

Integration and Neo-Segregation in Minnesota

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I. Introduction

If there were a single central contribution that Minnesota has made to American history, it would be its leadership in civil rights, particularly advancing racial integration in schools and housing. No other area of its activity has had such a profound, positive impact on the nation's law, culture and politics. Without Minnesota's multiracial and bipartisan leadership, it hard to imagine the passage of the 1964 Civil Rights Act, the 1965 Voting Rights Act and the Fair Housing Act of 1968 – the landmark trio of the federal civil rights canon.

Even more impressive progress occurred at the state and local level, where Minnesota law overcame many of the barriers, legal and political, that had limited the reach of federal statutory rights. Minneapolis would be the first city in the county to pass an enforceable Fair Employment Practices Commission and outlaw racial covenants. In 1955, the state enacted a Fair Employment Practices law, in 1961 a state Fair Housing Act, and in 1967-69, a comprehensive civil rights law that folded previous legal protections into a powerful state Human Rights Law providing for disparate impact cause of actions for all forms of discrimination and administrative authority to outlaw de facto segregation.

In the late 1960s and early 1970s, the state established a metropolitan government for the Twin Cities area and adopted a metropolitan land use requiring all suburbs provide for their fair share of affordable housing. It enacted regional property tax base sharing act and in upholding this act, the Minnesota Supreme Court declared the constitutional interdependency of

Minneapolis and its suburbs. By the early 1980s, Minnesota was one of the most integrated communities in the nation with some of the smallest racial disparities.

The Met Council of the Twin Cities was *the vanguard* of Federal Fair Housing Act enforcement. The Council supervised HUD's Section 8 program and was given authority to tie grants of state and federal funds to actual progress on economic integration. By 1979, 70 percent of HUD subsidized housing was constructed in the whitest developing edge communities of the suburbs – a record of integrated housing placement that has never been equaled in any major metropolitan area. In 1970, the state department of education would outlaw de facto segregation by administrative rule in schools and by 1980, Minnesota was the one of the nation's Twenty-five largest regions that had no segregated schools and one of the smallest racial ghettos. Comparatively small racial achievements gaps were closing.

Yet today these accomplishments are being undermined by a collection of leaders spanning the political spectrum. These leaders include Democrats and Republicans, elected officials, businesspeople, community figureheads, and industry representatives.

The fields of housing and planning, once understood as a core civil rights concern where decisions could impact living patterns for decades, are now dominated by parochial development interests and neighborhood activists. These include representatives from affluent and exclusionary suburbs, but also organizations working in the poorest quarters of the Twin Cities metropolitan area, where housing policy is dominated by the interest of nonprofit and public institutions that rely on the segregated status quo.

In the area of education, racially segregated charter schools and their allies and financial boosters have diverted the public discussion, from broad civil rights questions to narrow

concerns fixated on standardized test performance. Some of these allies are non-profits who portray themselves as part of a modern civil rights moment; others are profitmaking entities, growing rich on public expenditures earmarked for the poor. In previous work, the housing interests focused on low-income and segregated areas have been termed the poverty housing industry, while the educational institutions serving a poor and segregated student body have been referred to as the poverty education complex. Together these groups, and their de facto allies in exclusionary and affluent suburbs, can be termed Minnesota's neo-segregationists.

Neo-segregationists use the purported defeat of Jim Crow to advance a set of solutions which leave racial enclaves untouched. They assert that, now that black and Latino families have the legal right to live in any neighborhood they wish, any continuing racial patterns reflect a choice by those same families to live separately. Many maintain that not only is this choice clearly expressed, but it is in fact preferable – ultimately beneficial to the solidarity and economic prosperity of the groups in question. Despite overwhelming evidence of black and Latino preference for integrated neighborhoods, decades of academic study showing the myriad ways that illegal discrimination produces segregation, neo-segregationists accept the status quo as proof that the status quo is desirable and inevitable.

In much of the academic world, a consensus exists around the positive benefits of integration, akin to the consensus around the causes and harms of climate change. But academia also contains a cottage industry of think tanks and research organizations dedicated to supporting and assisting the poverty housing industry and the poverty education complex, often directly funded by these industries. These institutions reliably produce research and analysis that conform neatly to the policy objectives of their benefactors – highlighting the benefits of affordable housing, lauding school choice as instrumental to closing achievement gaps, and attacking

alternative interpretations of the evidence. By design or otherwise, these institutions find themselves frequently in conflict with civil rights organizations, because a focus on segregation and racial isolation inevitably undercuts the assertion that technocratic, well-funded policy tinkering can eliminate growing racial disparities since the 1990s.

This conflict threatens to damage hard-fought civil rights victories, especially in the legal realm. In order to protect funding streams and the status quo, neo-segregationists today have adopted legal arguments first advanced by right-wing groups like the Pacific Legal Foundation. They have actively sought to limit *Brown* and its progeny, to obstruct the ability of cities and schools to voluntarily integrate, and to undermine core elements of the Fair Housing Act – most especially, its integration imperative. Ironically, neo-segregationists have found themselves relying on the same expert witness that were used decades ago by opponents of federal desegregation, making the same arguments about the failures of integration and the limited scope of federal civil rights law.

Despite this, neo-segregationist views have spent decades accumulating support in the ranks of Minnesota's largest philanthropies, and even among members of the Democratic party establishment. With the support of these allies, neo-segregationists are erasing and rewriting Minnesota's civil rights history, contributing to a degree of racial inequality heretofore unknown locally, and weakening and isolating the state's civil rights movement.

This paper traces Minnesota's civil rights heritage, including its historical contributions to the nation's movements for racial justice, its local innovations to promote integration and civil rights, and the emergence of the neo-segregationist opposition. Part I briefly revisits the state's civil rights history, with an eye towards Minnesota's important role on the national stage. Part II

discusses the pursuit of school integration in the state since *Brown v. Board*, focusing on the recent resegregation of its schools. Part III discusses Minnesota's development, and then abandonment, of pioneering housing and urban development policies, which briefly served as a national model for housing integration.

Minnesota has in the past led the nation into progress on civil rights, creating some of America's most integrated schools and neighborhoods. People who would laud these victories can only fear the growing effectiveness of Minnesota's neo-segregationists, and hope that, in this respect, the state does not once again act as a bellwether for the nation.

II. Minnesota's Civil Rights Leadership

Minnesota's role in the history of civil rights has been unique. Despite spending much of its history as one of the whitest states, Minnesota has led the nation in passing and supporting foundational civil rights legislation, particularly systemic reforms to housing and schools. The state has also produced a hugely disproportionate share of leaders for racial justice, both black and white. It can be argued that Minnesota's very whiteness and homogeneity gave its political leaders freedom to act on these questions. Yet other equally white places did not generate equivalent contributions. Instead, Minnesotan civil rights leadership is rooted, in large part, in a continuous intellectual and political heritage that can be traced to the Civil War and the state's founding years.

A. Early Years

Minnesota's early territorial political leadership were abolitionists from Massachusetts, Maine, and New York. After the passage of the Kansas-Nebraska Act (which overruled the Missouri Compromise and allowed the population of each state to decide its own status on

slavery) Minnesota came into union as a free state in 1858 with both Democrats and Republicans strongly opposing slavery. Militant abolitionists protested the arrival of slaveholders on the St. Paul levy, at the hotels of slaveholders on vacation during Minnesota's temperate summers, and "kidnapped" slaves passing through the state in order to shepherd them to freedom. Minnesota's courts flouted the Supreme Court's *Dred Scott* decision by freeing slaves brought into the state by slaveholders under the Minnesota Constitution.¹

Minnesota was the first state to offer troops in the civil war -- on the condition that Lincoln hold firm and offer no concessions to the south on slavery. The First Minnesota Volunteers suffered the highest casualties of any northern regiment as they fought at Gettysburg, the turning point of the American Civil War. On the third day of Gettysburg the First Minnesota seized the Virginia militia's battle flag. For 150 years, Virginia has demanded its return, the US Army's chief of military history declared it should be returned to Virginia, and Congress has ordered its return. Minnesota has refused on more than one dozen occasions, declaring the captured flag part of the states "sacred heritage," "won with the blood and valor" of "Minnesota men fighting for universal freedom" and that it would be a "sacrilege" to return it to those who seek to honor a rebellion fought to preserve slavery.

Minnesota Congressman Ignatius Donnelly fought to forbid educational segregation in public schools established or aided by federal funds. In 1868, the Fourteenth Amendment was

¹ The most famous case being that of Eliza Winston who was a slave accompanying her mistress on vacation to Minnesota in 1860. Abolitionists brought a writ of habeas corpus and the slave Eliza Wright was freed from her master who was staying at a lodge on Lake Harriet in Minneapolis. A Hennepin County Judge held that the Minnesota Constitution forbid slavery despite the Supreme Courts' ruling that no state could do so.

adopted without debate. Minnesota became the first state in the union where black suffrage was created by public referendum and the state courts began to seat black jurors.

In 1869, Minnesota became the second state in the union to outlaw racial segregation in its schools and the first and only (until the passage of Title VI of the 1964 Civil Rights Act) to withhold all state funding to any segregated public school.² Minnesota's early colleges and the University of Minnesota were among the first to offer higher education to blacks who came from all over the union.

In 1883, the US Supreme Court in the Civil Rights Cases declared that prohibiting discrimination in public accommodations was beyond the reach of Congress under the 14th Amendment. Two years later, the Minnesota legislature outlawed segregation in public accommodations under state law. In 1921, after a racially motivated lynching in Duluth, Minnesota made lynching a crime decades before Congress would act.

The national movement toward racial integration in schools and neighborhood began in Saint Paul in 1905 when Frank McGhee, a brilliant black Minnesota attorney, agreed, in two historic strategy meetings with W.E.B. DuBois, to form the Niagara movement. The movement broke with the separatist policies of Booker T. Washington, and would lead to the formation of the NAACP and its central strategy to end apartheid in schools and neighborhoods. McGhee

² The modern version Minn. Stat. § 123B.30, enacted in 1959, forbade segregation on penalty of losing funding:

No district shall classify its pupils with reference to race, color, social position, or nationality, nor separate its pupils into different schools or departments upon any of such grounds. Any district so classifying or separating any of its pupils, or denying school privileges to any of its pupils upon any such ground shall forfeit its share in all apportioned school funds for any apportionment period in which such classification, separation, or exclusion shall occur or continue.

would represent this movement by bring legal actions against Jim Crow schools in Tennessee and other Jim Crow states. McGhee was the first in a series of great black civil rights lawyers fighting for racial integration, a pantheon that would ultimately grow to include Charles Hamilton Houston and Thurgood Marshall.

McGhee was a trailblazer: out of Minnesota, a new generation of remarkable black civil rights leaders would launch their careers, and an unusual number became icons of the national movement. Roy Wilkins, Clarence Mitchell, Anna Arnold Hedgemen, and Whitney Young, who received their college and graduate educations in Minnesota, began the modern civil rights movement with signal victories against racial covenants and employment discrimination in Minneapolis and St. Paul. Based on these local achievements, they moved to the national stage to become some the most important national black civil rights leaders. Wilkins would become the national executive director of the NAACP during its years of greatest accomplishment, Young the executive director of the National Urban League, and Hedgemen leader of the movement toward the adoption of the fair employment practices commission.

These iconic figures, together with Lena Smith, Minnesota's first black female lawyer and chair of the Minneapolis NAACP, Nellie Stone Johnson, Oscar Lewis, Harry Davis and Mathew Little would place racial integration of schools and neighborhoods at the heart of the civil rights movement in Minnesota, later at the center of the national struggle for freedom.

Minnesota experienced early successes that other places did not. As racial covenants and violence stopped residential integration in it tracks in Chicago, Detroit and almost every northern city, Smith and the Minneapolis NAACP defeated these tactics in an historical struggle in a south Minneapolis neighborhoods.

In June of 1931, Arthur and Edith Lee, a black couple, purchased a home at 4600 Columbus Avenue South, in a white neighborhood bordering the “color line.” After initial threats against the Lees failed, abusive crowds of thousands gathered nightly around their house, throwing garbage, excrement and stones, and becoming increasingly violent. Rather than back down as others were forced to do all over the country, Lena Smith galvanized the local NAACP, churches and reform organizations to defend the Lees. Notably, she also personally appealed to progressive governor Floyd B. Olson, who mobilized the Minnesota National Guard to disperse the crowds. This was unprecedented in residentially segregated northern cities. Out of this victory would come the Tilsenbilt homes, the first intentionally racially integrated neighborhood in the United States.

B. The Emergence of the Civil Rights Movement

Perhaps because of successes like these, many of Minnesota’s political leaders remained strong civil rights advocates throughout the 20th century. This included Republican Party leaders, such as Governors Stassen, Youngdahl, Anderson, Levander, Quie, and Carlson, who remained supportive of civil rights initiatives through the 1990s, even while many of their copartisans had backed away from racial justice issues. Governor Quie, when he served in Congress, even worked hand in hand with Hubert Humphrey to pass the 1964 Civil Rights Act.

But on the other side of the aisle, the issue had taken on an even greater importance. In 1944, the Minnesota Farmer Labor party, a left-leaning, anti-Wall Street, isolationist entity, merged with the more centrist Minnesota Democratic Party. The Farmer Laborites disliked and feared the pro-business internationalist bent of the Democrats. They agreed to merge only on the after receiving a clear commitment that the new, joint party would become the national leader in

the one area where both factions saw eye-to-eye: civil rights issues. Thus, the question of racial equality and integration became the mortar which fused Minnesota's DFL party together.

Hubert Humphrey would emerge as the leader of this new party, and true to the terms of the merger, would, as mayor of Minneapolis, act immediately to fulfill the party's civil rights agenda. In 1947, civil rights leaders would work with Hubert Humphrey to abolish racial covenants in Minneapolis. At the urging of Mitchell, Whitney Young, and Nellie Stone Johnson, Humphrey and the Minneapolis City Council would establish the nation's first effective fair employment ordinance a year later. The same year, Whitney Young would press St. Paul into major public employment reforms to benefit blacks.

These local accomplishments immediately made Humphrey a national civil rights figure, not to mention a hero of the Americans for Democratic Action, an organization that would become the era's leading liberal voice for integration. Humphrey built his national reputation as a liberal Democrat interested in human relations and was called on to speak to all the emerging civil rights organizations throughout the north. "I have an unholy desire to communicate to eastern audiences," he told a columnist.³ Joseph Rauh later recalled how the 37-year old mayor's "passion and sincerity on civil rights brought his audiences to their feet."

With Roy Wilkins, Whitney Young, Clarence Mitchell – now national leaders in their own right – at his side, not to mention Lena Smith and Nellie Stone Johnson, young Hubert Humphrey would take on the President of the United States and the unified leadership of the Democratic Party and force the inclusion of a pro-integration civil rights plank in the national party platform.

³ Delton at 119.

The struggle is nowhere better described than in Robert Caro's book *The Master of the Senate*. At first, Humphrey was stymied in the party's platform committee.

But Humphrey was not finished. Humphrey would lead a floor fight to amend the Democratic platform. He was warned that if he did so, it would ruin his political career. Humphrey was deeply aware of the harm this might do to his political career, but Humphrey was later to say, "some issues are beyond compromise. For me personally and for the party, the time had come to suffer whatever the consequences."

...

For once his speech was short – only eight minutes long, in fact only thirty seven sentences.

And by the time Hubert Humphrey was halfway through those sentences, his head tilted back, his jaw thrust out, his upraised right hand clenched into a fist, the audience was cheering, every one – even before he reached the climax, and said, his voice ringing across the hall. "To those who say we are rushing this issue of civil rights – I say to them we are one hundred and seventy two years late."

To those who say this bill is an infringement on states' rights, I say this --- the time has arrived in America. The time has arrived for the Democratic Party to move out of the shadow of state's rights and walk forthrightly in to the sunshine of human rights.

"People," Hubert Humphrey cried, in a phrase that seemed to burst out of him. "People, human beings – this is the issue of the twentieth century. In these times of world economic, political and spiritual crisis, we cannot and must not turn our back on the path so plainly before us. That path has already lead us through many of the valleys of the shadow of death. Now is the time to recall those who were left on the path of American freedom. Our land is now, more than ever, the last best hope on earth. I know that we can – know that we shall – begin here the fuller and richer reality of that hope – that promise – of a land where all men are truly free and equal..."

While Humphrey had been speaking, there is something else that Paul Douglas would never forget: "hard boiled politicians dabbing their eyes with their handkerchiefs." Humphrey would win, 651.5 to 582.5. The Dixiecrats would walk out. [Strom] Thurmond, as their nominee would win four states, but Truman would more than make up for this in increase black vote in northern states that would carry him to victory.⁴

⁴ Caro at 443-44.

After his election to the Senate, Humphrey would come to Washington as a liberal hero, but was initially marginalized by the Senate's political leadership. But events eventually quickened the pace of progress.

Congressional liberals were empowered by developments like the 1954 *Brown* decision, and the emergence of Martin Luther King and his work on the Montgomery bus boycott. Episodes like the Little Rock Crisis and the growth of massive resistance began to impress upon Lyndon Johnson, at the time Senate Majority Leader, the importance of making headway on civil rights if he wanted to ever lay claim on the Democratic presidential nomination.

In this, Humphrey had a role to play. He began to serve as Majority Leader Johnson's conduit to the liberal faction of the legislature, and in that capacity helped Johnson break the Senate gridlock that had prevented the passage of civil right legislation for the past 80 years. The 1957 and 60 Civil Rights Acts were not substantive, but they represented a breaking of a dam, and suggested that future progress was on its way.

In 1963, civil rights leaders organized the March on Washington, arguably the most important single civil rights demonstration in modern history. Of the "Big Six" who organized the March, three would be Minnesotans. In addition to Martin Luther King, John Lewis, and James Farmer, the six included Roy Wilkins, Whitney Young, and Anna Arnold Hedgemen, representing the NAACP, National Urban League, and National Council of Churches, respectively (the latter taking the place of A. Phillip Randolph, the aging head of the Brotherhood of Sleeping Car Porters).

Humphrey's larger role would come after the March, as the floor leader for the passage of the 1964 Civil Rights Act, whose major planks involved employment and public

accommodation. Title VI allowed the Justice Department to commence school desegregation suits and the cutoff of federal funds to segregated schools and public housing. The bill would take the whole summer of 1964, and Humphrey's legislative genius, especially bringing Illinois Republican Everett Dirksen into the fold, would be central to its passage.

The leaders of the 1960s saw segregation as a central mechanism by which black Americans were oppressed, and understood the elimination of segregation to be a core aim, if not the core aim, of the entire movement. In the March on Washington, and over 100 other speeches and writings, King condemned segregation:

But one hundred years later, the Negro is still not free; one hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination; one hundred years later the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity; one hundred years later, the Negro still languishes in the corners of American society and finds himself in exile in his own land.

King was an unambiguous foe of segregation in schools and neighborhoods. He would write that

if democracy is to live, segregation must die. Segregation is a glaring evil. It is utterly unchristian. It relegates the segregated to the status of the thing rather than elevate them to the status of the person. Segregation is nothing but slavery covered up with certain niceties of complexity. Segregation is a blatant denial of the unity which we all have in Jesus Christ.

Although the legal distinction between "de facto" and "de jure" segregation was not widespread at the time, writings from the period make clear that leaders' concerns about segregation were not restricted to the mere existence of discriminatory laws, but the actual fact of racial separation. Humphrey himself would make this clear in his 1964 book *Integration v.*

Segregation:

A first essential is to understand the magnitude of the problem [of segregation] as it now exists, after generation of segregated education. In any part of the nation, a Negro baby has only one half the chance of completing high school, and one third of the chance of completing college, as a white baby born at the same time and place. And today, a

decade after the Supreme Court ruling against segregated education, only about 9 percent of the 3 million negro children in the south attend integrated schools....

[O]ur society cannot refuse the negro an equal education and then refuse to employ him in a decent job on the grounds that he is untrained. We cannot follow a deliberate policy of apartheid and then say we refuse to have our children associate with the Negro because of differences in behavior. Such difference as exist result from this very pattern of forcing the Negro's exclusion from the mainstream of American life.

... But if responsible leaders fail to act affirmatively and constructively, they lose the battle. If they wait for public opinion to jell, the leadership role will be inevitable seized by racial extremists. Public opinion must be considered in shaping public policy, but policy itself is a major determinant of that opinion. For the successful desegregation and integration of our schools and communities, resolute leadership is essential.

C. The Fair Housing Act

No single piece of civil rights legislation has stronger Minnesota ties than the Civil Rights Act of 1968, also known as the Fair Housing Act.

Throughout the 1960s, civil rights campaigners had pushed for government action to eliminate segregation in housing. These fair housing advocates had seen little success at the federal level, but had won some limited victories in state and local contexts. This was especially true in Minnesota, where both the city of Minneapolis and the state itself were early adopters of fair housing legislation.

In 1966, Martin Luther King brought his fair housing act campaign north to Chicago. Dr. King met with violent resistance in the suburbs of Chicago, and that summer riots broke out in Watts and Cleveland. More than sixty riots occurred in as many cities in July and August of 1967.

As a result, by January 1968, Congressional progress on fair housing had ground to a halt. Regardless of the fact that they were in fact rooted in segregation, the riots created a backlash. Conservative forces picked up many seats in the 1966 election, and Ronald Reagan was elected governor in California, riding white fear coming out of the Watts riots.

As had happened with Humphrey 20 years prior, it was left to a young Minnesotan to spur representatives to abandon their course of inaction. With fair housing in a tough political spot, 38-year-old Walter Mondale was able to take leadership on the issue. “Nobody else wanted to touch it with a ten foot pole,” Mondale said, “Nobody thought we had a chance.”

Ed Brooke of Massachusetts and Mondale co-authored a strong new fair housing amendment to a minor worker protection bill moving through the Senate. By pre-arrangement Humphrey himself was presiding, and he recognized Mondale to offer his amendment

Southern senators launched a filibuster against the bill, and three cloture votes failed. (At the time, sixty-seven votes were needed to end a filibuster.) But on the day of the third vote, the Kerner Commission, tasked by President Johnson with uncovering the roots of the 1967 riots, finally released its report. It attributed the riots to residential segregation and the conditions of the ghetto, and said that if the United States wanted to stop these riots, it must pass a comprehensive fair housing bill.

The Kerner report’s breadth and strong prescriptive conclusions jarred the fair housing law out of gridlock. Several years earlier, in 1966, Minority Leader Dirksen had declared Mondale’s fair housing proposal unconstitutional. But with calls from action now coming from the public, from civil rights leaders, and from the Kerner Commission, he now expressed openness to compromise. With assistance from President Johnson, the bill passed the Senate.

In the House, the law stalled again, this time in the Rules Committee. But on April 4th Martin Luther King was shot in Memphis, triggering riots nationwide, with one of the most severe outbreaks of violence happening in Washington DC itself. Forced to react, the House passed the bill on April 10th, and the Fair Housing Act was signed into law the next day.

In 2017, Mondale would reflect on the Act, writing:

Above all Congress intended – as the Supreme Court recently held – that the Fair Housing Act serve as a new powerful tool to end racial residential segregation and to replace racial ghettos with vibrant and racially integrated neighborhoods. The events of the late 1960s highlighted how deeply interwoven segregation was into the social fabric of American cities, and how concertedly American institutions had worked to maintain it. Racial separation, once enforced as policy, was now perpetuated as a matter of habit through the actions of public agencies and private citizens alike. Especially after the Kerner Commission report, Congress understood that integration was the only mechanism for attacking the root causes of the discrimination and suffering that plagued American cities. Halting segregation, dismantling it, and building integration were the overriding objectives of the FHA, the end goals towards which all its provisions were to be directed.

For over a century, Minnesota has blazed a trail on civil rights in ways large and small. Its advocates and activists were instrumental in forging the 20th century's civil rights movement, and from the end of World War II, its elected leaders have been at the front lines of the legislative battle to fulfill the promise of *Brown v. Board of Education* and to make the guarantees of the Fourteenth Amendment a lived reality in American society. These courageous individuals risked their careers, endured threats and abuse, and two leaders -- Hubert Humphrey and Walter Mondale -- paid the ultimate political price, losing the presidency to opponents who campaigned on white reactionary and segregationist sentiment.

D. Local Regression

Minnesota did not only contribute to the national advancement of civil rights. Even after the waning of the national movement, the state continued to make progress locally, adopting rules, laws, and policies, particularly with regards to housing and school segregation, that could serve as a model for much of the rest of the country.

But starting in the late 1980s, something strange began happening. In the Twin Cities racial disparities were growing. The first indications of ongoing neighborhood segregation

emerged in many of the older suburbs surrounding Minneapolis and Saint Paul. Attempts to broaden the scope of school and housing integration policies started to meet resistance. Curiously, this resistance often arose from unpredictable quarters – not the ultra-conservative exurbs or wealthy enclaves at the urban fringe, but from liberal quarters within Minneapolis and Saint Paul themselves.

In the 1990s, Democratic resistance to civil rights was not unheard of. Based on the writings of Kevin Phillips and Thomas Edsall, the centrist Democratic Leadership Conference determined that the party's identification with programs that helped black Americans -- and with civil rights programs in particular – had harmed, and would continue to harm, its broader political prospects. Still, this was a strange prediction in Minnesota, which had never experienced the intense racial backlash that had emerged in places like Michigan and Ohio.

Nonetheless, following the DLC lead, local moderates would purposefully dismantle Minnesota's powerful civil rights laws put in place a new regime that would literally prevent state and local elected officials from voluntarily integrating schools and neighborhoods. At the time Minnesota's historic programs were abandoned, there was little organized opposition to these policies, save from small -- if vocal -- conservative think tanks, and a few public officials on the far right wing. Be that as it may, the result would be a rapid segregation of Minnesota schools and neighborhoods and the creation of the largest racial disparities in the nation in education, health, employment, incarceration, access to credit and housing. By 2018, Minnesota had become one of the most segregated low minority regions in the nation, with the largest racial gaps in employment, education, housing, incarceration and wealth.

The remainder of this paper follows this trajectory in the specific context of school and housing desegregation. It shows how far Minnesota advanced towards true integration in a few brief decades – and then, pressured by neo-segregationist interests, how far it regressed in an equally short period.

III. Schools

A. State and Local School Desegregation

Starting in the 1960s, various governmental entities in Minnesota began to proactively attack school segregation. Minn. Stat. § 123B.30, first enacted in 1959, forbade segregation on penalty of losing funding:

No district shall classify its pupils with reference to race, color, social position, or nationality, nor separate its pupils into different schools or departments upon any of such grounds. Any district so classifying or separating any of its pupils, or denying school privileges to any of its pupils upon any such ground shall forfeit its share in all apportioned school funds for any apportionment period in which such classification, separation, or exclusion shall occur or continue.

In 1967 the state added an additional anti-segregation provision to the Minnesota Human Rights Act forbidding local school districts from “discrimina[ting] in any manner in the full utilization of or benefit from any educational institution or the services rendered thereby to any person based on race, creed [or] color.” Discrimination is expressly defined to include segregation or separation. The law also defined a discriminatory practice to “exclude...or otherwise discriminate against a student seeking admission as a student, or a person enrolled as a student because of race, creed, color.”

By the early 1970s, state educational policy started galvanizing against segregation in earnest. Although federal law had begun to distinguish between de jure and de facto segregation, the Minnesota Board of Education announced its intention to regulate and reduce both types in 1967. In 1973, the Minnesota Department of Education promulgated its first desegregation rule.⁵ This rule applied flexible racial ratios in accordance with the Supreme Court’s approved remedial framework outlined in *Swann v. Charlotte-Mecklenburg*.

This is not to say segregation never took hold in Minnesota. On the contrary, at the local level, segregation was still common. A federal school desegregation lawsuit, *Booker v. Special Sch. Dist. No. 1*, was filed against the Minneapolis, resulting in a court-enforced desegregation order in 1972. The decision creating the order cited “optional attendance zones,” “the size and location of schools,” “transfer policies,” and “racially motivated” boundaries as evidence of de jure segregation by the district. For the following decade, the court helped guide policies such as school boundary decisions, and conducted annual reviews of the district’s progress towards integration.

In the mid-1970s, the Minneapolis district and the state battled over the scope and reach of Minnesota desegregation rules. In a 1978 Statement of Need and Reasonableness (SONAR) supporting a rule regulating de facto school segregation, the Attorney General and the Board of Education declared that, reading the 1869 prohibition on segregation *in pari materia* with the 1967 Minnesota Human Rights Act, the legislature’s intent to regulate de facto discrimination was clear.

⁵ Until 1999, Minnesota maintained a separate State Board and Department of Education, which shared rulemaking authority to an extent. Also, for a lengthy period, the Department of Education’s name was changed to the Department of Children, Families, and Learning, although the shorter title is used in this brief.

The Minneapolis district retaliated by challenging, in an administrative proceedings, the state's authority to regulate de facto segregation, both on constitutional and state law grounds. An ALJ upheld the state's regulation of de facto segregation and rejected every aspect of Minneapolis's challenge. The ALJ found ample constitutional grounding for Minnesota's rules in the Supreme Court's 1971 *Swann* decision which clearly distinguished target racial ratios from prohibited quotas or racial balancing.⁶ The ALJ opinion upheld the state law authority to forbid de facto segregation rule by examining the § 123B.30 statutory prohibition of segregation, and the even broader prohibition of the Minnesota Human Rights Act. The opinion noted that the legislature had acquiesced in these regulations by repeatedly funding transportation, construction, and other activities undertaken in the course of desegregation.

In the 1970s and early 80s, the legal and policy consensus appeared to be that Minnesota's desegregation efforts were working. The Minneapolis desegregation order was dissolved in 1983, in order give the district "the opportunity for autonomous compliance with constitutional standards." Notably, the court did not find that the Minneapolis school district was integrated or unitary, and received assurances that the State Department of Education was "willing and able to assume the duty of monitoring the further implementation of the District's desegregation/integration plan."

⁶ In *Swann*, the United States Supreme Court validated the use of race in student assignments by educational authorities, even absent a showing of intentional segregation, when the goal was integration rather than segregation. *Swann* pointed out that local and state authorities, acting in service of a compelling governmental interest, possessed "plenary" powers beyond that of a court acting in a remedial capacity. *Id.* ("School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to White students reflecting the proportions for the district as a whole."). The court decided two other cases the same day that clarified beyond doubt that Minnesota had the power to regulate defacto segregation with target racial ratios. *McDaniel v. Barresi*, 402 U.S. 39 (1971); *N.C. Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971).

1. Minnesota Abandons Integration in Schools

Starting around 1990, school diversity increased rapidly in Minnesota. While most nonwhite segregation had previously been between schools in the same district – primarily in Minneapolis and Saint Paul – interdistrict segregation now grew rapidly. But the existing rule imposed no interdistrict remedies, meaning districts, acting alone, could not avoid becoming segregated if their demographics shifted too much.

In 1994, the Minnesota State Board of Education proposed a metropolitan-wide desegregation rule to resolve this problem.⁷ The rule used flexible racial ratios as integration targets. A draft of the rule was provided to the Minnesota legislature, which indicated its approval by expanding the Board’s statutory rulemaking authority. The new authorization statute permitted the board to “make rules related to desegregation/integration,” but contained an important qualification:

In adopting a rule related to school desegregation/integration, the state board shall address the need for equal educational opportunities for all students and racial balance as defined by the state board.

In the same law, the legislature established a new “office of desegregation/integration” to “coordinate and support activities” related to interdistrict integration efforts.

But before they could be promulgated, the newly proposed rules were swallowed by a sharp political backlash, spurred in part by the suburbs’ sudden inclusion in civil rights regulation. Katherine Kersten, a conservative political columnist for the *Star-Tribune*, launched frequent attacks against the proposal, and Bob Wedl, the Assistant Commissioner of the

⁷ The M

Department of Education, began to lobby for an alternative, “voluntary” integration approach. Talk radio also pilloried the proposed rules, and a separate, related set of “diversity rules.” The Department of Education received “hundreds of calls and letters concerning the proposed rules – including two death threats.” After years in limbo, the second set of rules was withdrawn, and soon thereafter, the State Board of Education abolished altogether.

The Board’s rulemaking authority persisted, however – now transferred to the Department of Education. The Department and the Attorney General’s Office had already begun to strip the strongest desegregation tools out of the Board’s original proposal. This process took place in a deeply politicized environment. For instance, on September 17, 1998, two days after Attorney General Hubert Humphrey won the Democratic primary for governor, the Attorney General’s Office released a Statement of Need and Reasonableness (SONAR) that dramatically weakened the rule. Several weeks later, Bob Wedl, now Commissioner of Education, announced that his new rule would end racial quotas. Kersten used the proposal in a newspaper column to frame the differences between Humphrey and his opponent, Norm Coleman.

The newly released SONAR marked a sharp break with previous iterations of the rule. It altered the definition of segregation to only include intentional discrimination, *de jure* discrimination, limited the mandatory interdistrict integration requirements, and raised the standard for proving intentional discrimination far above that required by the U.S. Supreme Court. The SONAR also argued that interdistrict open enrollment rules could not be guided by integration requirements, and, on policy grounds, it exempted charter schools from its provisions altogether, though they had previously been subject to desegregation rules.

The SONAR's legal conclusions were similarly striking. It concluded that there was no compelling government interest in K-12 integration absent proof of intentional discrimination – limiting districts' abilities to voluntarily implement integration plans. It based this determination on a prediction that Supreme Court justice retirements would result in a change to the law, noting that one 5-4 decision in 1990 “is surely the high water mark for diversity as a justification for racial preference.” Tellingly, the SONAR made a concerted effort to downplay the meaning and scope of *Brown v. Board of Education*, stating that the case “did not stand for the proposition that racially segregated schools, without more, are inherently equal.” At one point, it appears to engage in an extended apologia for segregated schools:

Throughout the United States, such public schools have tackled some of the toughest problems in urban education and been successful. These exemplary schools are located in some of the poorest inner-city neighborhood, serving student bodies that are largely poor and minority.

It is certainly not the intent of the rule to promote racial separatism; however, it is important to understand that a desegregation rule is not unreasonable, or ineffective, simply because some schools may remain racially identifiable.

The new Minnesota Desegregation/Integration Rule, with the limitations imposed by the SONAR, was finally adopted in early 1999. Shortly thereafter, a number of integration policies in Minnesota schools came under legal attack by white parents, who echoed the SONAR's claim that there was no compelling governmental interest in K-12 integration absent intentional discrimination.⁸ Fearing legal reprisals, many districts abandoned previous integration plans.

2. The Failed Achievement and Integration Rule

The weakened Desegregation/Integration Rule adopted in 1999 has not fared well.

⁸ For example, this argument was deployed in a lawsuit filed by the Center for Individual Rights, a conservative legal advocacy group, against the Saint Paul public school district, in which it claimed that a magnet school with an integration-oriented race-conscious admissions process was discriminating against white children.

Many of its legal conclusions have not withstood the test of time – most importantly, its suggestion that K-12 integration is not, or would be found not to be, a compelling government interest. In 2007, the Supreme Court, in *Parents Involved in Community Schools v. Seattle School District No. 1*, confirmed the existence of a compelling government interest in encouraging diversity and avoiding racial isolation in K-12 education. It also reaffirmed the viability of several integration methods, such as the use of flexible racial ratios. Justice Kennedy, whose opinion was controlling, wrote passionately in defense of integration:

The nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest therefore exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.

In similar fashion, the legality of the rule’s charter school exemption has been called into question. In 2014, the U.S. Department of Education released guidance strongly suggesting that the exemptions are unconstitutional, because they allow a separate state-supported school district to interfere with and undermine the efforts of the state to integrate a segregated system. The Department’s official guidance document declared that “charter schools located in a district subject to a desegregation plan (whether the plan is court ordered, or required by a Federal or State administrative entity) must be operated in a manner consistent with that desegregation plan.” One study found that no other state has a similar charter exemption to civil rights rules.

In the meantime, the degree of segregation in Minnesota schools has grown sharply – rapidly accelerating since the rule’s promulgation. This is particularly true of charter schools, which account for a hugely disproportionate share of the state’s most racially isolated schools. Open enrollment, which was also loosed from desegregation requirements in the wake of the

rule, has also caused a great deal of segregation, by facilitating white flight. These trends will be discussed in greater detail below.

In 2013, the legislature once again focused on school segregation. It enacted yet another statutory provision forbidding segregation, this time at Minn. Stat. § 124D.855:

SCHOOL SEGREGATION PROHIBITED. The state, consistent with section 123B.30 and chapter 363A, does not condone separating school children of different socioeconomic, demographic, ethnic, or racial backgrounds into distinct public schools. Instead, the state's interest lies in offering children a diverse and nondiscriminatory educational experience.

The legislature also created a policy task force to revise laws governing the use of achievement and integration state aid. That task force delivered recommendations, including the retention of all existing remedial integration measures. The legislature enacted these in 2013, as the Achievement and Integration for Minnesota statutes. It also modified the Department of Education's grant of rulemaking authority to instruct it to conform its rules with the new statute. As such, the full grant of rulemaking authority read – and still reads – as follows:

DESEGREGATION/INTEGRATION AND INCLUSIVE EDUCATION RULES.

(a) The commissioner shall propose rules relating to desegregation/integration and inclusive education, consistent with [the Achievement and Integration statutes at] sections 124D.861 and 124D.862.

(b) In adopting a rule related to school desegregation/integration, the commissioner *shall address the need for equal educational opportunities for all students and racial balance as defined by the commissioner.* Minn. Stat. § 124D.896 (2017) (emphasis added).

Using this authority, the Department of Education attempted a new rulemaking.

In 2015, the Department released a rule for public notice and comment. The new proposal represented yet another dramatic weakening of the state's integration rules. It was less than a quarter of the length of the extant rule, eliminating almost all of the rule's content. It primarily

restated statutory provisions and lacked important definitions – including “racial balance,” which the authorizing statute required. It eliminated virtually all remedial provisions in the extant rule, and made interdistrict remedies completely voluntary. Despite the statutory instruction to promulgate a rule relating to desegregation/integration, it did not contain the word “segregation”; it also ignored the statutory requirement to address the need for equal educational opportunities for all students. The only significant strengthening provision was the deexemption of charter schools.

A new SONAR, released in support of the proposed rule, failed to justify most of these changes. The SONAR claimed that the Department lacked statutory authority to promulgate a broad new rule, but did not explain where it had derived the authority to repeal the vast majority of the existing rule. In addition, Minnesota’s administrative procedure laws require promulgating agencies to delineate who will be affected by a proposed rule. The Department of Education dodged this requirement, saying only that “communities” where “achievement and integration plans are presented at public school board meetings which allow for input” would be affected “positively.” No mention of the effects on schoolchildren was made. Indeed, at no point in the rulemaking process did the Department of Education affirmatively state if it expected the rule to reduce racial segregation in Minnesota schools.

The public hearing to the proposed rule generated considerable resistance. Civil rights groups objected to its overall lack of content. Confronted about the lack of policy support for the rule, Department representatives confessed they had made no attempt to model the rule’s impact on the demographic composition of Minnesota schools. The Department also appeared to abandon its earlier position that there is no compelling interest in K-12 integration.

Meanwhile, charter schools objected to the proposed elimination of their exemption. Over a dozen charter administrators and representatives spoke. A number of charter administrators affirmatively defended their right to operate racially-targeted schools, arguing that “cultural focus” was necessary because different racial groups think and behave differently.

For example, the director of Hmong-focused charter school stated the following: “Each culture group has their own - the Hmong, we are very quiet. We are introverts. We don't talk much. The African-American students, they are extroverts. They talk. That's how they are.”

The director of the Excell Academy, which is nearly 100 percent black and low-income, relayed messages from the school’s enrollees: “You need to think about what you are doing to people of color and whites. If you make a white kid go to a colored school or a colored kid go to a white school, there are a lot of things that can go wrong.”

Other charter defenders included the attorney who had authored the original 1999 charter exemption. She argued that it was important for parents to be able to choose other school features instead of integration, if they wanted: “But not all parents and student value diversity above all other educational needs. . . Some families price a premium on - and this was the case for me - small class size and a teacher to student ratio that's small.”

The final ALJ report disapproved of the entire proposed rule on a variety of grounds. Rather than correct the defects identified by the ALJ, the Department of Education abandoned the rule altogether. Although it is still required by statute to readopt new rules that comport with the Achievement and Integration statute, it has not done so, and its statutory authority for rulemaking has expired.

At present, school desegregation in Minnesota is governed by a 1999 rule founded in fundamental legal errors and promulgated in a highly irregular process. The Department of Education has acknowledged these errors and yet is making no attempt to correct them. It has indicated that it will not act until it receives additional guidance from the legislature, but the legislature has not provided such guidance. There is no indication that the political resistance that has impeded all attempts to integrate Minnesota schools for the past four decades will abate soon. In the meantime, the wellbeing and education of tens of thousands of Minnesota children is at risk, as the laws of their state steer them towards segregated schools.

3. Evidence of School Segregation in Minnesota

i. The Number of Segregated Schools Is Growing Rapidly

Minnesota schools are now rapidly resegregating. Although segregation has long been thought of as a primarily urban or central city problem, this is no longer true. Instead, Minnesota school resegregation is simultaneously taking place in central cities, inner-ring suburbs, and even outside the Twin Cities metropolitan area. In fact, the speed and degree of segregation in some suburban districts outstrips that found in the cities of Minneapolis and Saint Paul.

In the Twin Cities metropolitan area, the number of heavily segregated schools with student bodies more than 90 percent nonwhite has increased sharply, from 6 in 1995 to 100 in 2015. Likewise, while only 1,081 students attended such a school in 1995, over one-fifth of all students – or 39,902 – attended one by 2015. This is a thirty-sevenfold increase in the number of students exposed to hypersegregated education.

Although the population of the Twin Cities metropolitan area has grown more diverse over time, the increase in segregation in the region's school districts cannot be explained through

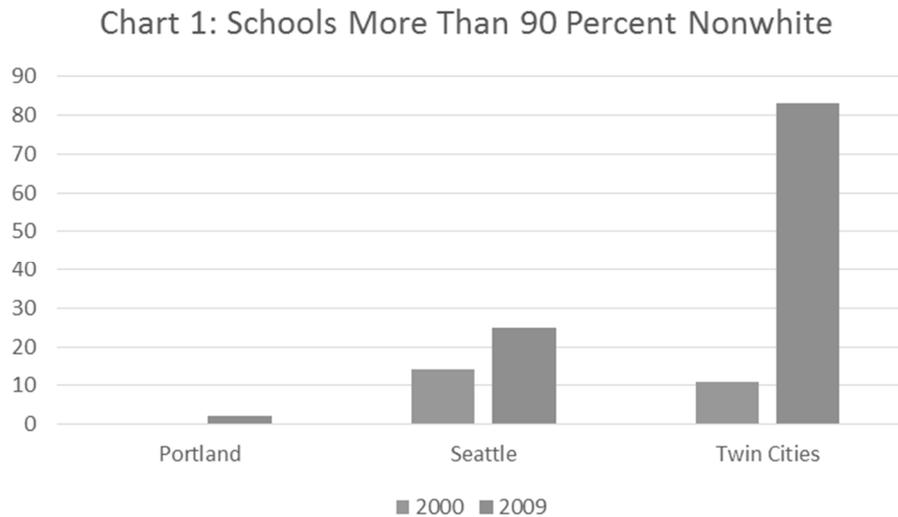
demographic changes alone. The number of racially isolated schools, and the share of students attending such schools, have both grown much more rapidly than the overall nonwhite population.

Particularly illustrative are the changes in the Minneapolis Public School District, the third-largest in the state. After the district transitioned to a “neighborhood schools” plan in the mid-1990s, segregation spiked rapidly. But the degree of segregation has continued to climb ever since, even while the number of children of color in the district has declined. In 1995, the district was 63 percent nonwhite, but only 13 percent of its students attended schools more than 80 percent nonwhite. Today, the district has become only 3 percent less white – but 43 percent of its students attend segregated schools. Since peaking at 73 percent nonwhite in 2001, the district has actually become nearly 7 percent white – but more segregated over the same interval. Given the close proximity of Minneapolis schools, these trends can only be explained by political and policy choices that tend to increase racial isolation.

Minneapolis’s racial sorting patterns are clearly visible in Maps 1 and 2, attached as an appendix below: nonwhite students have become comparatively more clustered in the north and center of the city, while white students have clustered in the southwest.

Nor have peer regions with similar demographic changes seen comparable increases in school segregation. The cities of Portland and Seattle are instructive examples; both have demographic compositions similar to the Twin Cities, and have undergone increases in diversity in the previous decades. Yet there has been no comparable growth in the number of highly segregated schools more than 90 percent white. For instance, between 2000 and 2009, in the Portland region, the number of highly segregated schools increased from 0 to 2. The number of

highly segregated schools in the larger Seattle region increased from 14 to 25. In the Twin Cities region, the number of highly segregated schools increased from 11 to 83. These trends are illustrated in Chart 1, below.



ii. State Policy Is Facilitating Segregation

A number of Minnesota's educational policy choices are contributing directly to growing segregation. In most cases, these policy choices appear to have been made despite policymakers' awareness that they could contribute significantly to racial isolation; in a number of cases, the policies appear to have been adopted specifically to facilitate white flight, segregation, or white parents who wished to avoid integrated schools.

a) Charter Schools

Charter schools facilitate segregation in a number of ways.

First, as schools of choice, they have proven convenient vehicles for white flight from diverse traditional public schools. Although all children are equally eligible to enroll in a charter,

not every child is equally able to attend, due to practical obstacles such as transportation or curricular concerns. As a consequence, heavily white charters have experienced very rapid growth in Twin Cities suburbs, where traditional schools are quickly becoming more diverse. Maps 3 and 4, attached in an appendix, shows the expansion of segregated charters in the Twin Cities.

In addition, charters are forced to recruit their student bodies from the student population, and many have opted to do so by billing themselves as racially targeted or culturally focused. Minnesota is home to Afro-, Hmong-, Latino-, and Somali-centric charter schools, which explicitly recruit students on claimed commonalities.⁹ Although there are no *explicitly* white-segregated charter schools, there are a number of European-oriented schools, such as a Russian language charter (96 percent white) and a classical academy (76 percent white). In one particularly egregious case, a German immersion charter, which was 88 percent white, opened nine blocks from a traditional public school serving the same grades, which was only 8 percent white.

As a result of these dynamics, and as the recipients of a blanket exemption from the state desegregation rule, charters are overwhelmingly more segregated than their traditional school counterparts. Of the 50 most segregated schools in the Twin Cities region, 45 are charters. The region contains 78 schools more than 95 percent nonwhite; 59 are charters. Out of all charter enrollees, 72 percent of black students, 68 percent of Hispanic students, and 74 percent of Asian students are attending a highly segregated school more than 90 percent nonwhite. At traditional

⁹ Once opened, these schools, as is frequently the case with segregated schools, appear to lose attendance quickly. By comparison, diverse charters grow rapidly. However, charter openings are often driven by underlying financial incentives, not parental demand.

schools, the equivalent figures are 16 percent, 11 percent, and 18 percent, respectively. Similarly high levels of segregation have existed at charters since at least the 1995-1996 school year.

b) Open Enrollment

The policy of open enrollment was exempted from desegregation rules in 2001. Prior to that, certain enrollments could be rejected if they had a segregative effect.

A 2013 study examined the effect of open enrollment on district demographics. In the 2000-2001 school year, 12 percent of white students' open enrollment moves were integrative in effect, and 20 percent were segregative in effect. The remainder were neutral (i.e., between two similarly composed school districts). By 2013, over a third – 36 percent – were segregative in effect, while 19 percent were integrative in effect.

The school districts most affected by open enrollment are those in rapidly diversifying suburbs, where the policy provides an escape route for white families concerned about integrated schools. These communities include Richfield, Columbia Heights, Osseo, and Robbinsdale.

Meanwhile, a number of districts serve as white flight “hubs,” receiving a significant portion of their overall student body as open enrollees from neighboring districts. These include St. Anthony, Mahtomedi, Edina, and Minnetonka.

Some districts have utilized open enrollment and diversifying neighborhoods as a strategy for recruiting wealthier student bodies. For example, four districts bordering the Minnetonka district have officially considered or implemented integrative boundary changes. While its neighbors considered these plans, the Minnetonka school district launched an expensive and unusual paid advertising plan in local newspapers, television, and radio.

According to superintendents of neighboring districts, the Minnetonka district was engaged in an

active effort to recruit skittish parents. Not only could these efforts increase white segregation in Minnetonka schools, but they undermine attempts by neighboring districts to maintain demographically balanced schools. Despite all this, the Minnetonka district is one of a handful of districts that does not accept low-income Minneapolis students through a state program called “Choice Is Yours.”

c) Other Policies

A number of other policies have also contributed to school segregation.

For instance, districts regularly engage in potentially discriminatory boundary drawing, which the state rarely monitors or corrects. A particular egregious case occurred in the early 2000s, when the Apple Valley-Rosemount district drew a non-contiguous attendance zone connecting a predominantly Latino trailer park to a neighborhood with a high share of affordable housing occupied by black families. Sandwiched in between these places was the attendance zone for a significantly whiter and wealthier school. Despite this strong evidence for purposeful segregation, the state found that this boundary did not meet the definition of intentional discrimination under its desegregation rule.

The current rule also does not place any realistic pressure on segregated schools to integrate. Although schools deemed “racially identifiable” are required to submit annual integration plans, there is no publicly available evidence that these plans are reviewed, evaluated, carried out, enforced, or subject to any requirement to even marginally related to segregation. For instance, in Minneapolis, one of the state’s most-segregated districts, the integration plans amount to only a few lines per school. None of the stated goals have any impact on school integration or demographics at all, instead focusing on lowering suspension rates or raising

student achievement. Under the Department of Education’s desegregation rule, the creation of integration plans is one of the primary mechanisms for reducing racial isolation in schools. As implemented, they are unlikely to have any effect at all.

The history of school segregation in Minnesota is inglorious. Historic efforts by the legislature to desegregate schools – sporadically revived – have been undone by a combination of political resistance to integration, harmful policy, and deference to the preferences of parents engaged in white flight.

Minnesota’s status as a predominantly white and high-income state, without the staggering concentrations of poverty that exist in places like Detroit or Cleveland, make the task desegregating Minnesota schools comparatively straightforward. The political branches have nonetheless proven unable to effectively desegregate schools, and at times have appeared use the powers of government to actively protect the interests of those preferring racial and economic homogeneity. The result has been spiraling segregation. Dozens of public schools are now highly segregated, and tens of thousands of students are forced to learn in segregated environments. The process shows no sign of stopping.

IV. The Rise and Fall of Regional Housing Planning

When it comes to combatting housing discrimination and promoting housing integration, Minnesota is gifted with a unique policy tool: the Metropolitan Council. In most states, major cities are fractured into dozens of municipalities, each operating independently of each other – a recipe for destructive, zero-sum competition, demographic and economic fragmentation, and ultimately, residential exclusion. The inability to construct unified regional housing policy is a recipe for the emergence of the classic urban-suburban divides that were stereotypical of

American cities in the 20th century, with white-picket-fence suburbs doubling as gated enclaves, built to exclude the poor and the nonwhite, both explicitly and implicitly.

Minnesota developed a better system. Although the Twin Cities are divided among nearly 100 municipalities, those municipalities are subject to the authority of a regional government, which has been given the tools to corral them. The Met Council has a well-established and robust state law authority to coordinate housing policy. It has the authority to:

- Review local applications for state and federal funding based on housing performance
- Award funds directly under its control on the basis of housing performance, including:
 - Sewer funds
 - Park funds
 - Transportation funds
- Suspend state agency plans inconsistent with Council policies, such as housing
- Suspend local comprehensive plans, including the mandatory housing element, if they do not conform with systems plans
- Embed housing elements into system plans
- Suspend *any* matter of metropolitan significance undertaken by a local government
- Form collaborative review agreements with state agencies, including MFHA
- Review housing bonding plans

It has, in the past, applied these various power authority with great success, effectively promoting the production of low- and moderate-income housing throughout the Twin Cities' affluent suburbs, transforming the region's living patterns in under a decade.

But ultimately, the Council caved under political pressure from the central cities and housing industry and returned to old, segregative patterns of development. In doing so, it unilaterally limited its own role in housing. Rather than coordinating housing development activity throughout the region, it now restricts its work to a handful of comparatively paltry funding sources over which it exercises direct control, and participation in a number of public-private "partnerships," largely with housing developers. Under the Council's watch, local governments have abandoned integrative planning with a regional perspective. They have reverted to segregative practices, creating a region in which exclusionary zoning reigns and lower-income housing is locked out of many communities. While some communities work to eliminate housing choice, and others are forced to bear the burden of runaway demographic transition, the Council does nothing.

Worse still, the Council's more recent activities have promoted, rather than disrupted, the traditional concentrations of poverty and segregation in the central cities. Its own funding sources are distributed in a segregative fashion, with a heavy emphasis on the central cities, and its negotiated housing goals reduce the obligation of the region's whitest communities to provide affordable housing. It has embedded housing elements into its systems plans – but only to encourage the development of lower-income housing along transit corridors, which are located almost exclusively in the central cities and less-affluent suburbs.

These changes are all the more remarkable because the Council still retains every bit of authority it used to promote housing integration in previous decades. It falsely maintains, however, that its authority has changed significantly, citing in particular the repeal of the federal A-95 review power. There is no support for this assertion in the law, or in the numerous contemporaneous reports produced about the Council's housing program. If it wished, the Council could restore its integrative housing program immediately. In order to satisfy its duty to not perpetuate segregation, and to affirmatively further fair housing, the Council must do so.

A. Background of the Council's Housing Authority and Housing Integration Program

Just as riots throughout the country in the late 1960s led to the Kerner Commission Report and ultimately to the passage of the Fair Housing Act, serious civil disturbances in North Minneapolis and the growing racial segregation in both central cities school systems were driving forces behind the Council's fair share housing policy. The Council believed that racial segregation was destroying the education and economic prospects of black citizens in North Minneapolis, the fabric and vitality of their neighborhoods, and that growing racial and social segregation, left unchecked, would harm the economic vitality of the entire metropolitan area.

In the mid-1970s, the Council sought to establish a staged growth land planning system. It hired the renowned land use scholar, Robert Freilich, to design a new Metropolitan Land Planning Act for submission to the Minnesota legislature. From the outset it was clear the Act would contain a "fair share" housing requirement, for Freilich believed that the staged growth system the Council wanted would be unconstitutional without it. In January of 1974, Freilich produced a report to the Met Council outlining the proposed act and its fair share provisions.¹⁰

¹⁰ See Robert H. Freilich and John W. Ragsdale, Jr., *A Legal Study of the Control of Urban Sprawl in the Minneapolis-St. Paul Metropolitan Region*, submitted to the Twin Cities Metropolitan Council (January 10, 1974) [hereinafter

Freilich grounded his “fair share” proposals in explicit goals already announced by the Council,¹¹ the requirements of the Federal Fair Housing Act, and the evolving case law prohibiting exclusionary zoning.

In its early planning documents, the Council highlights the importance of housing choice and desegregation. It defines the “Social Objectives of Physical Planning” to include:

1. To increase choice and opportunity for persons in the Metropolitan area, particularly people who are in some way disadvantaged such as low income, minorities, senior citizens, etc.
2. To decrease residential segregation by race, class and income level. To reduce the concentration of lower income families and individuals in the lower in the older areas of the region and increase housing choice for lower income persons throughout the area.¹²

The Council also planned to rely on its suburban integration efforts to receive supplementary funding from HUD, which offered special allocations to metropolitan areas operating fair share housing plans.¹³ On the basis of its promise to maintain a racially integrated regional fair housing program, the Council requested, and received, a 50 percent supplemental

Freilich Legal Study]. The report was later published in the Minnesota Law Review with the following note, “This article is the result of a 1971-73 grant from the Met Council to Professor Freilich to study and recommend a legal policy for regional growth in accordance with the council’s decision to pursue growth in a timed and sequential manner.” See Freilich and Ragsdale, *Timing and Sequential Controls – The Essential Basis for Effective Regional Planning: An Analysis for the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009 (1974) n.1.

¹¹ Freilich Legal Study at 67.

¹² Metropolitan Council, Discussion Statement on Metropolitan Development Policy 7 (Oct. 1973).

¹³ See, e.g., Letter from John Boland, Chairman of the Metropolitan Council, to James L. Young, HUD Assistant Secretary for Housing, on Metropolitan Council Application for Bonus Funds (July 6, 1976).

Section 8 allocation from HUD in both 1976 and 1979 – almost twice the allocation received by any other region. It also received further support when its Areawide Housing Opportunity Plan, which encompassed its housing program, was certified for extra funding from HUD in 1976.

B. The Council Promotes Housing Choice and Integration

In response to clear internal and external directives, the Council in the early 1970s used its state law powers to adopt and enforce a series of policies to improve racial and economic integration. It did so by ensuring that subsidized housing was produced in suburban communities.

The centerpiece of these was Policy 13 – later renamed Policy 39 – which, in the words of contemporaneous reports, “stated that in reviewing requests from a local community for state or federal grants that priority for such requests would be given based on the community’s housing performance.”¹⁴ This meant that “applications for parks, sewers, water, highway construction, open space, and criminal justice funds [were] prioritized according to not only the merits of the application itself, but also on the community’s plans and performance for providing housing for low and moderate income persons.”¹⁵

In addition, the Metropolitan Land Planning Act, which was passed in 1976, empowered the Council to create numerical housing allocations for communities within its jurisdiction. It could then review local comprehensive plans to ensure that they were in compliance with allocated goals. The Council was granted the authority to temporarily suspend plans that did not

¹⁴ Trudy McFall, *A Regional Housing Strategy: From Plans to Implementation* 8 (1975).

¹⁵ *Id.*

comply with its systems plans; these systems plans complemented and incorporated the housing allocations through the use of density goals and similar measures of housing performance.

These policies were remarkably successful at promoting fair housing: over the course of the 1970s the geographic distribution of subsidized housing in the Twin Cities changed dramatically. In 1970, 90 percent of Twin Cities subsidized housing was located in the central cities; by 1979, 40 percent of units were in suburban communities. In some of the intervening years, the proportion of new units built in the suburbs approached or exceeded 70 percent of the regional total. Likewise, while only 16 of the region's 189 municipalities contained any subsidized housing at all in 1970, that number had grown to 97 by the end of the decade. This represents a nearly eight-fold increase in the total number of units in the suburbs, from 1,878 in 1971 to 14,712 in 1979. Over 13,000 units were added in this period, with 9,400 of these units, or seventy percent, at the developing edge of the suburbs.¹⁶ An examination of the comprehensive plans of twenty-five sample communities shortly after the passage of the Metropolitan Land Planning Act found that over 7463 parcels of land, totaling 8590 acres, had been set aside for high density affordable housing.¹⁷ In short, through dedicated effort, the Metropolitan Council substantially and meaningfully opened many of the suburbs to lower income families.

Writing in 1975, the manager of the Council's housing program noted that "[t]he most pervasive characteristic of housing patterns in virtually all metropolitan areas is that of socioeconomic segregation."¹⁸ In light of this fact, "[t]he Council has been chiefly concerned

¹⁶ See Metropolitan Council, *Housing Opportunity in the Twin Cities: A Staff Background Report on the Local and Regional Response 1967-1978* (Oct. 1978) at 3 [hereinafter *Twin Cities Housing Opportunity*].

¹⁷ Goetz, Edward G., Karen Chapple and Barbara Lukermann, *The Minnesota Land Use Planning Act and the Promotion of Low- and Moderate-Income Housing in Suburbia*, 22 L. & INEQUALITY 31, 31-72 (2004).

¹⁸ Trudy McFall, *A Regional Housing Strategy: From Plans to Implementation* 1-2 (1975).

with locating housing in well-served suburban locations.”¹⁹ Council documents rigorously tracked progress towards altering the distribution of subsidized housing between the suburbs and central cities; for example, the table below, reproduced from a Council housing report, depicts the rapid suburbanization of subsidized units.

Subsidized Housing in the Twin Cities in the 1970s

| Year | Central Cities | | | Suburbs | |
|---------|---------------------|-----------|-------|-----------|-------|
| | Region New Units | New Units | Share | New Units | Share |
| 1971-72 | 4,139 | 2,668 | 64% | 1,471 | 36% |
| 1972-73 | 2,147 | 1,083 | 50% | 1,064 | 50% |
| 1973-74 | 917 | 504 | 55% | 413 | 45% |
| 1974-76 | 5,363 | 2,029 | 38% | 3,334 | 62% |
| 1977 | 4,657 | 1,255 | 27% | 3,402 | 73% |
| 1978 | 2,099 | 831 | 40% | 1,268 | 60% |
| 1979 | 2,329 | 724 | 31% | 1,605 | 69% |
| Totals | 21,651 | 9,094 | 42% | 12,557 | 58% |

Cumulative Totals of Subsidized Housing

(includes units provided before 1971)

| Year | Central Cities | | | Suburbs | |
|------------|-----------------------|-------------|-------|-------------|-------|
| | Region Total Units | Total Units | Share | Total Units | Share |
| July, 1971 | 18,736 | 16,858 | 90% | 1,878 | 10% |
| July, 1973 | 24,202 | 19,877 | 82% | 4,325 | 18% |
| July, 1974 | 25,013 | 20,414 | 82% | 4,599 | 18% |
| Dec., 1976 | 27,986 | 20,118 | 72% | 7,868 | 28% |
| Dec., 1977 | 31,851 | 21,060 | 66% | 10,791 | 34% |
| Dec., 1978 | 34,650 | 21,891 | 63% | 12,759 | 37% |
| Dec., 1979 | 37,268 | 22,556 | 61% | 14,712 | 39% |

Family Housing

| Year | Central Cities | | | Suburbs | |
|----------|-----------------------|-------------|-------|-------------|-------|
| | Region Total Units | Total Units | Share | Total Units | Share |
| pre-1975 | 11,957 | 8,367 | 70% | 3,590 | 30% |
| 1975-76 | 3,578 | 1,537 | 43% | 2,041 | 57% |
| 1977-79 | 2,022 | 10 | 0% | 2,012 | 100% |

Remarkably, documents from the period indicate that the Council confronted, overcame, and eventually transformed political resistance to integration in the suburbs. At the outset, suburban communities were skeptical of the Council’s housing policies – for instance, one staff

¹⁹ *Id.* at 4.

report describes initial reactions “of anger, hostility, and frustration” from suburbanites.²⁰ But the agency remained dedicated to the principle of providing housing choice and opportunity, noting in the same report that “the available evidence strongly suggests that minority populations would like a far broader opportunity for suburban and rural living than they presently have.”²¹ Moreover, the Council defended its authority to pursue that outcome, noting that its “review role [for funding] is an invaluable tool for implementing policy.”²²

Ultimately, the Council’s determination paid off, and a number of the suburbs accepted or even embraced the goals of suburban integration. For instance, a 1979 report on the region’s housing policy describes the extraordinary efforts of Edina, one of the region’s wealthiest suburbs, to comply with its housing requirements (efforts which were undermined by HUD itself):

The most extreme case we heard of was Edina’s valiant effort to use one of its last remaining parcels (on its boundary) for family subsidized housing. It used CDBG funds for land write-downs, held developers’ hands, got city council approval, and submitted the proposal (demand by the Metro Council’s allocation plan) to HUD, which turned down the project on the grounds of “impaction of family housing” although Edina, the most affluent suburb in the metropolis, had only one other subsidized family project, and the proposed density was only nine units per acre. The Edina planner fears . . . the city will be left out of compliance with the regional plan.²³

The same report describes many successful instances of cooperation with suburban communities to produce subsidized and lower-income housing.

²⁰ Metropolitan Council, *Housing Opportunity in the Twin Cities Area: A Staff Background Report on the Local and Regional Response 1967-1978* (1978).

²¹ *Id.*

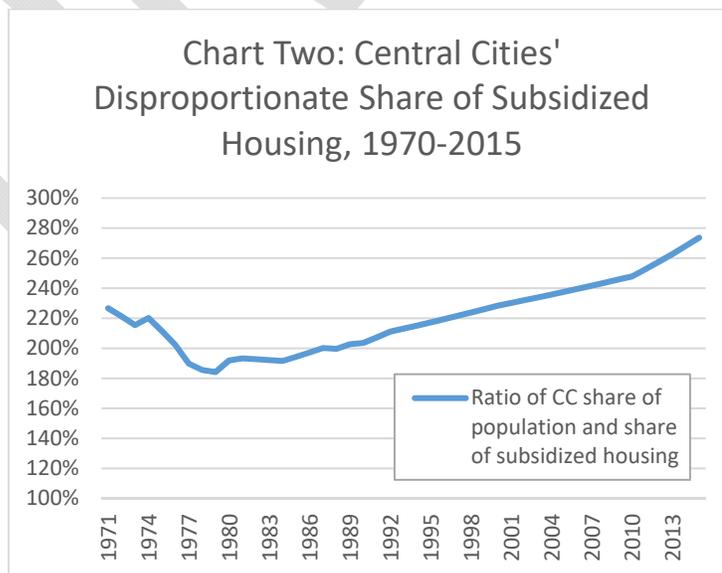
²² *Id.*

²³ Berkeley Planning Associates, *Assessment of the Impact of the Housing Opportunity Plan (AHOP) Program III-7* (Nov. 1, 1979).

C. Reversal

Today, as the result of a combination of political timidity and capitulation to special interests, the Council has unraveled virtually all of its previous progress towards housing integration.

After the 1970s, the Council's efforts to integrate subsidized and affordable housing into the suburbs began to stagnate. The suburban share of subsidized housing reached approximately 42 percent in the mid-1980s and has not significantly changed since. Meanwhile, as sprawl as progressed and the region has grown, the central cities' share of regional population has continually shrunk (see Chart One, below). As a result, the oversupply of subsidized housing in the central cities, as compared to their proportion of population, has worsened continually since 1980. Today, the mismatch between share of population and share of housing in the central cities is actually far worse than it was before the Council's integration efforts began in earnest in 1970 (see Chart Two, below).



The causes of this reversal are complex, but two factors have played a key role. First, political actors, particularly housing interests and central city governmental agencies, have battled to retain housing funding. Second, there have been marked policy changes at the Council itself, which has deemphasized the very housing policies it once strictly enforced.

Concern among central city political circles and development interests about the loss of funding is readily apparent in the documentary record. As early as 1975, the manager of the Council's housing program was reporting pushback arising out of worries over funding:

The major issue which has arisen out of around the allocation plan has been the number of units which have been allocated to the central cities of Minneapolis and St. Paul; the plan directs that they should receive 16 and 12 percent of the available funding. City officials have argued that this is inadequate to meet their needs, slows their urban renewal efforts, and inadequately provides for reallocation needs. The Council has, however, remained firm in its intention to carry out its plan to increase the supply of low income housing in suburban areas.

That center city resistance should be the major issues surrounding the plan was surprising to us, but it is certainly understandable. Large and sophisticated housing authorities exist in the cities. . . . They have further relied heavily on subsidized housing to turn over the land clear through urban renewal. Reduction of their program through redirection of subsidy funds causes considerable problems and adjustments.²⁴

Although this report was released before the passage of the Metropolitan Land Planning Act and subsequent creation of a numerical fair share plan, a 1979 report, commissioned by HUD to evaluate the region's areawide housing plan, makes clear that resistance continued and

²⁴ Trudy McFall, *A Regional Housing Strategy: From Plans to Implementation* 12 (1975).

stiffened over time, resulting in demands for a higher housing allocation from the central cities.

For instance, one section describes the political relationship between cities and suburbs:

[T]he very success of the regional housing allocation plan has generated some discord among the multiple institutions dedicated to housing. . . . In the plan's early stages, the central cities – with 90% of the region's assisted housing – were eager for the suburbs to take on some of the burden. Now they feel dispersion may have gone too far, that central cities need more of the scarce housing resources.²⁵

The report elaborated further on the pressures on the Council to abandon its integration efforts:

The pressures to relax the plans aggressive fair share distribution comes from several sources. Most significantly, perhaps, the HUD area office At the same time the central cities of Minneapolis and St. Paul are retreating from their support of the [areawide plan]. St. Paul, the more economically depressed, had never been as an enthusiastic [plan] supporter as its Twin City, and is now seeing considerable redevelopment promoted by an aggressive director of a highly centralized organization directly under the mayor. In this situation, St. Paul understandably seeks a larger share of subsidized housing, citing arguments such as relocation needs, gentrification, and that the [areawide plan's] "white flight" assumption is akin to generals fighting the last war. . . . [B]oth central cities are looking for larger percentage shares of subsidized housing in any revisions of the regional allocation plan.²⁶

Central city resistance did not only take the form of lobbying and political pressure. The cities also created policy mechanisms to recapture housing money. For instance, in 1980, shortly after the above report was written, the cities jointly created the Family Housing Fund, a "quasi-public" entity designed to help generate and allocate funding for central city housing projects. In its first decade of existence, the Family Housing Fund reported that it had created approximately 10,500 units of affordable housing in the central cities. Family Housing Fund still exists today,

²⁵ Berkeley Planning Associates, *Assessment of the Impact of the Housing Opportunity Plan (AHOP) Program* III-11 (Nov. 1, 1979).

²⁶ *Id.* at III-4, III-5.

helping to produce hundreds of housing units annually, which are dramatically more likely to be located in segregated census tracts than regional subsidized housing as a whole. It has, in the interim, spun off a number of subordinate organizations, such as the Twin Cities Community Land Bank and Twin Cities Housing Development Corporation, which have also at times have been described as quasi-public but now operate more or less independently. And while it is impossible to quantitatively demonstrate the effect these efforts have had on Council housing policy, the Fund and Council are two of the leading partners on many local development coalitions, included the ostensibly public Corridors of Opportunity program (for development along urban transit corridors) and the ostensibly-private Central Corridor Funders' Collaborative (for development along the Green Line transit corridor through Minneapolis and Saint Paul).

The result of these pressures has been a marked change in the Council's priorities, and with it, a failure to enforce many of its own previous policies. The waning of political will to maintain the Council's housing policies is intrinsically linked to the growth of segregation in the region, as noted in one 2004 study:

Two important changes in the socio-political environment of the Twin Cities region also undermined the state's commitment to fair share housing during the second wave. The first change was a reduction in gubernatorial support for an interventionist Met Council. Democrat Rudy Perpich and his successor, Republican Arne Carlson, both expressed little interest in metropolitan planning, especially in the area of low-mod housing, and neither advanced policies to strengthen Met Council. The second change was a demographic shift in the region. At the same as more people of color moved to the area, greater concentrations of poverty and attendant social problems emerged in core neighborhoods. The social and economic homogeneity that had been the foundation of almost two decades of regional problem-solving began to disappear. With it went the language of regional commitment to low-cost housing needs under the fair share method.²⁷

²⁷ Goetz, Edward G., Karen Chapple and Barbara Lukermann, *The Minnesota Land Use Planning Act and the Promotion of Low- and Moderate-Income Housing in Suburbia*, 22 L. & INEQUALITY 31, 46 (2004).

The same study analyzed the interaction between Council policies and the comprehensive plans of twenty-five communities. It found that, after the Council began aggressively enforcing its need allocations in the late 70s, “[t]he first round of plans addressed both the local and regional needs by referencing the fair share allocation established by Met Council.”²⁸ The influence of the Council’s policies are clear in the plans themselves, with “[s]ome plans even indicat[ing] that the regional allocation system was the best way to determine local needs.”²⁹ These plans “routinely acknowledge the local regulatory options to overcoming barriers to low-cost housing development.”³⁰ Once again, suburban cooperation is a key theme: “the Apple Valley, Inver Grove Heights, and Eagan plans each contain language stating that housing needs are best established on a regional basis.”³¹

But after the Council’s commitment to integration subsided, cities felt free to ignore the fair share system. According to the study’s authors, “[n]ot a single plan submitted later than 1990 . . . identified the local share of regional low [and moderate income] housing needs,” and “[w]ith the exception of two communities, none of the later plans identified existing or projected low-mod housing needs at all.”³² Later plans “are generally bereft of specific statements outlining regulatory steps”³³; for instance, an Inver Grove Height plan only states that “[t]o the degree possible, the City will work to ensure that local actions do not unduly increase the cost of raw

²⁸ *Id.* at 48.

²⁹ *Id.* at 48-49.

³⁰ *Id.* at 55.

³¹ *Id.* at 49.

³² *Id.* at 48.

³³ *Id.* at 55.

land.”³⁴ The regionally-oriented language also vanished from the suburban plans, replaced by defiant assertions of local control:

[I]n its place [was] language asserting each community’s role in establishing housing goals. The 1999 plan for Apple Valley, for example, states that “[t]he City is in the best position to determine the most responsible option for meeting the future needs of Apple Valley rather than the Metropolitan Council, especially as it relates to residential densities.”³⁵

The 2004 study determined that these changes reflected a broader retreat from any consideration whatsoever of low-income housing in city planning:

Five [cities] indicated that they do not calculate low-mod housing need in any way. One city planner said her community does not calculate need because it “is a factor of the marketplace and changes periodically and regularly with the market.” In another community, the planner indicated, somewhat paradoxically, that they do not calculate need because it is zero.³⁶

The Council’s changing priorities is reflected in its own reports. As late as 1996, its Regional Blueprint discusses suburban housing integration, even noting the lack of progress over the previous decade.³⁷ But by 2004, the Blueprint omitted any discussion of the subject at all, instead only stating that “[t]he region will, of course, need much more housing in the next 30 years,” and emphasizing the importance of “public-private partnerships” in expanding housing supply.³⁸

In part, the passage of the Livable Communities Act (or LCA), a 1996 law supplementing the Council’s housing authority with a new set of voluntary housing benchmarks and incentive funding, provided a useful rationale for this shift. Although the LCA in no way altered or reduced the Council’s previously exercised powers, and was in fact intended to jumpstart the

³⁴ *Id.* at 57.

³⁵ *Id.* at 49.

³⁶ *Id.* at 50.

³⁷ Metropolitan Council, *Regional Blueprint* 59 (1996).

³⁸ Metropolitan Council, *Regional Development Framework* 13 (2004).

integrative processes that had been stalled since the previous decade, the law was quickly used to justify the Council's changing priorities. Suburban leaders argued, incorrectly, that the Council's previous legal authority "was superseded by the LCA."³⁹ And once again, the Council's failure to enforce its policies allowed exclusionary practices to take root:

Even though LCA benchmarks are low, many communities negotiate with Met Council to lower their goals even further. The 1998 plan for Lino Lakes, for example, provides no calculations of existing or projected need for low-mod housing, nor the City's share of the regional need for such housing. The plan references LCA goals, and notes that the goals for homeownership are to slightly reduce the rate at which affordable housing is produced in the City, and to slightly increase the rate at which affordable rental housing is developed. Even with the increase in affordable rental housing, Lino Lakes has adopted a goal that is ten to twenty-three percentage points below the benchmark provided to them by Met Council. . . Oakdale, Shoreview, and Prior Lake have also adopted goals below the provided benchmarks.⁴⁰

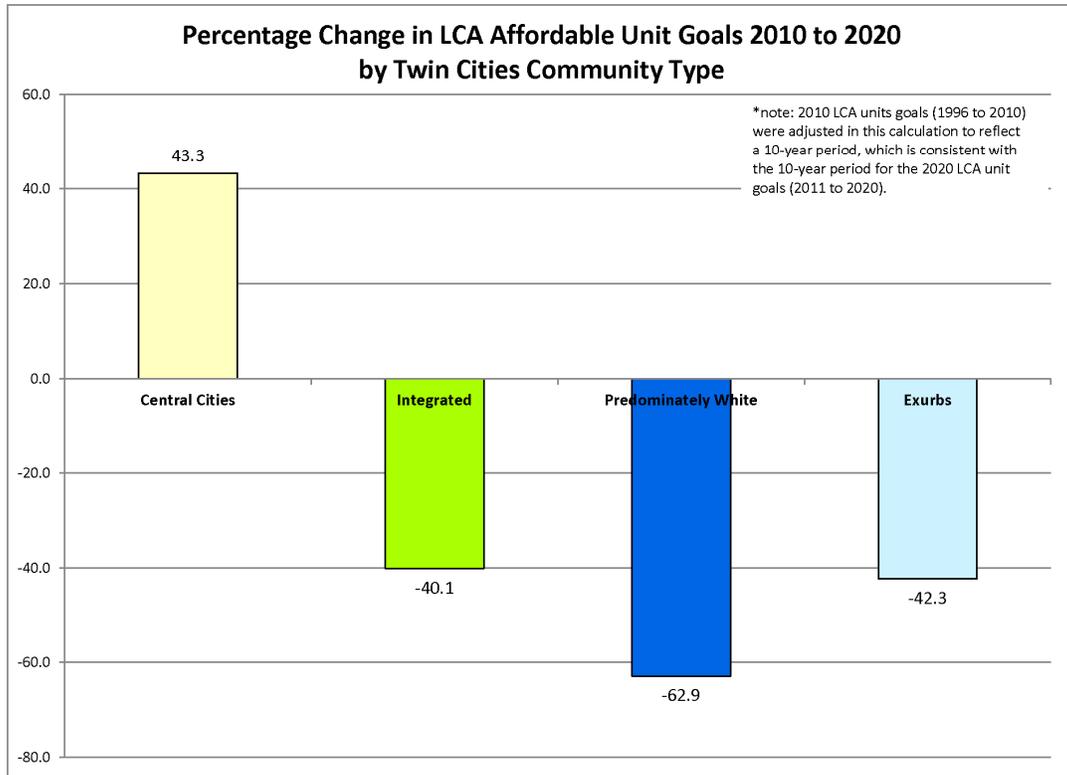
The Council today exhibits the same laxity about housing benchmarks. In the most recent set of LCA goals, nearly every subset of communities was permitted to adopt a benchmark far below their allocated regional need – except the central cities, which were explicitly required to adopt a benchmark that was 100 percent of their allocated need. The central cities were the only communities whose LCA benchmarks actually increased in relation to the previous round (see Table Two, below).

The lopsided LCA benchmarks have resulted in even-more-lopsided funding outcomes. Of the more than 14,000 housing units subsidized by LCA funding during the program's history, 49.8 percent have been located in the central cities of Minneapolis and Saint Paul, which contain only 24.7 percent of the region's housing and a majority of its concentrated poverty and

³⁹ Goetz, *supra* at 51.

⁴⁰ *Id.* at 54.

segregation. Most of these allocations occurred under the previous set of benchmarks. But as Table Two demonstrates, when new benchmarks were negotiated, the Council worked not to arrest this trend, but instead to accelerate it, by giving the central cities higher goals.



The creation of the Low-Income Housing Tax Credit also created an opportunity to placate housing interests by redirecting resources to the central cities. When the Minnesota legislature implemented the state’s LIHTC program, it created a series of “suballocators” – local governmental entities with allocations of tax credits that they could distribute to housing projects of their own choice. Rather than determining the size of these discretionary allocations in statute,

the legislature created an overall “metropolitan pool.” It granted the Council the authority to divvy up this pool between metropolitan suballocators:

By October 1, 1990, the Metropolitan Council, in consultation with [MHFA] and representatives of local government and housing and redevelopment authorities, shall develop and submit to [MHFA] a plan for allocating tax credits in 1991 and thereafter in the metropolitan area, based on regional housing needs and priorities.⁴¹

The allocative system produced by the Council granted 35.6 percent of metropolitan tax credits to the Minneapolis and Saint Paul suballocators, far greater than cities’ share of regional population. This share acts as an effective *minimum* allocation, but the cities are also eligible for additional credits, allocated by the state housing finance agency. For the previous decade, the cities have received an average of 45 percent of the regional allocation annually, and in some years, more than half the regional allocation.

D. Council Authority in Housing

Faced with these ongoing failures, the Council has at times found it politically convenient to reduce its own agency over housing decisions, thus shielding it from criticism of excessively active or passive policymaking. It has argued, and continues to argue, that its contemporary activities are both required by law, and simultaneously, represent the full extent of its statutory authority. The political merits of this strategy aside, it cannot be adopted by the Council to avoid its legal fair housing obligations. In reality, the scope and nature of the Council’s policymaking has evolved significantly over time, mostly as the result of internal decisions rather than any modification of law. Although the Council is permitted a degree of discretion in making these decisions, its discretion is limited by HUD civil rights law, the same as any other state body which relies on federal funding sources. The Council can no more redefine its own authority to

⁴¹ Minn. Stat. § 462A.222 subd. 4(a).

avoid these obligations than a city could avoid liability for discriminatory zoning by unilaterally disclaiming its own zoning powers.

In attempting to limit its own authority, the Council relies heavily on the claim that its previous, effective plan, which operated from 1971 to 1986, depended on the OMB Circular A-95 review power⁴² over federal grants, which was rescinded by President Reagan in 1982.⁴³ When A-95 was rescinded, the Council argues, its authority to implement an effective regional housing plan ended. The Council also asserts that it never claimed power over exclusionary zoning, nor that it could suspend a local comprehensive plan based on the failure of its housing element. However, the law and the historical record – bolstered by the Council’s own planning documents and reports – do not support this narrative.

To the contrary, the Metropolitan Council relied on its *state* statutory powers to enforce its regional fair share housing program, review state and federal funding requests, encourage housing choice and integration, and discourage exclusionary zoning. No federal rule could or did expand these powers, and they were never repealed. All remain in place, and the Council’s state law authority is arguably stronger today than it has been at any point in the past. To the extent that the Council has allowed the resegregation of Twin Cities housing, it is because it has unilaterally withdrawn from the field.

1. A-95 Review

⁴² See Executive Order, Delegation of Authority Under Intergovernmental Cooperation Act, November 8, 1968, 33 Fed.Reg. 16487-01; 38 Fed.Reg. 32874-32881 (November 13, 1973) Federal and Federally Assisted Programs and Projects (A-95 Rules).

⁴³ See Executive Order 12372, Intergovernmental Review of Federal Programs, July 12, 1982, 47 Fed.Reg. 30959; 3 C.F.R. 1982 comp. p. 197; Executive Order 12416 (April 8, 1983), 48 Fed.Reg. 15587; 3 C.F.R. 1983 Comp. p. 186).

In the 1970s and early 1980s, as a matter of convenience, the Metropolitan Council conducted a large share of its housing allocation enforcement through the auspices of the federal A-95 process. A-95 was subsequently repealed, and over time this repeal has given rise to the assumption that the Council can no longer carry out reviews as it had in the past. This is incorrect, however, and relies on an inaccurate conception of what A-95 was and how it operated.

The A-95 Circular, issued in 1969 by the federal Office of Management and Budget (OMB), created a process through which state and regional “clearinghouses” would review state requests for funds from certain federal programs, including certain housing programs. This system was instituted to encourage coordination between local, state, metropolitan, and federal agencies, and theoretically prevent disparate federal funding sources from undermining local goals. *A-95, however, was a purely advisory process, seeking to create coordination where institutional inertia or political pressures had prevented it previously.*

Although the Council’s reviews of local applications for federal and state housing funding were at times referred to as its use of “A-95 powers,” this phrase is somewhat misleading. A-95 did not grant state or federal agencies any additional statutory authority. Instead, A-95 was explicitly and solely conceived as a vehicle for interdepartmental and intergovernmental coordination. A summary of the circular, published by OMB itself in July of 1976, emphasizes its collaborative objectives:

It is the aim of OMB to be very clear about the objectives of A-95 . . . The requirements of A-95 apply almost entirely to Federal agencies (and under their rules to applicants for Federal assistance). That is, A-95 sets forth procedures under which Federal agencies and applicants for Federal assistance must give State and local governments through state and areawide clearinghouses, an *opportunity* to

assess the relationship of their proposals to State areawide, and local plans and programs.⁴⁴

But the same OMB report makes clear that A-95 places few binding obligations on state governments or state bodies:

A-95 puts few constraints on clearinghouses in the way they manage the review process. They are limited as to the time allowed for reviews, and they are obligated to identify jurisdictions and agencies whose plans or programs might be affected by a proposed project and give *them* a chance to participate in the review process. However, A-95 does not prescribe:

- The existence of clearinghouses as such;
- The organization of clearinghouses;
- The procedures or techniques by which clearinghouses manage the review process;
- Whether or not clearinghouses even carry out reviews for particular projects or types of projects under programs covered by the Circular.

In short, A-95 is designed to provide an opportunity for . . . State and local officials, through clearinghouses, to influence Federal decisions on proposed projects that may affect their own plans and programs.⁴⁵

In other words, under A-95, states were permitted to design their own clearinghouses, structured and operated however was most convenient for the state in question. The Council, already empowered by state law to review state and federal funding applications, chose to conduct these reviews as part of the flexible A-95 requirements. Although this approach was logical at the time, it has also created some confusion, particularly for modern observers who, unfamiliar with the now-defunct A-95, have sometimes assumed that it was the source of the review powers in question.

⁴⁴ OFFICE OF MANAGEMENT AND BUDGET, A-95: WHAT IT IS – HOW IT WORKS 4-5 (1976).

⁴⁵ *Id.* at 5.

With respect to federal grant reviews, the Council's influence under A-95 was limited, because agencies were not required to honor its recommendations (emphasis in original): "*It should be stressed, however, that clearinghouse recommendations on Federal or federally assisted development proposals are advisory only.*"⁴⁶ Contemporaneous reports from the Twin Cities highlight this point by demonstrating that the Council's A-95 recommendations were frequently ignored, such as in August of 1975, when "the Council reviewed 21 Section 8 New Construction projects, prioritizing the projects which should be funded in accordance with metropolitan plans," and rejected a number as being in conflict with Council plans. Nonetheless, "50 percent of the projects HUD funded were in conflict with area-wide plans."⁴⁷

In short, A-95 alone could not have expanded the Council's review authority because A-95 did not expand *anybody's* authority. Instead, it *restricted* authority – primarily, that of federal agencies – by imposing a handful of loose requirements related to communication and notification. A-95, however, did not bind any level of government to honor the decisions of any other, and it certainly did not require states to participate in a substantial fashion. In colloquial terms, A-95 created a negotiating table and required federal agencies to sit at it. It did not force states to pull up a chair, nor did it force either side to listen to what the other had to say.

Of particular note is the fact that A-95 was *exclusively* targeted at a limited set of federal funding sources. In other words, while the highly malleable A-95 process provided an opportune vehicle for the review and prioritization of state funding sources, A-95 itself could not create the authority to review and prioritize state funding. Any power to do so was entirely derived from

⁴⁶ *Id.* at 5.

⁴⁷ Trudy McFall, *A Regional Housing Strategy: From Plans to Implementation* 16 (1975).

state law. Yet the Council unquestionably prioritized state funding as a component of its review process.

The Minnesota state code makes clear that no special authority is attached to the A-95 review process. One provision delineating the Council's review powers, called "Council Review; Applications for Federal and State Aid" establishes a number of conditions under which the Council may review grant and loan applications by local governments.⁴⁸ One such condition is in instances where "review by a regional agency is required by federal law."⁴⁹ However, this is preceded by a requirement that the Council also review applications for grants and loans that are "submitted in connection with proposed matters of metropolitan significance."⁵⁰ Highlighting the fact this provision was meant to extend far beyond A-95, the law also instructs the Council to review all applications for *state* grants and loans "submitted in connection with proposed matters of metropolitan significance," a provision that could have no bearing on a federal review process.⁵¹

2. *State Statutory Powers*

Sources from the period in question frequently do not carefully distinguish between the Metropolitan Council's state law powers and the A-95 review process, because at the time such a distinction was unnecessary. After all, until 1982, A-95 was the venue in which many of those state powers were exercised. However, Minnesota law, as well as a number of reports written in the 1970s, including writings by Council officials produced at the Council's behest, clearly indicate that the source of the agency's powers lay in its state law grant of authority, not any

⁴⁸ Minn. Stat. § 473.171 (2015).

⁴⁹ Minn. Stat. § 473.171 (a) (2015).

⁵⁰ *Id.*

⁵¹ Minn. Stat. § 473.171 (b) (2015).

federal program. Moreover, several years after A-95 was repealed, the Council released a new Housing Policy Plan, which clearly indicated that the agency intended to retain the review powers it had previously exercised.

The Council adopted its first Housing Policy Plan in 1971. State law gave the Council extensive authority to promulgate a metropolitan development guide which included:

“a compilation of policy statements, goals, standards, programs, and maps prescribing guides for the orderly and economic development, public and private metropolitan area. The comprehensive development guide shall recognize and encompass physical, social, or economic needs of the metropolitan area and those future developments which will have an impact on the entire area including but not limited to such matters as land use, parks and open space land needs, the necessity for in location of airports, highways, transit facilities, public hospitals, libraries, schools and other public buildings.”⁵²

To enforce the aims of the Guide, the Council was provided with an extremely broad grant of “all powers which shall be necessary or convenient to enable it to perform and carry out the duties and responsibilities now existing or which hereafter may be imposed upon it by law.”⁵³ To specifically enforce its housing plan, the Council was specifically given has the power to review all agency plans, including but not limited to the state housing finance agency, and suspend them indefinitely if they were inconsistent with the development guide.⁵⁴ Finally, as previously mentioned, the Council was given ability to review and comment on local government’s comprehensive plans and any matter proposed in the local government that it deemed of regional significance.⁵⁵

⁵² Minn. Stat. § 473B.06, subd. 5 (1971)

⁵³ Minn. Stat. § 473B.06 subd. 1.

⁵⁴ Minn. Stat. § 4373B.06B, subd. 6 (1971)

⁵⁵ Minn. Stat. § 473B.06B, subd. 7 (1971)

Then, in 1974, the Council received new authority to develop “systems” plan for each independent regional commission. At that time there were independent regional sewer agency, transit, a parks and open space commissions, and a regional airport authority. The Council received authority to approve their plans and to promulgate system plans that governed their operations. The statute also required that these agency systems plan must conform to all the policy plans of the Council, which included the housing policy plan, which by 1973 was in its second version.⁵⁶

Yet another new law passed in 1974 gave the power to the Met Council to suspend for up to a year any matter than it deemed of “metropolitan significance.” The rules developed under this title declared that a matter was of metropolitan significance if the action of a local government “created a substantial effect on an existing or planned land use within a local government other than the situs government.”⁵⁷ If this were not enough, the Housing Policy Plans were to be fully incorporated into all the systems plans and thus were of “metropolitan significance” under another section on the “metropolitan significance” rules.⁵⁸

Finally, in 1976, the Metropolitan Land Planning Act created the regional fair share allocative system, instructing local governments to plan for their fair share of low and moderate income housing, and empowering the Council to create, coordinate, and enforce these allocations.

Trudy P. McFall, the principal official in charge of implementing and leading the Council’s fair share plan throughout the 1970s, and later HUD’s National Director of Planning

⁵⁶ Minn. Stat. § 473B.06, subd. 5a (1974)

⁵⁷ Minnesota Code of Agency Rules, Rules of the Metropolitan Council, MC2B.

⁵⁸ Minnesota Code of Agency Rules, Rules of the Metropolitan Council, MC2A.

and the Director of Maryland's Housing Finance Agency, wrote at length about Council authority during her tenure as Housing Program Manager.⁵⁹ McFall's reports establish that state law provides all the authority the Council needed to develop an effective program to reduce racial and economic segregation.⁶⁰ McFall's reports characterize A-95 as only one element of a web of review powers and agency relationships which empower the Council to direct regional housing policy:

The Council has a number of review roles, including reviews of both individual housing projects and reviews of community housing plans. We have review relationships established with both the federal and state agencies funding housing developments in the area. We are also required by state law to review community comprehensive plans which provides us with the opportunity to impact on the long range planning for housing in the region. The requirement for A-95 review of housing assistance plans provides the *further* opportunity for input into the short range housing planning of communities in the area.⁶¹

Elsewhere in the same report, McFall is blunt about A-95 review, declaring it "meaningless without the support of the HUD office." A-95, in other words, is depicted as functionally equivalent to the bilateral review relationships the Council had voluntarily established with other agencies, not an independent grant of any authority.

Outlining the council's real power over housing, McFall wrote:

The Council has ... review relationships with the state of Minnesota. The Council has a cooperative agreement with the Minnesota Housing Finance agency. ***This agreement provides that the Council will review all multifamily housing projects financed by the state agency, including subsidized market rate housing.*** This state review relationship is critical particularly now that finance agencies are receiving direct allocations of Section 8 funds. ***To carry out the council's allocation plan, it***

⁵⁹ On official documents, she is listed as the Met Council's Director of the Housing Division or as Housing Program Manager); see also http://en.wikipedia.org/wiki/Trudy_McFall

⁶⁰ See Trudy Parisa McFall, *A Regional Housing Strategy: From Plans to Implementation*, American Institute of Planners (1975); Trudy Parisa McFall, *Bring Low-Income Housing to the Suburbs: The Twin Cities Experience* (Metropolitan Council Publication 1975); see also David Listokin, *Fair Share Housing Allocation* (1976) pp. 107-112.

⁶¹ Trudy McFall, *A Regional Housing Strategy: From Plans to Implementation* 14 (1975).

is necessary to review both HUD and state projects to ensure that funding is distributed as recommended by the Council.

....

The Council also makes review recommendations on the market rate housing financed by the state agency. With the adoption of the revised allocation plan, which will include a plan for the distribution of those funds, this review role should be further strengthened. *As part of our cooperation agreement the Council and the state have agreed to participate together in preparing plans for the allocation of housing funds.*⁶²

Elsewhere she discussed the ability of the Council to review and suspend comprehensive plans:

State law requires the Council review all community and County comprehensive plans. The Council is authorized to suspend the adoption of these plans for a period of time that they do not conform to area-wide plans and policies. The review of the housing components of the comprehensive plans provides an important opportunity to implement regional housing policies more broadly at the community level. Unlike the project nature of the federal and state housing reviews, the comprehensive plan review provides the basis for input into long-range housing planning of the communities and counties.⁶³

Notably, McFall's report was written *prior* to the passage of the 1976 Metropolitan Land Planning Act, which imposes the requirement that communities provide their share of low- and moderate-income housing, and granted the Council even more sweeping authority over local comprehensive plans.

Under McFall's guidance, the Council reviewed state agency plans and temporarily suspended local comprehensive plans that lacked an adequate housing component. After gaining

⁶² *Id.* at 16-17.

⁶³ *Id.* at 17.

the power to address “matters of metropolitan significance” in 1975, the Council also reviewed and prioritized local requests for state and federal funding. This approach guided Council policy for years.

An independent review commissioned by HUD from the Berkeley Planning Associates, conducted in 1979 to evaluate the Council’s housing plan after the passage of the MLPA, also emphasized that the majority of the Council’s powers were derived from state law. Although it describes a review process conducted under the auspices of A-95, the Berkeley report again makes clear that A-95 was a weak tool that served primarily as a vehicle for consolidating the Council’s various powers. Indeed, the report describes the Council wielding its state law powers to resist federal and local pressure to concentrate housing in the central cities, depicting friction between the area HUD office and central cities, on one hand, and the Council, on the other, over the allocation of housing resources. According to the report, HUD and the cities “would prefer an [Area Housing Opportunity Plan] more generous to central cities,” as a consequence of “vocal neighborhoods’ insistent pressures.”⁶⁴ But it continued: “Perhaps even more forceful than HUD’s and the central cities’ demands in creating pressure for revisions to the fair-share plan is the Met Council’s own implementation vehicle, *the state mandatory land planning act* . . . The Metro Council is to review the conformity of local units’ plan with the Act and with its own Housing Guide Chapter.”⁶⁵

The Berkeley report described the housing allocation plan as the primary force between regional housing policy, noting that “recognition of the regional allocation plans’ very real

⁶⁴ Berkeley Planning Associates, *Assessment of the Impact of the Housing Opportunity Plan (AHOP) Program III-7* (Nov. 1, 1979), III-7.

⁶⁵ *Id.*

success in redistributing housing from central cities to suburbs, in forcing suburbs to provide assisted housing, and in constraining HUD is making every governmental level take the plan's revision very seriously."⁶⁶

None of the authority described in these reports has been removed; the Council's ability to influence regional housing development patterns remains unchanged. The only significant change repeal since this period was that of A-95 in 1982. However, the Council's own subsequent actions make clear that it did not consider A-95 instrumental to its own authority, most significantly in its 1985 Housing Policy Plan.⁶⁷ Policy 39, in the 1985 plan, was a direct continuation of Policy 39 in the previous plan, which had instructed the Council to review local applications for grant aid in accordance to those communities' performance in providing low and moderate income housing. The provision is worth reproducing in full:

Policy 39

In reviewing applications for funds, the Metropolitan Council will recommend priority in funding based on the local government's current provision of housing opportunities for people of low and moderate incomes and its plans and programs to provide such housing opportunities in the future.

Many communities have demonstrated a commitment to expanding their supply of lower and modest cost housing they take justifiable pride in their efforts to provide housing for their citizens and to help solve regional housing problems. To encourage and support such local efforts, the Council uses its review authority to recommend funding priorities for communities based on their housing performance. The priorities reward communities that have provided a full range of housing opportunities. They also help compensate for additional costs for services that might be incurred by subsidized lower cost units.

⁶⁶ *Id.*

⁶⁷ Metropolitan Council, *Housing Development Guide* (1985).

This policy applies to all local applications for state and federal funding these funds include community development block grants, transportation, parks and open space and aging grants among others.⁶⁸

Moreover, the Council, in its preface to Policy 39, acknowledged that its review policies were conducted against a changing backdrop of federal law, and explicitly noted that its review authority was robust against to survive any such changes:

The Council reviews a variety of development proposals and community plans. Uses reviews to help implement the goal of a better distribution of housing types and costs throughout the area. . . . ***The guidelines are flexible enough to be adapted to changes in state and federal legal requirements and programs*** . . . They are fairly complex in order to address the many interrelated housing policy issues in this region. Included are: housing distribution response and lifecycle needs, and accessibility to services, preservation of existing housing stock, strategy by Council development framework policy area, concentration of subsidized housing, environmental impacts, and community and use of community development block Grant that funds and tax-exempt mortgage revenue bonds.⁶⁹

The 1985 plan, with its strong review provision, remained in place until sometime in the late 1990s, when the Council claimed that it was repealed through implication.

3. *Recent Developments in State Law*

Although the historical record should make clear that the Council's powers are not as narrowly circumscribed as it claims, the agency has repeatedly put forward a handful of specific arguments in recent years about the limitations to its authority over housing.

First, it has claimed that housing is not a "systems plan," and as such, it cannot take strong measures to conform its housing policies with local comprehensive plans, such as

⁶⁸ *Id.* at 45.

⁶⁹ *Id.* at 44.

suspending those plans. Historically, the Council has less carefully distinguished between its housing plan and systems plans, reasonably understanding these elements of regional policy to be deeply interrelated. Its Metropolitan Development Guides prior to the 1990s include Housing Development Guides that are indistinguishable from its development guides for sewers, parks, airports, and other metropolitan systems.

However, even today, the Council's systems plans embed housing elements. Unfortunately, this is only done in a fashion that would tend to *increase* affordable housing construction in the central cities and inner-ring suburbs, reducing housing choice and perpetuating segregation. For instance, its Transportation Policy Plan require comprehensive plans to increase housing density and “[c]reate and preserve a mix of housing affordability” in transitway station areas and along high-frequency bus networks.⁷⁰ These networks are almost solely located in the central cities and inner suburbs, and are heavily correlated with segregated and impoverished neighborhoods. (See Map One, below.) In other words, in its present arrangement, the Council could indeed suspend a local comprehensive plan for its housing elements – it could suspend the plan because those housing elements were not segregative *enough*.

The other frequently-used rationale for the Council's limited housing authority is *Alliance for Metropolitan Stability v. Metropolitan Council*, a case decided in 2003 in the Minnesota Court of Appeals.⁷¹ The *Alliance* case simply held that there is no private right of action to enforce the Metropolitan Land Planning Act. In dicta, the case discussed the extent of the Council's discretion in conducting housing policy *under state law*. This case, however, has

⁷⁰ Metropolitan Council, *Transportation Policy Plan 151* (2015).

⁷¹ *Alliance for Metropolitan Stability v. Metropolitan Council*, 671 N.W.2d 905 (Minn. Ct. App. 2003).

no bearing whatsoever on the Council’s federal civil rights obligations. Frequently, what is discretionary under state law – for instance, exclusionary zoning – becomes impermissible when an entity accepts federal funding and becomes bound by HUD rules and the Fair Housing Act.

In fact, at virtually no point has the Council attempted to understand or frame its duties in the context of the Fair Housing Act, the duty to not perpetuate segregation, or the duty to affirmatively further fair housing. The agency’s most recent Housing Policy Plan addresses the issue primarily by requiring other entities to maintain (undetermined and unspecified) fair housing policies, pledging to participate in regional collaboration, and “recognizing” local efforts. The Council claims that, as it receives no HOME or CDBG funding, it is not required to maintain an Analysis of Impediments, but pledges to participate in the drafting of the regional AI, a deeply insufficient document produced earlier in 2015 by a consortium of cities and counties.⁷² (Notably, the Council’s justification for not producing an AI cannot be correct, because it does receive HOPWA funding.) An earlier draft of the present policy plan also failed to integrate fair housing into most of its operative provisions, but also disclaimed the Council’s role in affirmatively furthering fair housing: “The Council and the Council’s Housing Policy Plan have a role to play in the larger regional fair housing conversation but lack the authority to tackle this issue alone.”⁷³ Although this language has been excised, this, for all intents and purposes, appears to still be the Council’s position today.

E. Conclusion

⁷² Metropolitan Council, *Housing Policy Plan 51* (2014); see also Fair Housing Implementation Council, *Analysis of Impediments to Fair Housing Choice: Twin Cities Region* (2015).

⁷³ Metropolitan Council, *Draft Housing Policy Plan 69* (2014).

At one time, in order to promote regional stability and satisfy state and federal civil rights requirements, the Metropolitan Council operated the nation's most effective housing integration program. This program was designed and operated at the behest of the Minnesota legislature, and was so promising that it was rewarded with several major federal funding grants.

But such rapid changes generated unexpected political pressures. These did not originate from the suburbs themselves, which quickly discovered that providing a fair share of housing was not unduly onerous. Instead, the main source of resistance was the central cities and housing industry, which felt that the new integrative approach threatened their financial interests in housing production. Faced with this pressure but with no other cause, the Council reversed course. Progress towards integration collapsed, and today the region is more segregated than at any previous point. Communities which previously acquiesced in a regional fair share system now exclude affordable construction, creating concentrations of poverty in the region's central cities and inner-ring suburbs. The state does virtually nothing to prevent this from occurring.

As the historical record demonstrates, however, the Council's ability to adopt policies that promote fair housing survives unchanged. In order to satisfy its federal civil rights obligations to affirmatively further fair housing and avoid perpetuating segregation, the Council cannot without cause abandon its strong and effective earlier measures to integrate affordable housing across the region; it must retain, and where necessary, readopt those measures.

Lawsuits on Schools and Housing

[unfinished]