,<sup>8</sup> there remains much to be done. Even very recently, commentators have observed that housing patterns in the United States remain deeply segregated.<sup>9</sup> As William Faulkner famously wrote in his novel *Requiem for a Nun* – and the reference is especially apt in the case of U.S. and South African housing discrimination alike, “the past isn't dead. It isn't even past.”<sup>10</sup> This is to acknowledge that in the remarks that follow, I am keenly aware that both in the United States and South Africa, the kinds of initiatives discussed here, initiatives aimed at dismantling generations and generations of oppressive and deliberate segregated housing is no easy matter.

One could argue, furthermore, that it is of limited utility to try and argue for inclusionary housing in Cape Town, even if focused on density, and for at least two reasons. First, it might be claimed that the extent of the South Africa's social and economic inequality make it utopian at best to argue for such goals,

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<sup>5</sup> Republic of South Africa Department of Cooperative Government and Traditional Affairs, Integrated Urban Development Framework 22-23 (2016).

<sup>6</sup> Presentation of David Savage (National Treasury City Support Programme) to the Study Space IX seminar, June 28, 2016.

<sup>7</sup> See, e.g., Cape Town Environment, at <http://www.capetown.at/heritage/environment/index.htm> (2008) (detailing some of the area's environmental riches) (last accessed March 3, 2017).

<sup>8</sup> The most celebrated example is surely *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151 (1975).

<sup>9</sup> See, e.g. Robert G. Schwemm, *Housing Discrimination Law and Litigation* §§ 2:1-2.2 (2016).

<sup>10</sup> Quoted in *The Daily Dish*, Atlantic Magazine, March 18, 2008, available at <https://www.theatlantic.com/daily-dish/archive/2008/03/-the-past-isnt-dead-it-isnt-even-past/218789/> (last accessed March 3, 2017)

where millions are still relegated to slum housing conditions.<sup>11</sup> As the South African Constitutional Court famously observed in 2000, the desperate, short-term needs of millions may not be sacrificed to medium- and longer-term housing accommodation goals.<sup>12</sup> Second, South African land use scholars have studied inclusionary housing practices in the U.S. and elsewhere and found them coming up wanting as ideas relevant to the South African context. One recent commentator, reviewing the South African literature and a study that focused on Johannesburg, noted that “in particular due to the resistance of the private property sector and the middle class, the significant gap between the income of the wealthy and the poor, and institutional issues”<sup>13</sup>, inclusionary housing efforts of any stripe were something of a non-starter in South Africa. The report further noted that, in addition to a the relatively modest level of private housing construction in South Africa, any efforts at inclusionary housing were simply not an appropriate response to achieving land use justice in South Africa: “it is unlikely that inclusionary housing provisions, if enacted, will make any substantial impact on the South African urban form in the short to medium term.”<sup>14</sup>

Nonetheless, what I would like to offer in this short article are some thoughts about ways Cape Town might benefit from lessons in the United States’ long and still continuing struggle with racially segregated housing and to do so by promoting strategies that are not only inclusionary in aim but also more environmentally sustainable if developed properly. I do this in part from the conviction that this is a benefit of any comparative legal scholarship – to suggest different ways of looking at problems. In this, I will particularly examine density-focused incentives. Indeed, incentive-based practices, it seems to me, might have some traction in the Cape Town/South African context, a suggestion that is supported, in fact, by the authors of the study largely discounting inclusionary housing in the South African context.<sup>15</sup> Moreover, and

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<sup>11</sup> According to the United Nations, in 1990 8,834,000 urban South Africans lived in slums, a number that reduced only to 7,858,000 by 2014. United Nations Statistics Division, Department of Economic and Social Affairs, Millennium Development Goals Indicators 2014, available at <https://mdgs.un.org/unsd/mdg/SeriesDetail.aspx?srid=711&crid=> (last accessed March 3, 2017).

<sup>12</sup> *Government of the Republic of South Africa v. Grootboom*, South African Constitutional Court, Case 11/00 (decided October 4, 2000). See also *Occupiers of 51 Olivia Road et al v. City of Johannesburg*, South African Constitutional Court, Case CCT 24/07 (decided February 19, 2008) (Constitutional Court prohibited eviction of those without homes from occupied buildings because this would render them homeless and ordered parties to find a solution.).

<sup>13</sup> Stuart Paul Denoon-Stevens, *Developing an appropriate land use methodology to promote spatially just, formal retail areas in developing countries: The case of the City of Cape Town, South Africa*, 54 *Land Use Policy* 18, 20 (2016).

<sup>14</sup> *Id.* at 19-20.

<sup>15</sup> Neil Klug, Margot Rubin and Alison Todes, *Inclusionary housing policy: a tool for re-shaping South Africa’s spatial legacy?* 28 *J. Hous. & Built Env.* 667, 677 (2013).

to emphasize a point made above, density incentives, if executed carefully, have the advantage of being more environmentally responsible because they promote less sprawl.<sup>16</sup> This is consistent with South Africa's commitment to more sustainable land use practices.<sup>17</sup>

These techniques, I am thus suggesting, might be useful as part of a larger effort to address contemporary urbanization patterns in South Africa generally and Cape Town in particular. As a government report observed in 2016:

South Africa's urban areas continue to be hampered by a legacy of racial segregation, poverty and exclusion from social and economic opportunities. The spatial legacy is one of sprawl, low densities, functional segregation between home and work, and overlapping racial and class separations. As a result, high levels of inefficiency and wasteful use of scarce resources (especially land and infrastructure networks) characterise the country's cities and towns. . . . Despite significant service delivery and development gains since 1994, apartheid spatial patterns have largely not been reversed. Indeed, in part because of the pressure to provide housing and services quickly after 1994, most of the post-1994 infrastructure investments have unintentionally served to reinforce the apartheid status quo. The cumulative effect is that it is harder to reverse apartheid geographies today than in 1994.<sup>18</sup>

Clearly, then, some aggressive and innovative thinking is required to try and address this social and spatial logjam. And if that thinking can also have residual benefits for protecting the physical environment, so much the better. While I know of course this will not be easy, I modestly suggest, nonetheless, that density-focused inclusionary land management practices might be a useful part of the mix in South Africa. To that end, and following this introductory Part I, Part II will discuss two density tools that have had some success in the U.S. context, highlighting their use not just to promote density but also as inclusionary housing tools. Part III will offer thoughts on the integration of pro-

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<sup>16</sup> See, e.g. Margaret E. Byerly, A Report to the IPCC on Research Connecting Human Settlements, Infrastructure and Climate Change, 28 *Pace Envtl. L. Rev.* 936, 942 (2010-2011). But see Paige Pavone, Smart Sprawl? Green Aspirations and the Lowdown on High-Density Suburbia, 40 *Colum. J. Envtl. L.* 145 (2015).

<sup>17</sup> See, e.g., comments of then South African Minister of Housing Lindiwe Susulu at a 2006 Slum/Shack Dwellers International Conference, available as Partnerships between government and slum/shack dwellers' federations, 18:2 *Env't and Urbanization* 401 (2006), available at [http://sasdialliance.org.za/wp-content/uploads/docs/archive/2006\\_Sisulu\\_Environment\\_and\\_Urbanization.pdf](http://sasdialliance.org.za/wp-content/uploads/docs/archive/2006_Sisulu_Environment_and_Urbanization.pdf) (last accessed March 3, 2017)(expressing a commitment to, inter alia, sustainable development practices).

<sup>18</sup> *Supra* note 5 at 22.

density and pro-racial and –class integration tools. Finally, the concluding Part IV will query what traction such strategies might have in the Cape Town context, keenly aware as I am of the inherent limitations for any outsider to make suggestions for a social and legal reality he does not deeply understand.

Yet it is also my contention that the techniques discussed below could avoid the two pitfalls identified by Berrisford in so many post-colonial African planning systems, namely failure to identify and involve key stakeholders in decision making and an over-reliance on highly elitist, technical approaches to spatial planning.<sup>19</sup> In doing so, however, I need also acknowledge the same author’s admonitions elsewhere about the real political, social, economic and practical impediments to putting too much faith in the mantras of participatory and democratic planning models in a complicated human terrain like that of post-apartheid South Africa.<sup>20</sup>

## II. A BRIEF SURVEY OF SELECTED U.S. EFFORTS TO PROMOTE URBAN DENSITY FOR INCLUSIONARY HOUSING.

The challenges of providing quality housing for all of a country’s citizens are inevitably daunting. This is especially true, of course, for countries marked with high levels of economic inequality, such as the United States and South Africa. In such contexts, it becomes especially important to conceive of the housing need not in isolation, but as one part of an integrated package of social and economic transformation. Thus, as recently as 2012, in the United States, the National Coalition for the Homeless proposed a comprehensive housing and social services model statute, the “Bring America Home Act”, which sought to improve national housing conditions by adopting a wide range of measures including, for example, better transportation infrastructure and employment opportunities.<sup>21</sup> Similarly, while better housing has been a national priority in South Africa since the end of apartheid in 1994 and the adoption of the new constitution in 1996, housing has been a special priority, and one recognized not to exist in isolation from addressing other social needs.<sup>22</sup> Therefore, in what follows in this section it should be remembered that neither

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<sup>19</sup> Stephen Berrisford, *Why It Is Difficult to Change Urban Planning Laws in African Countries*, 22 *Urb. Forum* 209, p. 2 (2011), available at <http://link.springer.com/article/10.1007/s12132-011-9121-1> (last accessed March 3, 2017).

<sup>20</sup> *Id.* at pp. 9-10

<sup>21</sup> See National Coalition for the Homeless *Bring America Home Act*, available at <http://www.nationalhomeless.org/advocacy/baha.html> (last accessed February 28, 2017).

<sup>22</sup> The 1996 South African Constitution’s Bill of Rights, Chapter 2, article 26 promises “adequate housing” to all South Africans. Chapter 2’s 39 articles guarantee provision of over 30 different rights, from civil and political rights to social and economic guarantees. See <http://www.gov.za/documents/constitution/chapter-2-bill-rights#26> (last accessed February 28, 2017).

of the two density management options discussed here are meant to be understood in isolation. Rather, it need be recognized that they are possible techniques to be used in conjunction with a wider menu of techniques all addressed to creating a more inclusive and sustainable social fabric.

**A. FORCED URBAN CONCENTRATION: AN URBAN GROWTH BOUNDARY.**

The example of the State of Oregon is celebrated in the urbanism literature of the United States.<sup>23</sup> The northwestern state, in some respects not unlike that of Western Cape Province, is notable for its coastline, its mountains and its forests: a rare and precious combination of natural assets. To manage those assets in the long term, starting in the late 1960s, the State began focusing on a statewide planning process.<sup>24</sup> In a country where land use management has long remained a secure bastion of local control,<sup>25</sup> this move was in its way revolutionary. The resulting statute<sup>26</sup> created, among other initiatives, a statewide planning agency. But most observers agree that “[t]he most noteworthy planning tool of the Oregon program is the urban growth boundary (UGB), a legally binding, legislatively-created line that separates ‘rural land’ from ‘urban land.’”<sup>27</sup> Moreover, as a recent commentator observed, the distinction between “rural” and “urban” land “is profound. Land outside of the UGB cannot be developed for urban uses, absent a goal exception. Land within the UGB must be sufficient to accommodate urban needs and populations and must also be used efficiently.”<sup>28</sup>

The UGB system has grown over time from one of voluntary compliance to a wide-ranging, state-sponsored, constitutionally and popularly approved effort to manage growth, with a focus on densifying urban growth.<sup>29</sup> A key argument in favour of an UGB, and a measure of its success, is premised on the existence of opportunities to increase density within the city boundaries, primarily by increasing the availability of multifamily housing in existing neighbourhoods and by infilling and redeveloping underutilized urban

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<sup>23</sup> For a list of some jurisdictions that have adopted the concept, see Lisa Grow Sun, *Smart Growth in Dumb Places: Sustainability, Disaster, and the Future of the American City*, 2011 B.Y.U. L. Rev. 2157, 2186 note 146 (2011).

<sup>24</sup> Edward J. Sullivan, *Urban Growth Management in Portland, Oregon*, 93 Or. L. Rev. 455, 467 (2014).

<sup>25</sup> See, e.g. Richard Briffault, *Our Localism: Part I--The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 3 (1994) (stating that “[l]and use control is the most important local regulatory power.”)

<sup>26</sup> OR. REV. STAT. §§ 197.030-.070 (2013) (providing the statutory scheme for Land Control and Development Commission).

<sup>27</sup> *Supra* note 24 at 457 (citations in original deleted).

<sup>28</sup> *Id.* at 457-8 (citations in original deleted).

<sup>29</sup> *Id.* at 494-5.

spaces.”<sup>30</sup> To be sure, in the South African context, where rural land has tended to dominate and overpower efforts at urban land reform, this presents a challenge.<sup>31</sup> On the other hand, a planning model like that of Oregon State, one that integrates rural and urban planning mechanisms, might present advantages in South Africa, where the relation between the two distinct uses is understood.

In Portland, Oregon’s largest city, the effects of the UGB have been notable. When established, the UGB left an area equivalent to a little less than two-thirds of the area of the city’s footprint for development.<sup>32</sup> Twenty years into the experiment, however, concerns were expressed that, among other factors, the Portland UGB 1) had not corrected for tendencies to sprawl and 2) appeared to have been responsible, at least in part, for raising residential rental and purchase rates.<sup>33</sup> One positive result, however, was that density rates had increased.<sup>34</sup> This early observation was confirmed more strongly still another 20 years later.<sup>35</sup> In other words, the UGB was not established and then left untouched, but underwent constant scrutiny, discussion, struggle and readjustment to serve its underlying goals. One very clear lesson that emerged nearly 40 years into the Oregon and Portland UGB experiment is that this was one technique in an integrated approach to land use management focused on the needs of citizens, also including but not limited to “the reduction in minimum lot sizes, the construction of affordable housing, the assumption by the state of a very large percentage of school expenses, the creation of a metropolitan transportation authority, the adoption of mixed-use zoning, coordination of planning for housing development and planning for transportation, and a quasi-regional government that could plan for regional growth and that could decide, through its published plans, where that growth should go.”<sup>36</sup>

To be sure, such integration of efforts and functions is appealing anywhere. In Cape Town, however, therein lies the challenge. As Berrisford reminds us, in a country like South Africa, ill-staffed with professionals adequately trained to execute existing land use management plans, it can be

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<sup>30</sup> *Supra* note 23 at 2185-2186 (but noting that this may create incentives to develop in areas prone to natural risks).

<sup>31</sup> *Supra* note 19 at p.10.

<sup>32</sup> *Supra* note 24 at 477-478.

<sup>33</sup> Keith W. Dearborn & Ann M. Gigi, *Planner's Panacea or Pandora's Box: A Realistic Assessment of the Role of Urban Growth Areas in Achieving Growth Management Goals*, 16 *U. Puget Sound L. Rev.* 975, 1005 (1993).

<sup>34</sup> *Id.* at 1006.

<sup>35</sup> Benjamin P. Glaser, *Constitutional, Political, And Philosophical Struggle: Measure 37 and the Oregon Urban Growth Boundary Controversy*, 9 *U. Pa. J. Const. L.* 595, 599-600(2007).

<sup>36</sup> Terry J. Tondro, *Sprawl and its Enemies: An Introductory Discussion of Two Cities' Efforts to Control Sprawl*, 34 *Conn. L. Rev.* 511, 535 (2002).

counter-productive to imagine such an ambitious planning universe.<sup>37</sup> Nonetheless, it is also important to set the right aspirational model, and, at least, this model selects one that does not leave the planning to a single group of individuals, but rather understands land use management decisions as being part of a comprehensive social policymaking effort.

In that connection, the question about a UGB in the context of this article must also be this question: how can a UGB also be socially inclusionary? The discussion that follows about density bonus incentives for inclusion attempts a partial answer to that question.

### **B. DENSITY BONUS INCENTIVES FOR INCLUSION.**

The basic density mechanism as a land use management tool is straightforward. A land use code or ordinance provides a mechanism for developers to receive a “bonus” to build out in some form (more units, more area, more height, etc.) than the code or ordinance might otherwise permit, in exchange for satisfying some other requirement. That other requirement equally can take any form desired by the regulating entity, whether to promote mixed use or some more ambitious social goal, such as greater economic or racial or ethnic inclusion, or even use of more environmentally friendly building technologies, for example.<sup>38</sup>

Density bonus incentives have been tried and discussed for nearly 60 years in the United States, dating back at least to the 1960s, when they were used in New York City to seek private provision of street-level amenities.<sup>39</sup> Of greater relevance to this article, however, is the 1979 example of the State of California. In that year, “the California Legislature adopted a statute requiring cities and counties to grant prescribed density bonuses or equivalent financial incentives to projects that provide specified percentages of units affordable to low- or moderate-income households.”<sup>40</sup> Notably, then, the California legislation, like many such efforts, were addressing a problem well known to South Africans, namely housing affordability. In addition, the statute aimed to create more inclusionary housing since in the United States, as in South Africa, housing income inequality was and is disproportionately correlated with race

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<sup>37</sup> *Supra* note 19 at pp. 3 and 19.

<sup>38</sup> James D. Brown, *Biophilic Laws: Planning for Cities with Nature*, 34 *Va. Envtl. L.J.* 52, 79-102 (2016).

<sup>39</sup> Robert A. Johnston, Seymour I. Schwartz, Geoffrey A. Wandesforde-Smith and Michael Caplan, *Selling Zoning: Do Density Bonus Incentives for Moderate-Cost Housing Work*, 36 *J. of Urb. and Contemp. L.* 45, 49 (1989).

<sup>40</sup> *Id.* at 46.

and ethnicity.<sup>41</sup>

This is a problem of even more complex dimension in Cape Town than it was even in the economically unequal State of California of the late 1970s; South Africa's economic inequality – and the poverty that undergirds it – is of an entirely different dimension altogether.<sup>42</sup> Nonetheless, for a place – namely Cape Town – where housing affordability is an issue, not just for the urban poor but for the so-called “gap” segment of the population. (The “gap market”, in South African parlance, refers to the approximately 28% of the population who earn enough not to qualify for free or subsidized housing distribution programs and not enough to qualify for mortgage finance and so are caught in between with few options to secure good housing.) This situation suggests that it might merit consideration.<sup>43</sup> However, this must be done with great caution. Some land use scholars conclude that density bonuses were an idea that developed in response to other, prior land use management techniques that were exclusionary in nature, such as zoning, that worked whether consciously or not to exclude economic and racial and ethnic minorities.<sup>44</sup> A conclusion of this research is thus to question the underlying assumptions of the entire land use management system, rather than constantly presenting new proposals (like density bonuses) to remedy past wrongs. Given that South Africa's history is also marked by a long history of using land use techniques to exclude on the basis of race and ethnicity, this concern merits reflection.<sup>45</sup>

In the context of density bonuses directed to some form of social engineering, two questions regularly occur. First, the bonus scheme must be designed to permit the developer to make a profit despite the provision of subsidized units. Early studies indicate that at a minimum, at least one market-rate unit needed to be provided for every subsidized unit.<sup>46</sup> Second, if the efforts are to succeed in establishing vibrant, mixed neighborhoods (mixed in whatever sense), the question emerged as to how long the subsidies need remain in place. Again, in early studies, researchers concluded that the subsidies needed to remain in effect, via deed restrictions, for as long as 60 years and at least for

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<sup>41</sup> James Surowiecki, *The Widening Racial Wealth Divide*, *The New Yorker* (Oct. 10, 2016), available at <http://www.newyorker.com/magazine/2016/10/10/the-widening-racial-wealth-divide> (last accessed March 3, 2016). On South Africa see supra note 1.

<sup>42</sup> See supra note 11.

<sup>43</sup> See supra note 2. The Johannesburg-based Centre for Affordable Housing Finance in Africa (CAHF) has published usefully on issues related to the “gap” market. See, e.g. *Understanding the challenges in South Africa's Gap Housing Market and opportunities for the RDP Resale Market* (18 June 2015), available online at [http://housingfinanceafrica.org/app/uploads/Note-on-the-Gap-Market-and-mobilising-RDP-18\\_6\\_15.pdf](http://housingfinanceafrica.org/app/uploads/Note-on-the-Gap-Market-and-mobilising-RDP-18_6_15.pdf) (last accessed March 28, 2017)

<sup>44</sup> Supra note 39 at 47.

<sup>45</sup> See supra note 1.

<sup>46</sup> Supra note 39 at 50.

between 20-30 years.<sup>47</sup> Moreover, throughout the process, the program needs to be designed so that it will attract developers. That is, it must be appealing enough as an investment opportunity so that, in what are typically voluntary programs, a developer will want to invest time, energy and financial resources in a density bonus project and not some other project. At least one South African researcher has concluded that no such program is likely to be attractive in the country's relatively modest private housing development sector. In Cape Town in particular, land use management scholar and planning lawyer Stephen Berrisford is skeptical that such programs could have success in Cape Town in particular, where, in his words, "we suffer from constrained capacity." In Berrisford's view, such a proposal, in the Cape Town context may be utopian and unrealistic, observing that while "an approach such as the one proposed might just work in Cape Town, but probably not, and it certainly wouldn't work in other, less capable municipalities. The City of Cape Town is relatively well capacitated in South African terms, but even it will struggle to implement [such] a new instrument."<sup>48</sup>

One early lesson that has been repeated over and over again in the density bonus literature is that it is essential to have dedication on the part of the spatial development planning staff<sup>49</sup> to resist other efforts – such as permitting upzoning and other more exclusionary efforts – in the service of the use of density bonuses to create more inclusionary housing options. (Upzoning refers to the practice of receiving special exemptions to grant a different zoning classification for a particular end, such as to allow different uses or to achieve greater density. It is often controversial because it can occur because of cozy relationships between regulators and regulated, among other reasons.)<sup>50</sup> This means, of course, that there must first be social consensus on the need to provide better and inclusionary housing for all.<sup>51</sup> Stacy Seicshnaydre has conceptualized

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<sup>47</sup> *Id.*; see generally Cecily T. Talbert & Nadia L. Costa, *Inclusionary Zoning*, Chapter 9 in *American Bar Association, Current Trends & Prac. Strategies in Land Use & Zoning* (2005).

<sup>48</sup> See *supra* note 13. Berrisford's view was shared in a private telephone interview. (Telephone interview March 28, 2017 and email communication April 3, 2017. Notes on file with author.)

<sup>49</sup> I am deliberately avoiding the use here of the phrase "land use planning" because of its toxic history in the South African context. See *supra* note 1 at 258. Interestingly, however, the source of this observation – Cape Town urban lawyer Stephen Berrisford – reports that the term "land use planning" is now increasingly used in South Africa, shed of its historical association with apartheid-era practices. (Telephone conversation March 28,, 2017. Notes on file with author.)

<sup>50</sup> *Supra* note 39 at 53-55; see generally Nicholas Benson, Student Note, *A Tale of Two Cities: Examining the Success of Inclusionary Zoning Ordinances in Montgomery County, Maryland and Boulder, Colorado*, 13 *J. Gender Race & Just.* 753(2010).

<sup>51</sup> In the South African context, Stephen Berrisford has stressed the importance of seeking such consensus with respect to any planning paradigm chosen, including alignment with constitutional and legislative authorization for same. *Supra* note 1 at pp. 13-14.

the solution as a manner of developing efforts that direct consumers to “opt in” to inclusionary housing models rather than tolerating policies that allow them to “opt out” in the search of neighborhoods populated only by people who look like and earn like themselves.<sup>52</sup> Again, there is South African recognition of the need to push for inclusion and avoid such situations.<sup>53</sup> Admittedly complicating such an effort, however, is the possibility – if not the likelihood – of corruption,<sup>54</sup> which can promote exactly the sort of special deals and cherry picking of projects that inclusionary efforts seek to avoid. To imagine what this might mean, consider for example a competitive, public process to develop an inclusionary housing development. Unless the criteria for selection and the ways in which the development will, for example, compel people (with financing, infrastructure incentives or other project advantages) to “opt-in” to an inclusionary development are crystal clear and the bidding process thoroughly transparent and above-board, a process seeking to “include” could easily become a sweetheart deal between regulators and their friends in the regulated community. In such a situation, moreover, if the criteria as to what constitutes inclusion (e.g. social and economic diversity, racial and ethnic diversity, etc.) such a project could spur gentrification and privilege those with the fewest needs for adequate housing.

In a density incentive program, furthermore, developers thus must be convinced not just that they will make a profit, but also that a density bonus program designed to craft mixed neighborhoods can overcome other challenges, including design challenges and possible downward shifts in price because of worries about density’s effects on land prices, among other factors.<sup>55</sup> And again, it needs recognizing that this must be done before a word is spoken about the fact that in many societies people simply do not want to live near people unlike themselves.<sup>56</sup>

Many commentators have insisted, therefore, that the density bonus

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<sup>52</sup> Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 *Cardozo L. Rev.* 967, 987 (2012).

<sup>53</sup> See, e.g. Stuart Wilson, *Planning for Inclusion in South Africa: The State’s Duty to Prevent Homelessness and the Potential of “Meaningful Engagement”*, 22 *Urb. Forum* 265 (2011); see also *supra* note 13.

<sup>54</sup> *Supra* note 19 at pp. 9 & 19.

<sup>55</sup> *Supra* note 39 at 58.

<sup>56</sup> As Stephen Berrisford has observed in the South African context: “. . . where land is developed or redeveloped for the purposes of housing low-income people the neighbours will inevitably, and many already have done so, challenge the decision on the basis that their rights to the use and enjoyment of their land will be reduced or lost entirely because of a range of possible causes such as increased crime, air pollution, water pollution and reduced property values.” See *supra* note 1 at p .9.

practices must be mandatory to produce the desired socially inclusive effect.<sup>57</sup> In addition, some argue that density bonus incentive programs must be “deeply targeted” (meaning reaching deep into a society to provide opportunities for its least protected) to ensure success, in addition to a wide range of other, equally ambitious factors, including the requirement that all development in the municipality be subject to the ordinance.<sup>58</sup> The aim is thus to try and make it impossible within a jurisdiction to create new housing with directly exclusionary effects.

In fact, Cape Town’s 2015 Municipal Planning By-Law contemplates density bonus incentive practices, although the provision is skeletal at best.<sup>59</sup> The question remains, then, as to how it might be elaborated to have positive effects on Cape Town’s human, built and physical environment.

### III. INCLUSIONARY TECHNIQUES AND DENSITY.

As indicated above, density as a goal is itself neutral with respect to the incentives linked to promote the goal. One possibility is to try and use density incentives to promote affordable housing that is also inclusionary. In South Africa, fragmented planning efforts have exposed even well-intentioned spatial management efforts to failure because of litigation, including constitutional challenges.<sup>60</sup> This is no less true in the United States context.<sup>61</sup> A review of the

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<sup>57</sup> See generally *supra* note 39; and see generally Benson, *supra* note 50. Stephen Berrisford now believes that, in light of the especially rigid patterns of racial and social segregation on the basis of geography that any such program will be especially difficult to achieve in Cape Town; Berrisford suggests, however, that such initiatives might work more easily in other South African cities. (Telephone interview March 28, 2017; notes on file with author.)

<sup>58</sup> Valerie Feldman, *Local Land-use Advocacy: Inclusionary Zoning to Achieve Economic and Racial Integration* 42 *Clearinghouse Rev.* 61, 66-70 (2008).

<sup>59</sup> City of Cape Town Municipal Planning By-Law (2015). Chapter 19 of the By-Law provides for two strategies – incentive overlay zoning (ICO) and density overlay zoning (DO). The former “provides a mechanism for designating development incentive measures to land in order to promote development priorities and strategies as may be identified in the integrated development plan or spatial plans approved by the City. The development incentive measures may include, but are not limited to, incentives or concessions relating to parking, height, floor space, coverage and density. Such incentives could involve an increase in the floor space or density otherwise permitted in terms of this development management scheme.” The latter provides for The DO provides “a mechanism for designating development density measures to land in order to establish development priorities and strategies as may be identified . . . . The development density measures may include the setting of specific minimum or maximum development densities (e.g. erf sizes) given the availability of invested infrastructure or lack of available infrastructure, and may also include incentive measures to encourage and support development priorities and strategies.” Neither states any general provisions. There are specific restrictions on DO that are not relevant here.

<sup>60</sup> See generally *supra* note 1.

<sup>61</sup> See *supra* note 47 at 2-4.

experiences of inclusionary housing efforts, however, demonstrates that, given consensus about the importance of both affordable housing provision and inclusion as goals of a land management process, when such programs are made mandatory they are most successful.<sup>62</sup>

This is to recognize that in societies like the United States and South Africa, whose histories have been marred by deliberate, legalized racial suppression and oppression, that a conscious effort is undertaken to address the causes and effects of that history in land management. Myron Orfield, a longtime analyst of the effects of legalized racial segregation in United States life and law, thus suggests a detailed effort that integrates inclusionary housing with other forms of social-political engineering, from stakeholder identification and involvement to linking the affordable, inclusionary housing to improved services like transportation.<sup>63</sup> The nature of the engagement recalls rather directly the same sorts of appeals coming from South African sources.<sup>64</sup>

In other words, in both social contexts, practitioners and scholars alike recognize the need to develop solutions that force the hands of citizens with strategies that promote the goal not just with “vertical diffusion” (that is, from the top down) but also with “horizontal diffusion” – that is communication of the goal among different social sectors.<sup>65</sup> One manner to make this “diffusion” appealing – from whatever direction, is to focus not just on the advantages that an inclusionary model has in terms of constructing more robust, integrated societies and economies, but also by incorporating sustainable technologies into the designs, such as green roofs and other energy-saving and carbon-neutralizing efforts.<sup>66</sup> That is, the models diffused need be characterized not as some kind of penance for past wrongs but as part of a new vision of what a better-functioning society might look like.

Another, more recent alternative is a hybrid “voluntary-mandatory” inclusionary development model in which:

a growth restriction is imposed by ordinance that limits the number of dwelling units that can be constructed in any given year. To determine which development applications will be approved, the municipality holds a “beauty contest” whereby project sponsors compete to present the most desirable project. By awarding points for the inclusion of affordable units in the

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<sup>62</sup> Id. at 9.

<sup>63</sup> Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Residential Segregation*, 33 *Fordham Urb. L.J.* 877 (2006).

<sup>64</sup> See, e.g., *supra* note 5; see also *supra* note 19 at 11.

<sup>65</sup> Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 *Law & Contemp. Probs.* 115, 137-140 (2016).

<sup>66</sup> See *supra* note 50.

proposed development, the municipality is able to leverage its growth cap by encouraging developers to volunteer” to include affordable units in this manner to enhance their opportunity to be awarded their approvals.<sup>67</sup>

This approach may have the advantage of reducing challenges arguing that property rights have been denied by state activity.

#### **IV. CONCLUSION: CAN PRO-DENSITY HOUSING WORK IN CAPE TOWN?**

To be sure, the discussions we had in Cape Town, supported by the literature on the challenges of spatial development in South Africa,<sup>68</sup> made clear that no single effort – whether focused on density or any other goal, will be the magical solution to resolve the city’s and the country’s housing needs – which include both a need for more and better quality affordable housing, and also, if a more cohesive social order is desired, more inclusionary housing patterns. Nonetheless, this article aims to suggest that, if Cape Town is truly dedicated to providing better affordable and more inclusionary housing, that density efforts have several distinct advantages. First, a discussion about them can focus consideration of the kind of city and region the population desires. This is especially true, of course, if that discussion is conducted broadly throughout the society. Second, if an UGB and a density bonus incentive program are part of a menu of other social engineering designed to create more opportunity and economic growth, and are properly structured to assure developer profit, they can establish a new norm of neighbourhoods that are mixed as to income and use, making for an even more robust urban environment. Third, density incentives can reduce sprawl and control the growth of the urban footprint, with positive benefits for the physical and built environments. As it happens, all three goals appear not just in the United States’ academic literature examining density-forcing techniques.<sup>69</sup> The goals also appear in South African spatial management and land use law literature, even when that literature cautions about not presuming to copy the models of more economically developed countries with better established democratic and bureaucratic structures.<sup>70</sup> That similarity alone gives me some hope that there may be some merit in what is proposed here. Moreover, there is a concrete legal instrument waiting to be more fully articulated to secure the ideal of a denser, more inclusionary Cape Town, namely the 2015 By-Law.<sup>71</sup> The moment is now.

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<sup>67</sup> See supra note 47 at 8.

<sup>68</sup> See, e.g., Berrisford supra note 1 and Denoon-Stevens, supra note 5.

<sup>69</sup> See supra note 57 and accompanying text.

<sup>70</sup> See, e.g. supra note 19.

<sup>71</sup> Supra note 59.