

# ENVIRONMENTAL GENTRIFICATION

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*Gentrification is a term often used, much maligned, and difficult to define. A few general principles can nonetheless be distilled regarding the concept. First, gentrification is spurred by rising desirability of an area for housing or commercial purposes. Second, this rising desirability, following basic supply-and-demand principles, leads to higher property values and rents in an uncontrolled market. Third, gentrification leads to a shift in the demographics of a neighborhood. This shift can change not only the socioeconomic and racial composition of the area but also the community's character, as residential and commercial options begin to reflect the preferences of the new arrivals to the neighborhood. Much has been written and discussed about the nature of gentrification and its impacts on communities. Less has appeared in the legal literature focusing on one specific catalyst for gentrification—improvements to the environment.*

*Environmental gentrification is a term used by social scientists to refer to the process by which environmental cleanups, or other improvements to environmental health, spur the cycle of gentrification. Where land or waterways have been contaminated, cleanup of those resources often leads to renewed interest in the surrounding areas by developers and more affluent tenants and homebuyers. This is particularly the case in urban areas where the quantity of usable land is limited. In such areas, environmental contamination may have long contributed to depressing property values below what the market would otherwise support; removal of that contamina-*

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*tion may make these neighborhoods instant targets for new residential entrants and new development. In the same way, recovery of natural resources and open land may make the surrounding communities immediately desirable. When that happens, communities that have long been subject to the ill effects of environmental contamination may gain relief only to face pressures on other fronts, including rising rents and property taxes.*

*While environmental law has much to say about facilitating environmental improvements, it has had few entry points to date for addressing the impacts of environmental gentrification. These impacts include reduced affordability, displacement, and corresponding loss of community, all of which may undermine the ability of environmental laws to achieve environmental justice goals. Moreover, these impacts also have the potential to reverse efforts toward urban sustainability. Thus, environmental law may work at cross-purposes with itself: while traditional environmental laws encourage environmental cleanups, their failure to respond to the broader issue of affordable housing means that urban areas may be far from sustainable in a larger sense. This Article examines the divide that often exists between environmental law and affordable housing and explains why the problem of environmental gentrification is one for environmental law to solve. Finally, it suggests some legal tools to consider when confronting this phenomenon.*

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## INTRODUCTION

For observers of the urban landscape, the concept of gentrification<sup>1</sup> is nothing new. The exact parameters of gentrification have been notoriously difficult to define.<sup>2</sup> Broadly speaking, however, gentrification refers to changes in a neighborhood that occur as “higher-income groups move into low-income areas, potentially altering the cultural and financial landscape of the original neighborhood.”<sup>3</sup> Among other factors,

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1. The term “gentrification” was first coined by Ruth Glass, an urban geographer, who used it to describe changes occurring in London in the 1960s. Glass defined gentrification as “the process of middle- and upper-class households moving into distressed working-class neighborhoods, upgrading the derelict housing stock, and eventually displacing the working-class residents, thereby changing the social character of the neighborhood.” Diane K. Levy, Jennifer Comey & Sandra Padilla, *In the Face of Gentrification: Case Studies of Local Efforts to Mitigate Displacement*, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 238, 239 (2007) (paraphrasing Glass).

2. See, e.g., *id.* (“There is no agreed-upon definition of gentrification . . .”).

3. U.S. DEP’T OF HOUS. & URBAN DEV., ENSURING EQUITABLE NEIGHBORHOOD CHANGE: GENTRIFICATION PRESSURES ON HOUSING AFFORDABILITY 1

the decades-long transition to a service economy, a generational shift in housing preferences, and employment by young professionals in jobs located in the city have all led to increases in the cost of housing in many communities around the country.<sup>4</sup> The shortage of affordable housing stock in many parts of the country means that as new residents flood into neighborhoods, existing residents may be pushed out either into adjacent areas or into the surrounding suburbs.<sup>5</sup>

The process of gentrification has many triggers that vary by city and by community.<sup>6</sup> This Article, however, is focused on one gentrification catalyst in particular: environmental improvements that attract new, more affluent residents into areas that have long been contaminated by environmental hazards or have been impaired by a lack of open recreational space.<sup>7</sup> For instance, actions such as remediating contaminated streams, liberating waterways from old enclosures, and providing additional green space for the community often have the perhaps logical and foreseeable result of increasing residential and commercial demand, raising property values, and spurring new development.<sup>8</sup>

Often, plans for improvement for a given area do not adequately factor in the likely impacts of cleanup on residents who have lived in the area—alongside environmental harms or insufficiencies—for many years.<sup>9</sup> Owing to a variety of socio-

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(2016), <https://www.huduser.gov/portal/sites/default/files/pdf/Insights-Ensuring-Equitable-Growth.pdf> [<https://perma.cc/468W-TH9L>].

4. See, e.g., KENNETH A. GOULD & TAMMY L. LEWIS, *GREEN GENTRIFICATION: URBAN SUSTAINABILITY AND THE STRUGGLE FOR ENVIRONMENTAL JUSTICE* (2016).

5. OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP'T OF HOUS. AND URBAN DEV., *DISPLACEMENT OF LOWER-INCOME FAMILIES IN URBAN AREAS REPORT* (2018), <https://www.huduser.gov/portal/sites/default/files/pdf/DisplacementReport.pdf> [<https://perma.cc/Y947-XB38>].

6. Broadly speaking, cycles of disinvestment and later rehabilitation are often credited with spurring gentrification. See, e.g., NEIL SMITH, *THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY* 22–23 (1996).

7. See, e.g., H. Spencer Banzhaf, *Regulatory Impact Analyses of Environmental Justice Effects*, 27 J. LAND USE & ENVTL. L. 1, 18 (2011) (defining environmental gentrification).

8. See, e.g., Jeanne Hafner, *The Dangers of Eco-Gentrification: What's the Best Way to Make the City Greener?*, *GUARDIAN* (May 6, 2015), <https://www.theguardian.com/cities/2015/may/06/dangers-ecogentrification-best-way-make-city-greener> [<https://perma.cc/XNW5-ABZT>].

9. See, e.g., NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, U.S. EPA, *UNINTENDED IMPACTS OF REDEVELOPMENT AND REVITALIZATION EFFORTS IN FIVE ENVIRONMENTAL JUSTICE COMMUNITIES*, at *i* (2006) [hereinafter *NEJAC REPORT*],

economic and political factors, neighborhoods made less desirable by environmental conditions are often home to communities of color, low-income populations, or both.<sup>10</sup> These neighborhoods also have higher percentages of home rental versus ownership, making residents less likely to be able to capture any increase in value.<sup>11</sup> These residents are susceptible to displacement as a result of environmental improvements and may ultimately be ill-positioned to enjoy the benefits that come from neighborhood changes.<sup>12</sup> The potential for displacement from environmental improvements is often insufficiently considered in planning processes.<sup>13</sup> In more recent years, a better collective understanding of environmental gentrification has increased its role in conversations about the likely impacts of projects on the existing population.<sup>14</sup> But even where planners consider these potential impacts, project developments generally contain few concrete protections from increases in rent, property values, and housing demand.<sup>15</sup>

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<https://www.epa.gov/sites/production/files/2015-02/documents/redev-revital-recomm-9-27-06.pdf> [<https://perma.cc/K6MH-P3E2>] (noting that the “EPA may have unintentionally exacerbated historical gentrification and displacement” through its support of urban development activities).

10. See, e.g., Michael Gochfeld & Joanna Burger, *Disproportionate Exposures in Environmental Justice and Other Populations: The Importance of Outliers*, 101 AM. J. PUB. HEALTH S53, S58 (2011), <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2011.300121> [<https://perma.cc/M8JS-4JRZ>]; see also Veronica Eady Famira, *Recycling Brownfields Sites*, in THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 605 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008) (noting the heavier concentration of brownfields in “communities with high minority or ‘people of color’ populations and low-income populations”); NEJAC REPORT, *supra* note 9, at 1 (noting that “people of color and low-income people faced increased exposure to the pollution that accompanied industrialization”).

11. See, e.g., Isaac W. Martin & Kevin Beck, *Gentrification, Property Tax Limitation, and Displacement*, 54 URB. AFF. REV. 33, 34 (2016).

12. NEJAC REPORT, *supra* note 9, at 1 (“Citizens living in urban, poor, and people-of-color communities are currently threatened by gentrification, displacement, and equity loss on a scale unprecedented since the Urban Renewal movement of the 1960s.”).

13. See, e.g., GOULD & LEWIS, *supra* note 4, at 115 (“The social equity pillar has, for the most part, been ignored or at least de-emphasized in urban sustainability policy.”); Winifred Curran & Trina Hamilton, *Introduction to JUST GREEN ENOUGH: URBAN DEVELOPMENT AND ENVIRONMENTAL GENTRIFICATION 1* (Winifred Curran & Trina Hamilton eds., 2018).

14. See, e.g., GOULD & LEWIS, *supra* note 4, at 115; Curran & Hamilton, *supra* note 13, at 1.

15. Cf. GOULD & LEWIS, *supra* note 4, at 116–17 (noting that New York City’s sustainability plan under Mayor Michael Bloomberg, PlaNYC, included a nod to social equity issues but did not incorporate housing needs in a concrete way).

Displacement may be harmful to communities on many levels.<sup>16</sup> First, the need to relocate due to rising costs, landlord pressures, or both may result in housing insecurity for renters.<sup>17</sup> Second, departure of existing residents and the influx of new residents may lead to changes in neighborhood services, triggering further relocation of residents who are dissatisfied with those changes or find that the community no longer suits their needs.<sup>18</sup> When existing residents—many of whom may have long suffered the ill effects of environmental pollution—depart, they are deprived of the opportunity to enjoy environmental improvements in their neighborhoods.<sup>19</sup> In this way, displacement raises environmental justice concerns stemming from the inequitable distribution of both environmental burdens and environmental access.<sup>20</sup> For communities at risk for displacement, that lack of equity in the distribution of environmental harms and benefits may foster skepticism about whether or not they will see any benefit from environmental cleanups.<sup>21</sup>

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16. See, e.g., Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 843 (2009) (collecting articles detailing the ambiguous cost-benefit analysis related to gentrification and displacement); Richard Florida, *The Complicated Link Between Gentrification and Displacement*, CITYLAB (Sept. 8, 2015), <https://www.citylab.com/equity/2015/09/the-complicated-link-between-gentrification-and-displacement/404161/> [<https://perma.cc/8S4W-Z66B>].

17. Diana Becker Cutts et al., *U.S. Housing Insecurity and the Health of Very Young Children*, 101 AM. J. PUB. HEALTH 1508, 1508 (2011) (“The Department of Health and Human Services has defined housing insecurity as high housing costs in proportion to income, poor housing quality, unstable neighborhoods, overcrowding, or homelessness.”).

18. Jessica Ty Miller, *The Production of Green: Gentrification and Social Change*, in JUST GREEN ENOUGH, *supra* note 13, at 110–12.

19. Winifred Curran & Trina Hamilton, *Just Green Enough: Contesting Environmental Gentrification in Greenpoint, Brooklyn*, in JUST GREEN ENOUGH, *supra* note 13, at 19.

20. GOULD & LEWIS, *supra* note 4, at 25–26.

21. Cf. Miller, *supra* note 18, at 107–14 (describing the views of some residents in Gowanus, Brooklyn, that the Superfund designation of the Gowanus Canal will not benefit long-term residents and land uses); Paul Stanton Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 B.C. ENVTL. AFF. L. REV. 589, 607 (1998) (describing skepticism on the part of low-income communities and communities of color at the outset of the brownfields program due to fears that community members would not ultimately benefit from the remediation activities).

Environmental law is increasingly focused on the importance of urban sustainability.<sup>22</sup> Efforts in this area take two primary forms: first, a growing appreciation of the overall sustainability of urban spaces versus other forms of communities<sup>23</sup> coupled with efforts to shrink the footprint and impacts of low-density development; and second, the specific tasks of making urban areas themselves more sustainable.<sup>24</sup> The success of the former endeavor depends on the success of the latter: urban spaces cannot provide a needed fix to low-density development if they themselves suffer from environmental harms. As many urban areas move toward aspects of sustainability like energy efficiency, improved water quality, and increased green space, however, the lockstep of environmental improvements and displacement becomes concerning from both justice and sustainability perspectives.<sup>25</sup>

Environmental improvement projects may occur because of work under federal statutes, state statutes, or local land use planning efforts. Generally speaking, however, the environmental law framework at any level is ill-equipped to address the challenge of gentrification. Environmental law was not initially designed to address concerns about displacement and equity.<sup>26</sup> And beyond mere statutory and regulatory silence, there has long been both a perceived and real divide between environmental law and affordable housing concerns.<sup>27</sup> The goals of justice and environmental protection, however, call for a stronger partnership between the two areas. Such a partnership could potentially be forged in a number of ways, and the fields of environmental justice and sustainable development offer insights into how and why environmental law should bridge the gap. More specifically, communities attempting to prevent some of the negative consequences of environmental gentrification have various tools at their disposal, including adaptations of environmental advocacy and lawyering, along with

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22. See, e.g., Edward H. Ziegler, *Urban Sprawl, Growth Management and Sustainable Development in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape*, 11 VA. J. SOC. POL'Y & L. 26, 27 (2003).

23. *Id.*

24. *Id.*

25. Curran & Hamilton, *supra* note 13, at 1.

26. See, e.g., A. Dan Tarlock, *City Versus Countryside: Environmental Equity in Context*, 21 FORDHAM URB. L.J. 461, 461 (1994).

27. See, e.g., Rusty Russell, *Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?*, 30 B.C. ENVTL. AFF. L. REV. 437, 440 (2003).

better utilization of land use policies to prioritize community ties and investments.<sup>28</sup>

Many ideas about gentrification have been expressed elsewhere, along with proposals for how to make land use laws more progressive and how to better protect affordable housing.<sup>29</sup> This Article is distinct, however, in devoting its sole attention to the question of environmental gentrification and grappling with the complicated relationship between environmental law and affordable housing within that gentrification process. To explore these questions, Part I describes the phenomenon of environmental gentrification, the various forms that it may take around the United States, and both the benefits and drawbacks that the trend may have for communities and natural resources. Part II analyzes the environmental legal framework that facilitates urban cleanups and rehabilitation and explains the difficulty in using that same framework to prevent or remedy displacement. Part III addresses the perceived and real divide that has long existed between environmental law and affordable housing, and some of the legal structures that have facilitated that separation. Finally, Part IV offers suggestions for how environmental law might become more oriented to questions of displacement and its negative impacts. These suggestions include the acknowledgement of frameworks that might weigh in favor of incorporating housing concerns into environmental law, as well as tools that might be available to stem the effects of displacement. Ultimately, this Article calls on environmental law and environmental lawyers to better acknowledge the connections between the human population and the environment, and to develop new ways to distribute the benefits that come from improvements to the natural environment more equitably.

## I. ENVIRONMENTAL GENTRIFICATION

As noted, gentrification can perhaps best be said to refer to the process by which the relocation of higher-income house-

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28. See *infra* Part IV.

29. See, e.g., Mark Bobrowski, *Affordable Housing v. Open Space: A Proposal for Reconciliation*, 30 B.C. ENVTL. AFF. L. REV. 487, 502 (2003); Steven J. Eagle, “Affordable Housing” as Metaphor, 44 FORDHAM URB. L.J. 301, 333–41 (2017); James A. Kushner, *Affordable Housing as Infrastructure in the Time of Global Warming*, 42 URB. LAW. 179, 200–21 (2010).

holds to lower-income neighborhoods leads to the displacement of existing residents.<sup>30</sup> *Environmental* gentrification, in turn, is a term utilized by social scientists<sup>31</sup> but relatively unexamined in the legal literature.<sup>32</sup> The term is used to refer to the process by which improvements to the environment serve as the catalyst for gentrification. The cycle is straightforward: as environmental improvements are made to a neighborhood, an increased number of people find the neighborhood desirable, resulting in rising housing prices and property taxes.<sup>33</sup> In communities where average income levels are low, existing residents often lack the ability to capture the value of the environmental improvements<sup>34</sup> and may find it necessary to relocate.<sup>35</sup>

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30. See, e.g., Levy et al., *supra* note 1, at 239 (“There is no agreed-upon definition of gentrification . . .”).

31. See generally, e.g., Curran & Hamilton, *supra* note 13; Sarah Dooling, *Making Just Green Enough Advocacy Resilient: Diverse Economies, Ecosystem Engineers and Livelihood Strategies for Low-Carbon Futures*, in JUST GREEN ENOUGH, *supra* note 13; Melissa Checker, *Wiped Out by the ‘Greenwave’: Environmental Gentrification and the Paradoxical Politics of Urban Sustainability*, 23 CITY & SOC’Y 210 (2011); Jennifer R. Wolch, Jason Byrne & Joshua P. Newell, *Urban Green Space, Public Health, and Environmental Justice: The Challenge of Making Cities ‘Just Green Enough’*, 125 LANDSCAPE & URB. PLAN. 234 (2014); H. Spencer Banzhaf & Randall P. Walsh, *Do People Vote With Their Feet?: An Empirical Test of Environmental Gentrification* 6–10 (Resources for the Future Discussion Paper No. 06-10, 2006); see also, e.g., GOULD & LEWIS, *supra* note 4, at 12 (noting that scholars have also used the terms “green gentrification” and “ecological gentrification”).

32. A review of legal literature reveals only a few brief mentions of the concept of environmental gentrification, although the underlying concept has been explored in the context of brownfields redevelopment. See H. Spencer Banzhaf & Eleanor McCormick, *Moving Beyond Cleanup: Identifying the Crucibles of Environmental Gentrification*, in THE POLITICAL ECONOMY OF ENVIRONMENTAL JUSTICE 23 (H. Spencer Banzhaf ed., 2012); Banzhaf, *supra* note 7, at 18; R. Shea Diaz, *Getting to the Root of Environmental Injustice: Evaluating Claims, Causes, and Solutions*, 29 GEO. ENVTL. L. REV. 767, 786–88 (2017); Joseph P. Tomain, *Distributional Consequences of Environmental Regulation: Economics, Politics, and Environmental Policymaking*, 1 KAN. J.L. & PUB. POL’Y 101, 109 (1991).

33. See, e.g., Banzhaf, *supra* note 7, at 18.

34. See, e.g., Banzhaf & Walsh, *supra* note 31, at 24–25 (“In a world where households sort in response to changes in environmental quality, the bulk of the benefits of a policy that cleans up dirtier neighborhoods where the poor live may actually be captured by rich households. As the neighborhood amenity improves, wealthier households may move in, driving up rents. If the poor do not own their homes, landlords would capture the capital appreciation of the local housing, while the poor would pay higher rents. This ‘environmental gentrification’ may more than offset the direct gain of the environmental improvement, leaving the original residents worse off.”); Banzhaf, *supra* note 7, at 18; Checker, *supra* note 31, at 212 (“Environmental gentrification describes the convergence of urban redevelopment, ecologically-minded initiatives and environmental justice activism in an era of advanced capitalism.”).

In this way, environmental gentrification looks much the same as other forms of gentrification.<sup>36</sup> But the role of environmental cleanups in encouraging this kind of change in communities raises unique issues that necessitate exploration.

Environmental law has a consequential role in facilitating (or in certain cases, mandating) cleanups. At the broadest level, environmental law tends to encourage environmental improvements.<sup>37</sup> Many urban environments face challenges like poor air and water quality, lack of water availability, waste-disposal insufficiencies, and high energy consumption.<sup>38</sup> Environmental advocates and policymakers alike have long looked to environmental law to offer solutions for solving such problems, including use of the National Environmental Policy Act to identify the environmental impacts of planned urban development,<sup>39</sup> the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) and related statutes to remediate polluted urban areas;<sup>40</sup> the mandates of the Clean Water Act to improve urban streams;<sup>41</sup> and a variety of other environmental and land use tools. Such improvements have many positive benefits to offer communities and the environment at large. Where these legitimate environmental improvements also act as triggers for the gentrification process they may bring negative consequences that undermine the goals of environmental law and environmental justice. With that in mind, this Part will first detail some of the ways in which environmental law is

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35. Cf. NEJAC REPORT, *supra* note 9, at 2 (noting displacement pressures often faced by communities of color in gentrifying neighborhoods and challenges in obtaining new housing within the same community).

36. See, e.g., Eagle, *supra* note 29, at 329 (explaining how gentrification in housing does not benefit many existing residents).

37. Cf. James L. Huffman, *Markets, Regulation, and Environmental Protection*, 55 MONT. L. REV. 425, 425 (1994) (“Most of the environmental improvement has resulted from government regulation—the Clean Air Act, the Clean Water Act, the Resources Conservation and Recovery Act, and so on and so on.”).

38. See, e.g., *Urban Threats*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.com/environment/habitats/urban-threats/> (last visited Dec. 1, 2018) [<https://perma.cc/UN6C-DZLG>].

39. See, e.g., Hope Babcock, *The National Environmental Policy Act in the Urban Environment: Oxymoron or a Useful Tool to Combat the Destruction of Neighborhoods and Urban Sprawl?*, 23 J. ENVTL. L. & LITIG. 1, 17 (2008) (providing examples of uses of NEPA to consider urban environmental harms).

40. See, e.g., Sarah Fox, *CERCLA, Institutional Controls, and the Legacy of Urban Industrial Use*, 42 ENVTL. L. 1211, 1223–33 (2012).

41. See, e.g., Dave Owen, *Urbanization, Water Quality, and the Regulated Landscape*, 82 U. COLO. L. REV. 431, 452 (2011).

being used to improve the urban environment around the country and then explore the consequences of those actions.

### A. *Urban Environmental Improvements*

Around the United States and the world, cities are working to improve their environmental health and amenities.<sup>42</sup> National efforts in urban areas to address environmental hazards and improve the quality of the environment for urban residents are too plentiful, and too varied in type and size, to comprehensively list in this Article.<sup>43</sup> A handful of examples may be illustrative, however, in demonstrating the kinds of work going on around the country. To offer a survey of some key environmental improvement actions currently taking place in cities, this Section will focus on (1) remediation of urban brownfields, (2) cleanup of water bodies or “daylighting” of urban streams, (3) efforts to provide additional green space in communities, and (4) the incorporation of urban sustainability in planning processes.

#### 1. Contaminated Land

In most urban environments, some percentage of land is likely to have had a prior life as an industrial or manufacturing site.<sup>44</sup> Where that is the case, the land is often contaminated by hazardous substances, pollutants, or contaminants involved in its prior use.<sup>45</sup> Such sites may be referred to as “brownfields” in instances where the pollution involved is below a certain statutory threshold.<sup>46</sup> Where more extensive contamination is present, the sites may warrant placement on the National Priority List,<sup>47</sup> making them eligible for cleanup under CERCLA or similar programs at the state level.<sup>48</sup> There are no precise statistics on how many of these contaminated sites exist, but the

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42. See, e.g., GOULD & LEWIS, *supra* note 4, at 165.

43. *Id.*

44. See, e.g., Fox, *supra* note 40, at 1219.

45. See, e.g., *Overview of the Brownfields Program: What is a Brownfield?*, U.S. EPA, <https://www.epa.gov/brownfields/overview-brownfields-program> (last updated Nov. 6, 2018) [<https://perma.cc/YD2D-2G4R>].

46. See, e.g., *id.*

47. See, e.g., Robert W. Wells, Jr., *Brownfields for Beginners*, 71 FLA. B.J. 74, 74 (1997).

48. See, e.g., Joel B. Eisen, *Brownfields at 20: A Critical Reevaluation*, 34 FORDHAM URB. L. J. 721, 726 (2007).

number of proposed and currently contaminated sites on the National Priority List is over one thousand,<sup>49</sup> while the number of brownfields may be closer to 450,000 sites nationwide.<sup>50</sup> These sites can have extensive negative health impacts for those living nearby in the form of water contamination, emissions of dangerous vapors, foreclosure of the possibility of green or other recreational space, and others.<sup>51</sup> Due to a host of historic and socioeconomic factors, a disproportionate number of contaminated sites are concentrated in low-income communities and communities of color.<sup>52</sup> As a consequence, these communities are exposed to greater health issues resulting from contamination than other populations.<sup>53</sup>

Remediating urban brownfields may eliminate health hazards and otherwise increase enjoyment of the space for affected communities.<sup>54</sup> The brownfield remediation process generally involves either removal of contaminated soil or treatment of the soil *in situ*, combined with other methods for containing and monitoring any hazardous materials.<sup>55</sup> As remediation of contaminated sites takes place in a neighborhood, residents' increased enjoyment is often reflected in a change in property

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49. *Superfund: National Priorities List*, U.S. EPA, <https://www.epa.gov/superfund/superfund-national-priorities-list-npl> (last updated Feb. 28, 2018) [<https://perma.cc/YU5F-WUUE>].

50. See, e.g., *Overview of the Brownfields Program*, *supra* note 45.

51. See, e.g., *Brownfields and Public Health*, MINN. DEP'T OF HEALTH, <http://www.health.state.mn.us/divs/eh/hazardous/topics/brownfield.html> (last updated July 18, 2017) [<https://perma.cc/P3T6-X424>].

52. See, e.g., Banzhaf & McCormick, *supra* note 32, at 33 (noting that "cross-sectional studies consistently find poorer or minority households near [locally undesirable land uses]" such as brownfields); Paul Stanton Kibel, *Los Angeles' Cornfield: An Old Blueprint for New Greenspace*, 23 STAN. ENVTL. L.J. 275, 316 (2004); Lindsey Dillon, *Cleaning Up Toxic Sites Isn't Always as Good for the Community as You Might Think*, GRIST (July 15, 2017), <http://grist.org/article/cleaning-up-toxic-sites-isnt-always-as-good-for-the-community-as-you-might-think/> [<https://perma.cc/4ENT-VACS>]; see also *infra* Section IV.A.1.

53. See, e.g., Sarah Gonzalez & Jenny Ye, *Dirty Little Secrets: New Jersey's Poorest Live Surrounded by Contamination*, WNYC NEWS (Dec. 9, 2015), <https://www.wnyc.org/story/nj-contaminated-sites/> [<https://perma.cc/HAV2-2FW7>] (offering an example of exposure to toxic chemicals and health impacts by low-income communities in New Jersey).

54. See, e.g., *Brownfields and Public Health*, *supra* note 51.

55. See, e.g., U.S. EPA, CITIZEN'S GUIDE SERIES TO CLEANUP TECHNOLOGIES (Sept. 2012), [https://clu-in.org/download/Citizens/citizens\\_guide\\_to\\_cleanup\\_technologies.pdf](https://clu-in.org/download/Citizens/citizens_guide_to_cleanup_technologies.pdf) [<https://perma.cc/58S9-CC23>] (providing a list of twenty-two different strategies for cleaning up contaminated sites).

values for the surrounding community.<sup>56</sup> Such increases in property values have long been an expected part of the remediation process.<sup>57</sup> Indeed, the United States Environmental Protection Agency (EPA) has an online introduction to brownfields that includes as part of its description of “benefits to communities” the fact that brownfields remediation “[ca]n increase residential property values 5%–15.2% near brownfields sites when cleanup is completed.”<sup>58</sup> Those increased property values, spurred by the elimination of an environmental hazard, tend to encourage more extensive development. Some of these impacts may be seen before cleanup is even initiated, as developers vie for ownership of land that is expected to be more valuable after the cleanup.<sup>59</sup>

## 2. Improvement of Water Bodies

Another common mechanism by which cities enhance their urban environments is through improvements to their water bodies. Urban waters face unique and substantial pollution threats; in addition to often having been historical dumping grounds for industrial pollutants, they regularly take on pollution from a multitude of sources, including automobiles, residential and commercial wastewater, trash, and sewage and stormwater runoff.<sup>60</sup> These same waterways have also often had the natural course of their water altered or covered over for reasons of health or convenience.<sup>61</sup> To address these harms, improvements may be conducted either by remediating contam-

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56. Kriston Capps, *How Much Cleaning Up Brownfields Is Really Worth*, CITYLAB (July 29, 2014), <https://www.citylab.com/solutions/2014/07/how-much-cleaning-up-brownfields-is-really-worth/375234/> [https://perma.cc/W2SX-8J8R]; see also *Brownfield Program Produces Environmental and Economic Benefits*, HAZ. WASTE & HAZ. SUBST. COMPLIANCE (CCH) ¶ 28-6-2.04 (Oct. 10, 2010), 2010 WL 11250381.

57. See, e.g., NEJAC REPORT, *supra* note 9, at 1.

58. See *Overview of the Brownfields Program*, *supra* note 45 (citing Kevin Haninger et al., *The Value of Brownfield Remediation*, 4 J. ASS'N ENVTL. & RESOURCE ECON. 197 (2017)).

59. See, e.g., Miller, *supra* note 18, at 107.

60. See, e.g., John C. Dernbach, *Freshwater*, in 3 LAW OF ENVIRONMENTAL PROTECTION § 27:19 (Kathryn R. Campbell et al. eds., 2018); *Why Urban Waters?*, U.S. EPA (Feb. 23, 2017), <https://www.epa.gov/urbanwaters/why-urban-waters> [https://perma.cc/DKD6-YV8P].

61. See, e.g., Laura Bliss, *The Hidden Health Dangers of Buried Urban Rivers*, CITYLAB (Aug. 5, 2015), <https://www.citylab.com/equity/2015/08/the-hidden-health-dangers-of-buried-urban-rivers/400442/> [https://perma.cc/R9WI-3ZKE].

inated sources or by “daylighting”—the process of uncovering urban water bodies that were previously buried.<sup>62</sup>

Remediation of contaminated water sources is often an important part of improving the urban environment.<sup>63</sup> This remediation may take the form of waste removal, stricter controls on discharges into the water, restoration of wetlands and other natural features, and other cleanup actions.<sup>64</sup> A related and currently popular strategy that cities may employ is “daylighting” urban streams. As noted, “daylighting” refers to the process of “deliberately expos[ing] some or all of the flow of a previously covered river, creek, or stormwater drain.”<sup>65</sup> Urban waterways in their natural state have seasonally variable flow levels.<sup>66</sup> Once those waterways are surrounded by urban development, however, they are cut off from nearby wetlands and other natural features that absorb excess water. Thus, seasonal variations in water level may result in flooding of the surrounding development.<sup>67</sup> To stem these effects, many cities created artificial culverts for their urban water bodies, along with tunnels through which the water could flow.<sup>68</sup> These controls effectively eliminated urban streams as part of the surface environment.<sup>69</sup> In the past several decades, awareness has grown regarding the negative impacts that such culverts can create in terms of water quality, flooding, and reduction of

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62. See, e.g., *id.*

63. See, e.g., *Why Urban Waters?*, *supra* note 60.

64. See, e.g., *What Communities Are Doing*, U.S. EPA (May 29, 2018), <https://www.epa.gov/urbanwaters/what-communities-are-doing> [<https://perma.cc/59ZJ-P273>].

65. Timothy Beatley, *Biophilic Urbanism: Inviting Nature Back to Our Communities and into Our Lives*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 209, 224 (2009) (quoting RICHARD PINKHAM, *DAYLIGHTING: NEW LIFE FOR BURIED STREAMS IV* (Rocky Mountain Institute 2000)).

66. See, e.g., *Flow of a River—Hydrology*, MINN. DEPT. OF NAT. RES.: HEALTHY RIVERS, [https://files.dnr.state.mn.us/assistance/backyard/healthyrivers/course/200/201\\_60.htm](https://files.dnr.state.mn.us/assistance/backyard/healthyrivers/course/200/201_60.htm) (last visited Nov. 23, 2018) [<https://perma.cc/WV7G-YRDR>].

67. CHRISTOPHER P. KONRAD, U.S. GEOLOGICAL SURVEY, FACT SHEET 076-03, EFFECTS OF URBAN DEVELOPMENT ON FLOODS 1 (2003), <https://pubs.usgs.gov/fs/fs07603/> [<https://perma.cc/SMF2-8X4Y>].

68. Ron Love, *Daylighting Salt Lake's City Creek: An Urban River Unentombed*, 35 GOLDEN GATE U. L. REV. 343, 347 (2005); Bliss, *supra* note 61.

69. See, e.g., Kibel, *supra* note 52, at 284 (describing the process by which the Los Angeles River was confined to a culvert); Love, *supra* note 68, at 347 (explaining how Salt Lake City's City Creek was put into a culvert).

green space available to the community.<sup>70</sup> In response, cities have turned to daylighting to reverse some of these ill effects and improve the urban aquatic environment.<sup>71</sup>

Whether remediating a water body in its existing form or restoring a stream to its more natural state, the result is a revived urban amenity that can provide greater aesthetic and recreational opportunities for the neighborhood, control flooding, and eliminate certain environmental health hazards.<sup>72</sup> Echoing the disproportionate impacts of brownfields, the communities experiencing the worst aspects of urban water pollution are in many cases low-income communities and communities of color.<sup>73</sup> And as with brownfields remediation, improvements to urban waterways may provide a great deal of relief to community members who have been living with contamination nearby or who have not previously enjoyed the open space that daylighted streams can offer. These improvements, however, also have the tendency to make the neighborhood more desirable to residents outside the community.

### 3. Enhanced Green Space

Environmental remediation may also come in the form of creating open park space for recreation and other uses.<sup>74</sup> Many urban neighborhoods lack open space for residents, particularly low-income communities and communities of color, who experience disproportionate barriers to access to green space as compared to more affluent or white communities.<sup>75</sup> While the existence of truly vacant urban land for creation of new parks is rare, many municipalities have adopted creative approaches to greening the urban environment. For instance, some cities around the country have worked to convert abandoned railroad

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70. AMY TRICE, AM. RIVERS, DAYLIGHTING STREAMS: BREATHING LIFE INTO URBAN STREAMS AND COMMUNITIES 5–7, [www.AmericanRivers.org/wp-content/uploads/2016/05/AmericanRivers\\_daylighting-streams-report.pdf](http://www.AmericanRivers.org/wp-content/uploads/2016/05/AmericanRivers_daylighting-streams-report.pdf) [https://perma.cc/Z6RY-SLAJ].

71. *Id.* at 9.

72. *See, e.g.*, Bliss, *supra* note 61.

73. *See* Amy Vanderwarker, *Water and Environmental Justice*, in A TWENTY-FIRST CENTURY U.S. WATER POLICY 52, 56 (Juliet Christian-Smith & Peter H. Gleick eds., 2012).

74. Such projects provide both opportunities for recreation and environmental benefits in the form of rainwater retention, increased vegetation for carbon capture, and others. *Cf.* GOULD & LEWIS, *supra* note 4, at 25–26.

75. Wolch et al., *supra* note 31, at 236.

tracks or other unused infrastructure into new park space.<sup>76</sup> Some of the most high-profile examples of this kind of project include the High Line in New York City,<sup>77</sup> the 606 in Chicago,<sup>78</sup> the BeltLine in Atlanta,<sup>79</sup> and similar projects.<sup>80</sup> While these projects differ widely in their details, they have all used an influx of cleanup funding to create open—and often more interconnected—urban recreational areas. For example, both the High Line and the 606 eliminated eyesores in the form of abandoned rail lines and introduced new park space into urban neighborhoods.<sup>81</sup> More ambitious projects may add substantially more recreational space; for instance, the Atlanta BeltLine includes 1,300 acres of new green space and will link

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76. See, e.g., PETER HARNIK & ABBY MARTIN, TR. FOR PUB. LAND, CHARLESTON RAIL LINE LINEAR PARK 5 (2013), <https://www.tpl.org/sites/default/files/cloud.tpl.org/pubs/ccpe-charleston-railtrail-park.pdf> [<https://perma.cc/NU6R-93XC>] (“The United States is in the midst of an urban park renaissance, and linear trails are among the most popular of the new facilities.”).

77. The High Line is a project on the West Side of Lower Manhattan that turned abandoned freight rail tracks into a 1.5-mile-long stretch of walking paths and art space. See *High Line*, HIGH LINE NETWORK, <http://network.thehighline.org/projects/high-line/> (last visited Nov. 23, 2018) [<https://perma.cc/AF4C-ECHK>]; see also HIGH LINE, <http://www.thehighline.org/> (last visited Nov. 23, 2018) [<https://perma.cc/Y9T7-9QVF>].

78. The 606 is a 2.7-mile linear park created from an abandoned rail line on Chicago’s northwest side. See *The 606*, HIGH LINE NETWORK, <http://network.thehighline.org/projects/the-606/> (last visited Nov. 23, 2018) [<https://perma.cc/DJ6M-UEES>].

79. The Atlanta BeltLine is a planned “loop of parks, trails, transit, and affordable housing that circles the City of Atlanta. Built mostly in abandoned railway corridors, it will include 33 miles of multi-use trails, 22 miles of light rail transit, 1,300 acres of new greenspace, and 1,100 acres of remediated brownfields.” See *Atlanta BeltLine*, HIGH LINE NETWORK, <http://network.thehighline.org/projects/atlanta-beltline/> (last visited Nov. 23, 2018) [<https://perma.cc/EV2F-5ECK>].

80. In addition to these projects, members of the High Line Network, a nationwide organization for likeminded projects, include the 11th Street Bridge Park in Washington, DC; Bayou Greenways 2020 in Houston, Texas; Buffalo Bayou in Houston, Texas; Crissy Field in San Francisco, California; Dequindre Cut in Detroit, Michigan; Klyde Warren Park in Dallas, Texas; the Lowline in New York City; Presidio Tunnel Tops in San Francisco, California; QueensWay in Queens, New York; Rail Park in Philadelphia, Pennsylvania; River LA in Los Angeles, California; the Bentway in Toronto, Canada; the Underline in Miami, Florida; Trinity River Park in Dallas, Texas; Walter Creek in Austin, Texas; and Waterfront Seattle in Seattle, Washington. See *Projects*, HIGH LINE NETWORK, <http://network.thehighline.org/projects/> (last visited Nov. 23, 2018) [<https://perma.cc/VYY3-82EF>].

81. Kate Taylor, *After High Line’s Success, Other Cities Look Up*, N.Y. TIMES (July 14, 2010), <https://www.nytimes.com/2010/07/15/arts/design/15highline.html> [<https://perma.cc/F688-9ZX3>].

forty-five city neighborhoods once complete.<sup>82</sup> Other cities are improving waterfront areas,<sup>83</sup> covering highways,<sup>84</sup> and adding park space above, below, and alongside transit<sup>85</sup> in order to provide these new amenities. Conversion of underutilized or abandoned infrastructure into spaces more readily accessible for public use and enjoyment has the potential to improve the quality of life of nearby residents and the health of the urban environment.<sup>86</sup>

#### 4. Sustainability Planning

Finally, the general concept of “greening” the urban environment by using planning processes to make cities more sustainable is an ongoing project around the country. While broader in scope than the other suggested forms of environmental remediation, sustainability planning has been a significant contributor to the overall rise in urban property values.<sup>87</sup> This kind of planning has many possible conceptions and definitions and may encompass activities like increasing tree cover, improving air quality and energy efficiency,<sup>88</sup> finding ways to

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82. *Atlanta BeltLine*, *supra* note 79.

83. *Buffalo Bayou*, HIGH LINE NETWORK, <http://network.thehighline.org/projects/buffalo-bayou/> (last visited Nov. 23, 2018) [<https://perma.cc/VHF2-Y3G6>].

84. *Klyde Warren Park*, HIGH LINE NETWORK, <http://network.thehighline.org/projects/klyde-warren-park/> (last visited Nov. 23, 2018) [<https://perma.cc/QE8N-5FR3>].

85. *See, e.g., The Underline*, HIGH LINE NETWORK, <http://network.thehighline.org/projects/the-underline/> (last visited Nov. 23, 2018) [<https://perma.cc/2V46-W9XK>].

86. *See, e.g.,* David Fagundes, *Buying Happiness: Property, Acquisition, and Subjective Well-Being*, 58 WM. & MARY L. REV. 1851, 1907 n.253 (2017) (noting that “[n]umerous studies detail the positive impact of urban green spaces on residents’ happiness”); John R. Nolon, *Enhancing the Urban Environment Through Green Infrastructure*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10071, 10072 (2016); Nicole D. Porter, *Expanding Public Safety in the Era of Black Lives Matter*, 70 U. MIAMI L. REV. 533, 543 (2016) (noting that “[u]rban green space has been shown to increase perceptions of safety that may be caused by strengthening connections to one’s neighborhood and facilitating social interaction among residents due to improvements in shared community space”).

87. *See, e.g.,* KATHERINE BURGESS ET AL., URBAN LAND INST., *HARVESTING THE VALUE OF WATER: STORMWATER, GREEN INFRASTRUCTURE, AND REAL ESTATE* 11 (2017), <https://americas.uli.org/wp-content/uploads/sites/125/ULI-Documents/HarvestingtheValueofWater.pdf> [<https://perma.cc/4VG4-TZHF>]; Mikias Biazen Molla, *The Value of Urban Green Infrastructure and Its Environmental Response in Urban Ecosystem: A Literature Review*, 4 INT’L J. ENVTL. SCI. 89, 93 (2015).

88. Nolon, *supra* note 86, at 10079.

lower a city's overall carbon footprint,<sup>89</sup> decreasing the number of impermeable surfaces found in the urban environment,<sup>90</sup> and many others.<sup>91</sup>

This kind of planning may include some of the site-specific remediation activities already noted but may also occur in the form of a city-wide planning effort.<sup>92</sup> The focus of these general efforts is more diffuse, and it may be difficult to isolate particular neighborhood impacts of general sustainability planning.<sup>93</sup> But the improvement of environmental conditions in general increases the value of urban property.<sup>94</sup> Thus, overall reductions in air pollution and contaminated runoff, and gains in areas like energy efficiency, can stimulate overall increases in city housing costs.<sup>95</sup>

### B. *Benefits and Drawbacks of Urban Environmental Improvements*

As detailed above, renewed attention to environmental problems necessarily results in changing circumstances for the individuals living nearby. The elimination of negative environmental conditions can be a great boon to those who previously suffered negative impacts from those sites.<sup>96</sup> Such enhance-

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89. John Nolon, *Climate Change and Sustainable Development: The Quest for Green Communities*, 61 PLAN. & ENVTL. L. 3, 3 (2009).

90. Patricia E. Salkin, *Sustainability and Land Use Planning: Greening State and Local Land Use Plans and Regulations to Address Climate Change Challenges and Preserve Resources for Future Generations*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 121, 166–67 (2009).

91. *Id.*

92. A number of cities across the country have adopted sustainability plans. See, e.g., CITY OF CHICAGO, SUSTAINABLE CHICAGO: ACTION AGENDA 2012-2015 HIGHLIGHTS AND LOOK AHEAD 1 (2015), [https://www.cityofchicago.org/content/dam/city/progs/env/Sustainable\\_Chicago\\_2012-2015\\_Highlights.pdf](https://www.cityofchicago.org/content/dam/city/progs/env/Sustainable_Chicago_2012-2015_Highlights.pdf) [<https://perma.cc/E34V-EECQ>]; CITY OF NEW YORK, ONENYC PROGRESS REPORT (2017), [http://onenyc.cityofnewyork.us/wp-content/uploads/2017/05/OneNYC\\_Progress\\_Report\\_2017.pdf](http://onenyc.cityofnewyork.us/wp-content/uploads/2017/05/OneNYC_Progress_Report_2017.pdf) [<http://perma.cc/QJ4P-EXFW>]; CITY OF SEATTLE, SEATTLE CLIMATE ACTION PLAN (2013), [http://www.seattle.gov/Documents/Departments/OSE/2013\\_CAP\\_20130612.pdf](http://www.seattle.gov/Documents/Departments/OSE/2013_CAP_20130612.pdf) [<http://perma.cc/M35W-TA6H>]; CITY OF TULSA, SUSTAINABILITY PLAN (2011), [http://uccrma.org/wp-content/uploads/2017/06/99\\_Tulsa\\_2011\\_Sustainability-Plan.pdf](http://uccrma.org/wp-content/uploads/2017/06/99_Tulsa_2011_Sustainability-Plan.pdf) [<http://perma.cc/3HMN-PFLM>].

93. CITY OF NEW YORK, *supra* note 92, at 11.

94. Cf. Banzhaf, *supra* note 7, at 18 (noting “when neighborhoods improve, demand increases and housing values rise”).

95. *Id.*

96. See NEJAC REPORT, *supra* note 9, at 2 (noting that low-income communities and communities of color are “anxious to see their neighborhoods revitalized”).

ments in environmental conditions make affected neighborhoods more desirable to both current residents and to newcomers. Basic supply-and-demand principles dictate that heightened desirability will lead to increases in home values.<sup>97</sup> Thus, a steep rise in the cost to live in these areas is not uncommon as polluted sites are remediated, additional water or green space becomes available, or formerly unusable spaces transform into desirable recreational areas.<sup>98</sup> Those who own property in the neighborhood may experience increased financial health through the appreciation of a significant asset, whether they decide to continue living in the same location or to relocate.<sup>99</sup> And homeowners and nonhomeowners alike may appreciate the additional investments in the neighborhood that accompany these rising values, such as an increased number of businesses and available services.

However, urban environmental improvements may also come with a set of unintended negative consequences.<sup>100</sup> Simply put, rising property values may increase the cost of living in a neighborhood to the point that long-term residents can no longer remain in place.<sup>101</sup> For example, in the span of four

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97. See Banzhaf, *supra* note 7, at 18 (“[W]hen neighborhoods improve, demand increases and housing values rise. But housing prices may rise by *more* than existing residents’ values for the environment, as richer gentrifying households bid up housing values by their own higher willingness to pay for the improvement.”).

98. See, e.g., Karrie Jacobs, *The High Line Network Tackles Gentrification*, ARCHITECT MAG., Oct. 17, 2017, at 111, 114 (“Transforming an eyesore into an amenity is almost guaranteed to boost real estate values in the surrounding area.”).

99. E.g., Laura Sullivan, *Gentrification May Actually Be Boon to Longtime Residents*, NPR (Jan. 22, 2014), <https://www.npr.org/2014/01/22/264528139/long-a-dirty-word-gentrification-may-be-losing-its-stigma> [<https://perma.cc/X7MD-4ARW>].

100. See, e.g., Levy et al., *supra* note 1, at 238 (“Increased housing prices themselves are not a problem per se. It is when costs increase in predominantly lower-income neighborhoods where residents’ incomes do not keep pace that displacement can occur. As housing prices increase, lower-income households are at risk of being pushed out or prevented from moving into certain geographic areas because of the prohibitive costs and limited household earnings. It is this geographic component, along with restricted economic opportunities, that makes gentrification-related displacement a problem.”).

101. See, e.g., Richard Lazarus, *Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 795 (1993) (“Inequities in the ultimate distribution of environmental protection benefits may also result, paradoxically, from environmental improvement itself. A cleaner physical environment may increase property values to such an extent that members of a racial minority with fewer economic resources can no longer afford to live in that community.”).

years as the BeltLine project in Atlanta was being constructed, the value of homes in Atlanta within a half-mile of the BeltLine rose between 17.9 percent and 26.6 percent more than homes elsewhere in the city.<sup>102</sup> Although the cumulative impact of the project is difficult to quantify, similar leaps in property values have been seen in neighborhoods situated alongside new park projects<sup>103</sup> in cities both large and small.<sup>104</sup> In many cities, low-income residents are disproportionately more likely to rent versus own their homes.<sup>105</sup> Renters are likely to be the most sensitive to increased housing costs and the least able to capture the increased value in their homes. Thus, as the affordable housing stock declines due to rent increases or loss of units,<sup>106</sup> the corresponding rise in cost of living has the potential to force residents to move, uprooting long-established communities in the process. Even for homeowners, the increased property taxes that accompany the spike in property values may prove to be unsustainable if the homeowner's income does not rise in step with the real estate market.<sup>107</sup>

Examples of this phenomenon can be seen around the country. As explained above, cities nationwide have been converting abandoned railroad lines and other infrastructure into usable park areas. These conversion projects, such as the aforementioned High Line in New York City and 606 in Chicago,

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102. Dan Immergluck & Tharunya Balan, *Sustainable for Whom? Green Urban Development, Environmental Gentrification, and the Atlanta Beltline*, 39 URB. GEOGRAPHY 546, 548–49 (2017).

103. See, e.g., Editorial Board, *The 606's Uneasy Rapport With its Neighbors*, CHI. TRIB. (Mar. 20, 2017), <http://www.chicagotribune.com/news/opinion/editorials/ct-606-trail-gentrification-affordable-housing-edit-20170320-story.html> [<https://perma.cc/K8NZ-Q2DL>] (noting that housing prices in areas adjacent to the 606 in Chicago have increased 14 to 48 percent along the trail); Laura Bliss, *The High Line's Next Balancing Act*, CITYLAB (Feb. 7, 2017), <https://www.citylab.com/solutions/2017/02/the-high-lines-next-balancing-act-fair-and-affordable-development/515391/> [<https://perma.cc/HQY4-JBQK>] (discussing the impacts of the High Line in New York City on housing prices in the area); see also, e.g., Jacobs, *supra* note 98 (detailing the struggle with increased housing prices as a result of public works projects in a variety of locations).

104. Jacobs, *supra* note 98.

105. See, e.g., Shahrzad Emani, *Combatting Gentrification Through Community-Based Lawyering*, 25 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 231, 231 (2017).

106. Alessandro Rigolon & Jeremy Nemeth, "We're Not in the Business of Housing:" *Environmental Gentrification and the Nonprofitization of Green Infrastructure Projects*, 81 CITIES: INT'L J. URB. POL'Y & PLAN. 71 (2018).

107. See, e.g., Alese Bagdol, *Property Taxes and Community Land Trusts: A Middle Ground*, 91 TEX. L. REV. 939, 944 (2013).

have arguably caused or accelerated rises in property values and have spurred concerns about displacement and lack of access for current residents.<sup>108</sup> In another example, Washington, D.C. has begun efforts to clean up the long-contaminated Anacostia River and to construct a new bridge and park space, creating a new link from the Anacostia neighborhood to the rest of the city.<sup>109</sup> This project has led to an influx of new residential construction and an anticipated shift in neighborhood demographics as affluent, young, white professionals have begun to move into an area that historically housed an almost entirely lower-income and African American population.<sup>110</sup> The same dynamic has been observed in Los Angeles, where efforts to naturalize parts of the Los Angeles River in a highly industrialized section of the city have caused developers to flock to the site, attracted by the promise of additional green space in an area where such space is at a premium.<sup>111</sup> Additional examples from around the country abound.<sup>112</sup>

As noted above, such property value increases accompanying environmental improvements are foreseeable. And for individuals who can no longer afford the neighborhood, there may be little choice but to relocate once these improvements take hold.<sup>113</sup> Still other residents may face more subtle displacement as the shops, services, and community that they once valued leave the neighborhood due to increased costs, lack of business, or both.<sup>114</sup> Such housing pressures may be most acute

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108. Patrick Sisson, *Can High-Profile Park Projects, Catalysts for Development, Play Nice with Neighboring Communities?*, CURBED (July 17, 2018, 3:14 PM), <https://www.curbed.com/2018/7/17/17581456/park-high-line-606-affordable-housing-development> [https://perma.cc/FE6V-U2VX].

109. See, e.g., Amanda Kolson Hurley, *Bridging D.C.'s Starkest Divide: Can a Park Over the Anacostia Spur a Revolution in Urban Development?*, NEXTCITY (Nov. 21, 2016), <https://nextcity.org/features/view/washington-dc-anacostia-11th-street-bridge-park-plans> [https://perma.cc/Z2K4-ZPRG].

110. See, e.g., *id.*

111. See, e.g., Louis Sahagun & Catherine Saillant, *Big Plans, and Concerns, Surrounding L.A. River's Revitalization*, L.A. TIMES (May 24, 2014), <http://www.latimes.com/local/la-me-lariver-development-20140524-story.html> [https://perma.cc/NU3W-C4TP].

112. See, e.g., Sisson, *supra* note 108.

113. Cf. Courtney Lauren Anderson, *You Cannot Afford to Live Here*, 44 *FORDHAM URB. L.J.* 247, 273 (2017) (noting an example of the pressures created in Thomasville, Georgia when nearby communities experienced revitalization that funneled higher numbers of low-income residents into Thomasville).

114. Cf. Jessica Ty Miller, *The Production of Green: Gentrification and Social Change*, in *JUST GREEN ENOUGH*, *supra* note 13, at 107, 111–13 (noting resident concerns about a loss of services and an influx of new business); NEJAC REPORT,

in some of the larger cities already mentioned but can impact smaller urban environments as well.<sup>115</sup> Thus, some of the negative consequences that individuals may face where environmental improvement projects spur displacement include loss of home and community ties,<sup>116</sup> increased difficulty finding or commuting to work,<sup>117</sup> and suburbanized poverty.<sup>118</sup>

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*supra* note 9, at 2 (noting displacement pressure and a loss of community culture resulting from environmental gentrification).

115. See, e.g., Jeremy Bryson, *Brownfields Gentrification: Redevelopment Planning and Environmental Justice in Spokane, Washington*, 5 ENVTL. JUST. 26, 26 (2012) (describing concerns about property value increases after the redevelopment of a large brownfields site near a low-income neighborhood in Spokane, Washington).

116. See, e.g., David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1818–19 (2013) (“Low-income people’s lack of financial wealth makes noneconomic wealth proportionately more important. After their families, one of the most valuable assets low-income people have is their ties to their communities.”); *Managing the Potential Undesirable Impacts of Urban Regeneration: Gentrification and the Loss of Social Capital*, WORLD BANK, <https://urban-regeneration.worldbank.org/node/45> (last visited Dec. 1, 2018) [<https://perma.cc/83C3-4ZZK>] (“A second unwanted consequence of regeneration projects—related to gentrification and out-migration of the original population—is the loss of social capital, or community ties. Broadly speaking, social capital can be defined as a set of social norms of conduct, knowledge, mutual obligations and expectations, and reciprocity and trust that are widespread within a given region or community. The concept is also connected with social networks.”). Some scholars have called into question, however, the value of community ties, or social capital, for members of the community. See, e.g., Stephanie M. Stern, *The Dark Side of Town: The Social Capital Revolution in Residential Property Law*, 99 VA. L. REV. 811, 811 (2013) (questioning the benefits of social capital). Lack of concern about loss of social capital eliminates some, but not all, of the issues raised regarding environmental gentrification.

117. See, e.g., Joanna Evionuk, *Portland’s Gentrification Is Causing Massive Commute Issues*, GOLOCAL PDX (Mar. 27, 2015), <http://www.golocalpdx.com/news/portlands-gentrification-is-creating-mammoth-commute-issues> [<https://perma.cc/P3MB-MFXF>]. To make explicit an obvious point, residents who leave a gentrifying neighborhood will require housing elsewhere. The availability of affordable housing is likely to dictate where they relocate. That may mean that relocation to other urban neighborhoods is possible, or, as social scientists have begun to document, it may mean relocation to suburbs outside the city. Thomas J. Cooke & Curtis Denton, *The Suburbanization of Poverty? An Alternative Perspective*, 39 URB. GEOGRAPHY 300, 300 (2015) (noting that one factor in the growth of certain suburbs is “the impact of gentrification on housing opportunities for at-risk populations in large cities”); cf. Cody Hochstenbach & Sako Musterd, *Gentrification and the Suburbanization of Poverty: Changing Urban Geographies Through Boom and Bust Periods*, 39 URB. GEOGRAPHY 26, 26 (2018); Nikole Hannah-Jones, *In Portland’s Heart, 2010 Census Shows Diversity Dwindling*, OREGONIAN: OREGON LIVE (Apr. 30, 2011), [https://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/04/in\\_portlands\\_heart\\_diversity\\_dwindles.html](https://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/04/in_portlands_heart_diversity_dwindles.html) [<https://perma.cc/TEC4-C8DY>] (“Portland, already the whitest major city in the country, has become whiter . . . . The city core didn’t become whiter simply because lots of white residents moved in, the data show. Nearly 10,000 people of

To the extent that environmental gentrification sets in motion waves of relocation from communities that have long been impacted by negative environmental conditions, distributional justice becomes a pressing concern. As noted previously, low-income communities and communities of color experience disproportionate levels of environmental contamination.<sup>119</sup> In many cases, these communities' members are the main drivers for change.<sup>120</sup> Where these community members are unable to enjoy the benefits of environmental improvements even after they have long been subject to the neighborhood's harms or inadequacies, questions arise as to what segments of society should get to experience environmental benefits. Such concerns have been discussed often in the context of environmental justice advocacy and gain a fresh poignancy in the context of environmental gentrification.<sup>121</sup>

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color, mostly African Americans, also moved out. And those who left didn't move to nicer areas. Pushed out by gentrification, most settled on the city's eastern edges . . . where the sidewalks, grocery stores and parks grow sparse, and access to public transit is limited. As a result, the part of Portland famous for its livability—for charming shops and easy transit, walkable streets and abundant bike paths—increasingly belongs to affluent whites.”)

118. In a reversal from trends in preceding decades, when poverty tended to be concentrated in the inner city, there is now evidence of a growth in poverty in suburban neighborhoods. Recent testimony from the Brookings Institution before the Ways & Means Committee of the United States House of Representatives described a shift in the nation's geography of the nation's poor during the 2000s, noting that “[f]or the first time, suburbs became home to more poor residents than cities.” *The Changing Geography of U.S. Poverty: Hearings Before the H. Ways & Means Comm.*, 115th Cong. (Feb. 15, 2017) (testimony of Elizabeth Kneebone, Brookings Inst.). While the extent to which this holds true will of course vary based on the suburb in question, researchers have found evidence of a national increase in suburban poverty rates. Todd Swanstrom, *The Local Government Dating Game: Metropolitan Development and City-County Merger*, 34 ST. LOUIS U. PUB. L. REV. 71, 77 (2014) (describing “a national trend of growing suburban poverty”). The shift toward suburban poverty raises unique issues for communities, who may be unused to addressing the unique needs of residents facing poverty, as well as for social service organizations, whose infrastructure may not be well suited to the lower densities of suburban residents. And those residents who move from a low-income neighborhood in the central city to one in the suburbs may find themselves facing familiar problems but lacking the support structures on which they have previously relied to solve them.

119. See *supra* Introduction.

120. See, e.g., GOULD & LEWIS, *supra* note 4, at 140 (describing the role of UPROSE, a community organization in Sunset Park, Brooklyn, as a leader in the fight for neighborhood environmental improvements).

121. See, e.g., NEJAC REPORT, *supra* note 9, at 19 (“It is central to the notion of environmental justice that no population bears a disproportionate exposure to environmental hazards. In the same spirit, no population should consistently pay

Environmental justice, at its core, is aimed at preventing unequal distribution of environmental burdens.<sup>122</sup> It has moved beyond that original definition, however, to encompass concerns about unequal access to environmental benefits.<sup>123</sup> Where low-income communities or communities of color have suffered unequal environmental burdens due to contamination or lack of access to green space, community members and environmental justice advocates might suggest remedying that inequity through one of the mechanisms of environmental remediation described above.<sup>124</sup> But if remediation is followed by displacement of the very community it was intended to serve, then the environmental justice goal of equal access to environmental protection may not be met.<sup>125</sup> This doesn't mean that remediation should not occur in the first place, but that attention to the impacts of that remediation on the community is important.

## II. ENVIRONMENTAL LAW MEETS ENVIRONMENTAL GENTRIFICATION

The basic methods for securing the kinds of environmental improvement projects described above are found in traditional environmental law, including federal, state, and local programs. For instance, as noted, CERCLA and related statutes make cleanups of many contaminated sites possible; the Clean Water Act may serve as a tool to push the cleanup of urban

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a disproportionate price for the cleanup and revitalization of the neighborhoods in which they live.”); *see also* Rigolon & Nemeth, *supra* note 106, at 72.

122. Sandra Richardson, *Environmental Justice: A Tool for Community Empowerment*, COLO. LAW., Dec. 1998, at 55 (“The idea and purpose of the environmental justice movement is to prevent an inequitable distribution of environmental burdens on minority and low-income communities.”).

123. Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U. L. REV. 1327, 1338 (2016) (“Today, environmental justice can encompass many traditional civil rights fights such as housing equality, access to transportation, access to healthcare, access to education and economic opportunities, as well as more traditional environmental justice issues such as contaminated water, soil, and air.”); *see also* Julia C. Rinne & Carol E. Dinkins, *Environmental Justice: Merging Environmental Law and Ethics*, NAT. RESOURCES & ENV'T, Winter 2011, at 3 (noting that “[t]he environmental justice movement seeks to create equal access to ecological resources and equal protection from environmental hazards for all persons”); Rigolon & Nemeth, *supra* note 106, at 72.

124. *See supra* Section I.A.

125. *See supra* note 121.

waterways; and an increasing focus on environmental planning tools makes possible and furthers urban commitments to sustainable planning.<sup>126</sup> It is often difficult, however, to use these same legal mechanisms to address the potential negative consequences of urban environmental impacts. Environmental law as it currently stands does not provide a clear path forward to those who may value the improvements it offers but fear the impacts that such cleanups will have on affected communities.

This disconnect occurs, generally, because the harms resulting from environmental gentrification are outside the scope of impacts contemplated by drafters of the laws being employed.<sup>127</sup> Simply put, the major federal environmental laws are aimed at addressing harm to the physical environment, not social harm.<sup>128</sup> Other aspects of environmental law, including planning statutes designed to take overall impacts into account, are similarly ill-suited to address the particular issues raised by environmental gentrification.<sup>129</sup> Moreover, there is generally a decision-making divide between environmental and housing matters.<sup>130</sup> Environmental agencies have recognized this disconnect and have tried to address it in various ways.<sup>131</sup> But while a number of modifications have been made to environmental laws to confront some of these issues, those impacted negatively by environmental gentrification are still generally left without a remedy. This Part will describe some of the reasons why efforts to use environmental law and rely on environmental decisionmakers to address those issues face a number of hurdles.

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126. See *supra* Section I.A.

127. J.B. Ruhl, *The Co-Evolution of Sustainable Development and Environmental Justice: Cooperation, then Competition, then Conflict*, 9 DUKE ENVTL. L. & POL'Y F. 161, 177–78 (1999) (noting that “[m]ainstream environmentalism retained sharp boundaries between environment and economy, and hardly recognized social equity as a player in the evolution of environmental policy”).

128. *Id.*

129. Cf. A. Dan Tarlock, *City Versus Countryside: Environmental Equity in Context*, 21 FORDHAM URB. L.J. 461, 461 (1994) (“Using environmental regulation to promote social equity is not a high priority of the United States environmental policy.”).

130. See, e.g., Rigolon & Nemeth, *supra* note 106, at 75.

131. See, e.g., U.S. EPA, COMMUNITY CULTURE AND THE ENVIRONMENT: A GUIDE TO UNDERSTANDING A SENSE OF PLACE 2 (2002).

A. *Federal and State Environmental Statutory and Regulatory Protections*

The first line of defense against environmental contamination in a community is often to use traditional pollution control statutes, which aim to regulate emissions into air and water and provide mechanisms for cleanup of land that has become contaminated.<sup>132</sup> These federal statutory schemes, including the Clean Water Act (CWA),<sup>133</sup> the Clean Air Act (CAA),<sup>134</sup> CERCLA,<sup>135</sup> and others, impose limits on lawful pollution and provide mechanisms by which violations of the various regulatory schemes can be enforced. While common law solutions may exist to remedy pollution in some limited cases,<sup>136</sup> these

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132. Because this discussion is focused on impacts following the cleanup of contaminated areas, this Article does not consider the possibility of using environmental justice concerns to halt activities during the initial permitting stage. Such considerations are required under certain federal environmental statutes. *See, e.g.*, 42 U.S.C. § 7408(f)(1)(C) (2018); *see also, e.g.*, Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 *ECOLOGY L.Q.* 617, 621 (1999) (discussing how a permitting agency “might” consider conditioning a permit on the permittee’s promise to “redress environmental justice concerns”).

133. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388 (2012). “The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters.” *Summary of the Clean Water Act*, U.S. EPA, <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last visited Nov. 27, 2018) [<https://perma.cc/S2KG-2HC5>].

134. 42 U.S.C. §§ 7401–7671 (2012). “Congress designed the Clean Air Act to combat a variety of air pollution problems, and to tackle emerging pollution threats.” *Overview of the Clean Air Act and Air Pollution*, U.S. EPA, <https://www.epa.gov/clean-air-act-overview> (last visited Nov. 27, 2018) [<https://perma.cc/6AJJ-R6Y8>].

135. 42 U.S.C. §§ 9601–9675 (2012). “The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA): established prohibitions and requirements concerning closed and abandoned hazardous waste sites; provided for liability of persons responsible for releases of hazardous waste at these sites; and established a trust fund to provide for cleanup when no responsible party could be identified.” *Superfund: CERCLA Overview*, U.S. EPA, <https://www.epa.gov/superfund/superfund-cercla-overview> (last visited Nov. 27, 2018) [<https://perma.cc/U9W2-PESS>].

136. *See, e.g.*, Linda A. Malone, *Common Law Remedies for Pollution of Air and Other Media*, in *ENVIRONMENTAL REGULATION OF LAND USE* § 10:2 (2017); Arnold W. Reitze, Jr., *The Legislative History of U.S. Air Pollution Control*, 36 *HOUS. L. REV.* 679, 680 (1999). The exact parameters of a nuisance action depend on the law of the state in which it is brought (broadly speaking); however, a plaintiff must show “intentional interference of a substantial and unreasonable nature in another’s use and enjoyment of land.” Malone, *supra*. Common law remedies are often deemed preempted by state or federal regulatory schemes that address the same kinds of pollution. *See, e.g.*, Kathleen Roth, *A Landowners’ Remedy Laid to*

federal statutes and their state counterparts offer the primary means by which environmental harms are remedied in the United States.

Mainstream environmental enforcement mechanisms are often underutilized by regulators in communities of color and low-income neighborhoods, resulting in disproportionate levels of contamination as compared to higher-income areas.<sup>137</sup> Further inequalities arise under these statutory frameworks because of disparities in resources between many impacted communities and the industrial or commercial actors that are often some of the major sources of pollutants.<sup>138</sup> Attention to and enforcement regarding environmental issues under environmental protection statutes by regulators, politicians, and community and environmental advocates may therefore be a very welcome change. As an area attracts attention from regulators, successful enforcement efforts may effect change in the form of additional mandates regarding specific pollutants, halting sources of contamination, and mandated remediation of impacted areas.<sup>139</sup> For this reason, many scholars and practitioners

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*Waste: State Preemption of Private Nuisance Claims Against Regulated Pollution Sources*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 401, 401 (1996). Common law claims are difficult to win for a variety of other reasons as well. *See, e.g.*, Ronald G. Aronovsky, *Back from the Margins: An Environmental Nuisance Paradigm for Private Cleanup Cost Disputes*, 84 DENV. U. L. REV. 395, 422 (2006) (detailing difficulties in using state common law remedies to address land contamination); Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1810 (2004); Reitze, *supra*, at 683 (noting the “rarity with which the courts have used the doctrine of nuisance to abate air pollution”).

137. *See, e.g.*, Uma Outka, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 212 (2005) (“A *National Law Journal* study in 1992 found that average penalties under the Resource Conservation and Recovery Act (RCRA) were 500% lower for violations in minority communities than in white communities. Less dramatic but still substantial disparities in penalty totals were found under the other major environmental laws. The Clean Water Act was 28% lower, the Clean Air Act, 8% lower, the Safe Drinking Water Act (SDWA), 15% lower, and in multi-media actions involving enforcement of several statutes, 306% lower.” (citations omitted)); *cf.* Godsil, *supra* note 136, at 1868–70 (noting the failures of federal environmental laws to address harms to urban communities of color).

138. *See, e.g.*, Eileen Gauna & Sheila Foster, *Environmental Justice: Stakes, Stakeholders, Strategies*, 30 HUM. RTS. 2, 4 (2003).

139. *See, e.g.*, *City of Lancaster, PA Clean Water Act Settlement*, U.S. EPA, <https://www.epa.gov/enforcement/city-lancaster-pa-clean-water-act-settlement> (last visited Nov. 27, 2018) [<https://perma.cc/P8Q4-EPW6>] (announcing measures to end discharges of untreated sewage and other pollutants to local waterways from the City’s combined storm and sewage system); *see also, e.g.*, *Case Summary: EPA Agreement Will Start Clean Up of Contaminated Soil at the U.S. Smelter and*

have argued that use of the environmental remediation laws to address inequitable pollution is the best means by which to secure environmental justice.<sup>140</sup>

Within the context of environmental gentrification, however, such enforcement actions may quickly turn into a double-edged sword: successful enforcement actions may improve the environment but may also be a direct cause of escalating property values.<sup>141</sup> And nothing within the environmental statutes that trigger this process speaks to this impact. The absence of any mechanism to address rising property values is perhaps unsurprising, as the federal environmental statutes are focused primarily on environmental protection.<sup>142</sup> Some provisions of these statutes do allow for consideration of environmental justice concerns, particularly at the stage when federal regulators are issuing permits to polluting entities.<sup>143</sup> The permitting stage is generally distant in time from cleanup actions, how-

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*Lead Refinery Superfund Site*, U.S. EPA, <https://www.epa.gov/enforcement/case-summary-epa-agreement-will-start-clean-contaminated-soil-us-smelter-and-lead> (last visited Nov. 27, 2018) [<https://perma.cc/EE62-LXXR>] (describing anticipated cleanup of soil in East Chicago, Indiana); *Case Summary: NCR Corporation Agrees to End Litigation and Complete PCBs Cleanup at Fox River Superfund Site*, U.S. EPA, <https://www.epa.gov/enforcement/case-summary-ncr-corporation-agrees-end-litigation-and-complete-pcbs-cleanup-fox-river> (last visited Nov. 27, 2018) [<https://perma.cc/DK9F-5WSM>] (describing plans for sediment cleanup work in Green Bay, Wisconsin); *Case Summary: \$78 Million Clean Up Settlement Will Address Groundwater Contamination at Southern California Superfund Site*, U.S. EPA, <https://www.epa.gov/enforcement/case-summary-78-million-clean-settlement-will-address-groundwater-contamination-southern> (last visited Nov. 27, 2018) [<https://perma.cc/22UZ-3L9P>] (describing plans for cleanup of groundwater supply in California).

140. Cf. Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 *FORDHAM URB. L.J.* 523, 526 (1994); Outka, *supra* note 137, at 231 ("Depending on the circumstances, enforcing the basic environmental laws such as the National Environmental Policy Act (NEPA), Clean Air Act (CAA), the Clean Water Act (CWA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), can be as effective, if not more effective, for these communities . . .").

141. See *supra* Part I.

142. See, e.g., Gregg P. Macey, *Boundary Work in Environmental Law*, 53 *HOUS. L. REV.* 103, 117 (2015) ("There continues to be no federal legislation specifically addressed to the distributional effects of environmental law."); cf. Michael S. Giannotto & Thomas J. Mikula, *Environmental Justice and the Mining and Energy Industries*, 21 *ENERGY & MIN. L. INST.* 131, 135–59 (2001) (noting that, although several provisions of federal environmental law were cited in a 1999 report submitted by the National Environmental Justice Advisory Council to EPA as possible entry points for consideration of environmental justice factors, none of the statutes granted precise authority to incorporate such concerns).

143. See, e.g., Lazarus & Tai, *supra* note 132, at 621 (surveying the authority of the EPA to integrate environmental justice concerns into its permitting activities).

ever, and may be of little utility. Moreover, the core concern for the environmental justice inquiry in these settings is that the EPA “should take into account the racial and/or socioeconomic makeup of the community most likely to be affected adversely by the environmental risks of a proposed activity.”<sup>144</sup> Enforcement actions may very well serve to promote environmental justice in this sense, by ridding an area of a source of pollution and ending these disproportionate impacts. But once the process is set in motion, there is no control mechanism over who enjoys the fruits of these environmental improvements.

Thus, while the goals of the bulwark environmental statutes are not in tension with affordable housing concerns, they also do not specifically address or accommodate them.<sup>145</sup> Without a built-in mechanism to address or temper concerns about the secondary impacts of environmental enforcement actions, use of mainstream environmental statutes brings the potential for risk to communities suffering from negative environmental conditions.

The same tension occurs when a private party, rather than the government, is the one enforcing the environmental statutes. As noted, traditional environmental law provides several avenues through which to address environmental pollution. Even where government actors do not enforce permits or other requirements, several federal environmental laws provide concrete mechanisms—known as citizen suits—that citizens can use to effect improvements in their neighborhoods.<sup>146</sup> Using such suits, advocates and members of effected communities have a mechanism for enforcing environmental laws where no enforcement action is otherwise being taken.<sup>147</sup> Citizen suits may be brought against public or private actors for violations of

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144. *Id.* at 620.

145. *Cf.* Outka, *supra* note 137, at 216 (discussing possible reasons for the lack of reconciliation between environmental protections and civil rights laws); Tarlock, *supra* note 129, at 461 (discussing the limitations of traditional environmental law to address questions of social equity); George B. Wyeth & Beth Termini, *Regulating for Sustainability*, 45 ENVTL. L. 663, 667 (2015) (discussing the relationship between environmental protection and sustainability and why the two are not necessarily coextensive).

146. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365 (2012); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2012); Clean Air Act 42 U.S.C. § 7604 (2012).

147. *See, e.g.*, Sara Mogharabi et al., *Environmental Citizen Suits in the Trump Era*, NAT. RESOURCES & ENV'T, Fall 2017, at 3; *see also* Monique C. M. Leahy, *Air Pollution: Parties; Citizens' Suits*, in STUART M. SPEISER ET AL., 7 AMERICAN LAW OF TORTS § 20:47 (2018).

federal or state environmental laws, or against government officials for their failure to regulate. Although either kind of citizen suit is difficult to win,<sup>148</sup> such suits “have done much to define modern environmental law.”<sup>149</sup>

As with enforcement actions, however, even if a citizen suit is successful, nothing in the litigation framework addresses or mitigates the social impacts of any eventual cleanup.<sup>150</sup> Instead, success in such an action means that the environmental hazards for the community are reduced, either through payment of damages or through changes to polluting land uses.<sup>151</sup> This lack of control over what happens after a successful lawsuit may make fraught a community’s or individual’s decision to advocate for the relocation or abandonment of major sources of pollution in an area. Where such successes result in the kind of neighborhood improvements that spur gentrification, citizens may have worked to improve an area only to find themselves unable to reap the benefits.

### *B. The National Environmental Policy Act and Its State Counterparts*

The National Environmental Policy Act (NEPA) is the statutory means by which environmental impacts are incorporated into federal decision-making processes.<sup>152</sup> At the core of NEPA is a mandate that agencies consider the environmental impacts of planned, major federal actions.<sup>153</sup> The kinds of federal actions that trigger NEPA’s requirements are wide-ranging but include, at the most basic level, actions such as “making decisions on permit applications, adopting federal land manage-

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148. See, e.g., James R. May, *The Availability of State Environmental Citizen Suits*, 18 NAT. RESOURCES & ENV’T 53, 54–55 (2004) (describing some of the hurdles that citizen suits may face, including notice requirements, jurisdictional limitations, preclusion by other enforcement efforts, standing, and post-complaint compliance).

149. Mark A. Ryan, *Clean Water Act Citizen Suits: What the Numbers Tell Us*, 32 NAT. RESOURCES & ENV’T 20, 20 (2017).

150. Cf. James T. Lang, *Citizens’ Environmental Lawsuits*, 47 TEX. ENVTL. L.J. 17, 31 (2017) (discussing civil penalties as a remedy for violations of federal environmental statutes).

151. *Id.*

152. See, e.g., Kathryn C. Plunkett, *The Role of Local Environmental Impact Review*, in NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW 299, 301 (John R. Nolon ed., 2003).

153. See, e.g., *id.*

ment actions, and constructing highways and other publicly owned facilities.”<sup>154</sup> NEPA does not prescribe any particular course of action but does require that federal agencies engage in an environmental impact review when making certain determinations.<sup>155</sup> Following the passage of NEPA, many states imitated its form and function with their own state environmental protection acts, or SEPA’s.<sup>156</sup> To streamline the discussion, this Article will focus on federal requirements, but SEPA’s tend to operate in a fashion similar to NEPA.<sup>157</sup>

The federal environmental impact review process is designed to “provide full and fair discussion of significant environmental impacts and . . . inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”<sup>158</sup> To advance these goals, NEPA imposes requirements on federal agencies engaging in any “recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”<sup>159</sup> When NEPA’s obligations are triggered, the federal agency must prepare a detailed statement regarding, among other things, “(i) the environmental impact of the proposed action, [and] (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.”<sup>160</sup>

NEPA’s regulations define the human environment to include “the natural and physical environment and the relationship of people with that environment.”<sup>161</sup> “When an environmental impact statement [(EIS)] is prepared and economic or social and natural or physical environmental effects are interrelated, then the [EIS] will discuss all of these effects on the human environment.”<sup>162</sup> Agencies must look not only at ecological effects but also at indirect effects on the aesthetic, historic, cultural, economic, social, or health aspects of a community.<sup>163</sup>

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154. *What Is the National Environmental Policy Act?*, U.S. EPA, <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last visited Nov. 28, 2018) [<https://perma.cc/FCZ9-EFCY>].

155. *See, e.g.*, Plunkett, *supra* note 152.

156. *See, e.g., id.*

157. *Id.*

158. 40 C.F.R. § 1502.1 (2018).

159. 42 U.S.C. § 4332(C) (2012).

160. *Id.* § 4332(C)(i)–(ii).

161. 40 C.F.R. § 1508.14 (2011).

162. *Id.*

163. *Id.* § 1508.8.

The indirect effects that must be considered include “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”<sup>164</sup> Importantly, in the context of environmental improvements, such indirect effects may “include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.”<sup>165</sup> Indirect effects are defined as effects that “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”<sup>166</sup> Under this standard, “[a]n impact is reasonably foreseeable if a ‘person of ordinary prudence would take it into account in reaching a decision.’”<sup>167</sup>

All NEPA assessments must specifically consider the impacts of these indirect effects on low-income and minority communities, and any mitigation measures developed under NEPA must address the impacts on these same communities.<sup>168</sup> NEPA also mandates consideration of the cumulative impacts of the action in question. A cumulative impact under NEPA “is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”<sup>169</sup> For the cumulative impacts analysis, NEPA requires “a reasonably close causal relationship’ between the effect and the alleged cause.”<sup>170</sup>

The breadth of NEPA and its implementing regulations make it a popular tool for planners, community activists, and scholars in their attempts to engage with questions of neighborhood change.<sup>171</sup> Indeed, it may be the primary means of

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164. *Id.*

165. *Id.*

166. *Id.*

167. *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng’rs*, 310 F. Supp. 3d 707, 714 (M.D. La. 2018) (quoting *City of Shoreacres v. Waterworth*, 429 F.3d 440, 453 (5th Cir. 2005)).

168. Memorandum on Executive on Environmental Justice, 1 PUB. PAPERS 241, 242 (Feb. 11, 1994).

169. 40 C.F.R. § 1508.7 (2018).

170. *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1043 (D. Minn. 2010) (quoting *U.S. Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004)).

171. *Cf. Sheila R. Foster, The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 529 (2006) (discussing legal

gaining public input into federal and state decision-making processes.<sup>172</sup> In the context of projects that may trigger environmental gentrification, NEPA's explicit acknowledgment of social impacts may be useful. By mandating public involvement in the planning process, along with consideration of certain social factors, NEPA offers an otherwise nonexistent mechanism for community participation. And to the extent that community involvement does not yield the results some may hope for, NEPA may offer a means by which to challenge a planning process in court.<sup>173</sup>

For all its surface appeal, in reality NEPA rarely provides a viable means of relief for those concerned about loss of housing, community change, and other possible impacts of environmental gentrification. NEPA is unlikely to provide a mechanism to advance community interests for several reasons. First, NEPA applies only to federal agencies engaged in a major federal action.<sup>174</sup> Second, NEPA requires consideration of only those social impacts that are linked to physical changes, a chain of causation that may be difficult to satisfy. And, finally, NEPA is a process-based statute; it forces no particular action on the agencies under its mandate.

NEPA's utility is limited from the outset because the federal actions to which NEPA applies, and which might be plausibly linked to environmental gentrification, are limited. Listed above were some categories of projects that have been shown to spur gentrification, including improvement of urban waterways, remediation of contaminated land, and overall sustainability efforts. Examining these examples in the NEPA context shows some of the difficulties in using the statute to engage with the question of environmental gentrification. For instance, remediation of urban waterways typically occurs under the Clean Water Act's (CWA) grant of authority to federal or state agencies. NEPA's requirements do not apply to state agencies,

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scholars' failure to "fully grapple with the costs imposed on the social networks and ties, or social fabric of a community, arising from land use and development decisions").

172. Elly Pepper, *Never Eliminate Public Advice: NEPA Success Stories*, NAT. RESOURCES DEF. COUNCIL (Feb. 1, 2015), <https://www.nrdc.org/resources/never-eliminate-public-advice-nepa-success-stories> [<https://perma.cc/33FU-6J5Q>].

173. See Saint Paul Branch of NAACP v. U.S. Dep't of Transp., 764 F. Supp. 2d 1092, 1104 (D. Minn. 2011), *enforcement granted in part, denied in part*, No. CV 10-147 (DWF/AJB), 2012 WL 13028740 (D. Minn. 2012).

174. 42 U.S.C. § 4332 (2012); see 40 C.F.R. § 1508.18(b) (2018) (identifying categories of federal actions).

and even where there is federal involvement, the CWA specifically exempts federal enforcement or remediation actions from the requirements of NEPA.<sup>175</sup>

Another of the possible triggers for environmental gentrification is the cleanup of contaminated land. For sites on the National Priorities List,<sup>176</sup> the federal government may become involved in cleanup under the umbrella of the CERCLA cleanup process. For smaller sites, the EPA's brownfields program provides grants of federal funding that may finance portions of these cleanup projects.<sup>177</sup> Cleanup of contaminated sites under CERCLA is not subject to judicial review—including review of NEPA compliance—until after completion of the remedy in question.<sup>178</sup> Because this delayed availability of judicial review is at odds with the requirement for judicial review of NEPA compliance before a project commences, the federal government has long taken the position that NEPA does not apply to actions taken under the CERCLA program.<sup>179</sup> Thus, for cleanup of contaminated land, environmental review at the federal level is likely to be inconsequential.

To the extent that a site receives substantial federal assistance to remediate a brownfield, a NEPA analysis may apply.<sup>180</sup> Similarly, where federal funding is used for remediation of infrastructure or implementation of sustainability plans, those projects may be required to undergo a NEPA analysis. Ultimately, for most remediation and infrastructure projects, federal agencies are likely to issue a short environmental assessment, followed by a “Finding of No Significant Impact”

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175. 33 U.S.C. § 1371 (“[N]o action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.” (citations omitted)).

176. *Superfund: National Priorities List*, *supra* note 49 (“The National Priorities List (NPL) is the list of sites of national priority among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States and its territories. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation.”).

177. *See, e.g., Overview of the Brownfields Program*, *supra* note 45.

178. 42 U.S.C. § 9613(h).

179. *See, e.g., Memorandum from Lois J. Schiffer, Assistant Attorney Gen., Env't & Nat. Res. Div., U.S. DOJ to Steven Herman, EPA, et al. 2–3* (Jan. 23, 1995), [https://www.energy.gov/sites/prod/files/G-DOJ\\_nepa\\_cercla\\_cleanups.pdf](https://www.energy.gov/sites/prod/files/G-DOJ_nepa_cercla_cleanups.pdf) [<https://perma.cc/4P5A-NYHV>].

180. *See, e.g., Bradford Mank, Reforming State Brownfield Programs to Comply with Title VI*, 24 HARV. ENVTL. L. REV. 115, 163 (2000).

based on the limited nature of the environmental impacts involved.<sup>181</sup> When using that process, the agency is not required to complete a longer, more extensive EIS. Thus, for all but the largest changes in infrastructure, it will likely be difficult for a community to show a large enough physical change and a close enough causal relationship to mandate full EIS review under NEPA.

The second reason that NEPA is unlikely to be an effective counter to environmental gentrification is that it provides no guarantee of full consideration of social impacts. Only “significant” effects must be considered, raising a threshold question whether displacement of residents is sufficient to mandate consideration. Moreover, for an “effect” of an action to be a required part of a NEPA analysis, there must be a “reasonably close causal relationship between [the] change in the physical environment and the effect at issue.”<sup>182</sup> For this reason, economic or social impacts alone do not require preparation of an EIS under NEPA. Instead, courts have consistently found that consideration of social impacts under an environmental impact analysis must be linked to physical impacts on the environment.<sup>183</sup> This causal nexus requirement has generally limited consideration of social impacts, meaning that the scope of the physical impacts in question will determine whether social impacts are part of the NEPA discussion.<sup>184</sup>

Thus, in the context of environmental gentrification, successful arguments for consideration of social impacts under NEPA would need to link significant physical changes stemming from infrastructure changes to social effects such as displacement.<sup>185</sup> As described above, however, the link between physical impacts and these social effects is not direct. Instead, physical changes in terms of environmental improvements increase the desirability of the neighborhood, which, due to market forces, leads to higher home values, which eventually leads

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181. *Id.*

182. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

183. *See, e.g., id.*; *see also* Foster, *supra* note 171, at 533 (“NEPA and its state counterparts have consistently been interpreted in physically deterministic ways . . . despite judicial recognition of the ways in which physical land use changes can significantly alter the very ecology of urban communities by severely disrupting, and often triggering the demise of, the fabric of social and economic relationships.”).

184. Foster, *supra* note 171, at 550–51.

185. *Id.* at 531–33.

to displacement.<sup>186</sup> Where social impacts are this far removed from the physical impacts in question, courts are less likely to find that such social impacts must be considered in the environmental analysis.<sup>187</sup>

Some federal actors may be inclined to consider such impacts even if they are not required to do so by NEPA,<sup>188</sup> and even where they are not, advocates could potentially argue for such a consideration based on the connection between any environmental improvements and community changes.<sup>189</sup> Ultimately, however, upon challenge, most courts will uphold an agency's consideration of environmental justice impacts.<sup>190</sup> Thus, success in this realm likely depends on federal agencies' willingness to consider potential social impacts under the NEPA framework.

The above analysis is focused on the requirements under the federal framework. But it should again be noted that many actions with the potential to trigger environmental gentrification are carried out not by federal actors but by state and local governments. States, as noted, may have their own planning statutes in place. These statutes, the aforementioned SEPAs, may provide for a more thorough focus on social impacts.<sup>191</sup> Where applicable, these state planning statutes may provide another opportunity for court review of a planning process.<sup>192</sup> However, most SEPAs have been interpreted to limit consid-

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186. See *supra* Section I.B.

187. See, e.g., Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 605 n.88 (1997).

188. See *Saint Paul Branch of NAACP v. U.S. Dep't of Transp.*, 764 F. Supp. 2d 1092, 1115 (D. Minn. 2011), *enforcement granted in part, denied in part*, No. CV 10-147 (DWF/AJB), 2012 WL 13028740 (D. Minn. 2012) (upholding U.S. Department of Transportation's consideration of gentrification impacts in its approval of a light rail construction project).

189. See Daniel R. Mandelker et al., *Environmental Justice Executive Order*, in NEPA LAW AND LITIGATION § 2:46 (2d ed. 2018).

190. *Id.*

191. Cf. *Akpan v. Koch*, 547 N.Y.S.2d 852, 856 (N.Y. App. Div. 1989), *aff'd*, 554 N.E.2d 53 (N.Y. 1990) (reviewing a New York State agency's analysis of secondary displacement impacts of a proposed development under the New York environmental review statute); Alan Ramo, *Environmental Justice as an Essential Tool in Environmental Review Statutes: A New Look at Federal Policies and Civil Rights Protections and California's Recent Initiatives*, 19 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 41, 62-65 (2013) (describing California's more stringent requirements for consideration of social impacts).

192. See, e.g., *Vega v. Cty. of L.A.*, F036810, 2002 Cal. App. Unpub. LEXIS 4783, at \*2-3 (Jan. 17, 2002); *Jackson v. N.Y. Urban Dev. Corp.*, 494 N.E.2d 429, 437 (N.Y. 1986).

eration of social impacts, similar to the interpretation of NEPA.<sup>193</sup>

Finally, environmental planning statutes may prove ineffective at addressing environmental gentrification because they are, at their core, process-based statutes. If a NEPA or SEPA analysis is challenged as incomplete due to its lack of consideration of social impacts, and a court agrees, the remedy is an injunction, a remand, or both.<sup>194</sup> In consequence, such challenges may delay the beginning of the project while the agency analyzes the social impacts of the proposed action but are unlikely to significantly alter the scope of the project or its likelihood of completion.<sup>195</sup> Ultimately, however, even where social impacts are integrated into a state environmental planning analysis, such efforts appear unlikely to effect any meaningful alterations.<sup>196</sup>

Like NEPA, SEPA's tend to require consideration of certain impacts but do not force particular outcomes. Thus, in an example of a case assessing the impact of a rezoning plan in Sunset Park, Brooklyn, New York City's planning agency considered neighborhood change as part of its environmental review. It dedicated, however, "less than a page to the impact on neighborhood character in its environmental review, merely stating that no impact would occur."<sup>197</sup> This conclusion was contrary to the one arrived at by members of the community with regard to

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193. See, e.g., Foster, *supra* note 171, at 551.

194. Mandelker et al., *supra* note 189, § 4:76.

195. See, e.g., Haydn Davies, *From Equal Protection to Private Law: What Future for Environmental Justice in U.S. Courts?*, 2 BRIT. J. AM. LEGAL STUD. 163, 175 (2013) (noting that the "most likely outcome" with regard to a challenge under NEPA "is a delay to the proposed project or facility rather than cessation or closure"); John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 109 (2014) (describing *Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359 (1986), a case that challenged permits given to a proposed apartment building on the basis that the required state environmental impact statements did not consider displacement impacts, and that resulted in rescission of the permits and the agency being required to consider those impacts); Hannah Weinstein, *Fighting for a Place Called Home: Litigation Strategies for Challenging Gentrification*, 62 UCLA L. REV. 794, 822 (2015).

196. See, e.g., Christopher D. Ahlers, *Race, Ethnicity, and Air Pollution: New Directions in Environmental Justice*, 46 ENVTL. L. 713, 732 (2016) ("Judicial decisions considering challenges to siting of industrial facilities and transportation projects under NEPA demonstrate that this statute provides limited protection to low income minority communities.").

197. Bethany Y. Yi, *Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 FORDHAM L. REV. 1189, 1234 n.291 (2016).

what would happen to the character of the low-income neighborhoods being gentrified.<sup>198</sup> Given the lack of common understanding surrounding community character and the impacts that environmental improvement projects may have, such an outcome is perhaps unsurprising. Lawyers and community members seeking to use NEPA or SEPA to stimulate a discussion about gentrification and its impacts on communities are likely to find limited success under statutes as they are currently implemented.

Thus, under both substantive and process-driven environmental laws, it is difficult to force consideration of the impacts of gentrification and displacement spurred by environmental projects. Relatedly, outside of the statutory context of environmental law, environmental planning processes generally separate environmental and housing planning perspectives, and environmental and housing regulatory roles are typically performed by different departments at the local, state, and national levels.<sup>199</sup> Such separations make it difficult for environmental law and environmental lawyers to take a more comprehensive view.

In short, environmental law may be an effective tool for launching environmental cleanups, but it is often ill-equipped to address the social impacts that may accompany these improvement actions. Environmental law's focus on improving the environment is to be expected. But without any ability to address community impacts, the utility of environmental law remedies may be questionable for communities fighting for access to healthy, green neighborhoods in urban areas. In the same way, gentrification and displacement spurred by environmental projects may undermine the notion of true sustainability. And this more limited sphere of focus may lead to a sense that environmental law exists to protect only those who can pay the premium that environmental benefits command.

### III. THE DIVIDE BETWEEN AFFORDABLE HOUSING AND ENVIRONMENTAL LAW

For communities at risk of displacement, the difficulties in using environmental law to address the aftermath of environ-

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198. *Id.* at 1234.

199. *Cf.* Rigolon & Nemeth, *supra* note 106, at 4 (describing separation and fragmentation between parks and housing departments in Chicago, Illinois).

mental improvements may contribute to skepticism about the law's equity and efficacy.<sup>200</sup> This divide between environmental law and affordable housing concerns is potentially reinforced in other ways as well. This Part will explore some of the reasons for this divide as well as the consequences of the current separation between law, policy, and lived reality.

First, as noted, a number of factors have led to racial and socioeconomic disparities in communities' experiences of environmental harm. That environmental law lacks a mechanism by which to remedy those disparities without triggering displacement may decrease the value of environmental protections for some residents.<sup>201</sup> Second, environmental and land use advocates have a history of employing legal strategies that are at odds with affordable housing and the needs of low-income communities, including challenges to planned affordable housing developments on environmental grounds,<sup>202</sup> battles for historic preservation restrictions,<sup>203</sup> and others. Finally, while nearly twenty years have passed since environmental law began to focus on questions of sustainable development in a concrete fashion,<sup>204</sup> the issue of affordable housing has often been absent from the conversation.<sup>205</sup>

Combined, these gaps between environmental law goals and affordable housing goals, both perceived and real, mean that environmental law may be seen as the province of the privileged, and not a field that adequately addresses the inequities in environmental exposure and enjoyment experienced

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200. Cf. Patricia Salkin, *Anti-Sprawl (Smart Growth) Measures*, in 3 NEW YORK ZONING LAW & PRACTICE § 32A:66 n.10 (4th ed. 2018) ("Not everyone favors anti-sprawl measures, and opponents are not limited to developers and real estate interests. Habitat for Humanity affiliates opposed anti-sprawl efforts for fear that the ballot initiatives would raise land costs. Others have criticized programs because they have not adequately addressed the potential for gentrification of older neighborhoods and displacement of lower-income families." (internal quotations omitted)).

201. Cf. Joel B. Eisen, *Brownfields Policies for Sustainable Cities*, 9 DUKE ENVTL. L. & POL'Y F. 187, 221 (1999) (quoting "one resident of a San Francisco neighborhood" as saying: "As far as I'm concerned, a brownfield is just a Superfund site. African-Americans bore the brunt of the poison and pollution when they were Superfund sites, but now they are not going to be a part of cleanup and redevelopment. From my neighborhood's perspective, brownfields redevelopment means that African-Americans are being passed over and moved out").

202. See *infra* Section III.B.

203. See *id.*

204. See, e.g., Ruhl, *supra* note 127, at 161–62.

205. See *infra* Section III.C.

by large segments of the population.<sup>206</sup> These issues also may make it increasingly difficult to achieve buy-in from communities who are facing potential cleanups in their neighborhoods, or who would like to advocate for such cleanups but fear the consequences of doing so. Moreover, such divides mask the very real connections between overall environmental aims regarding resource allocation and land use on the one hand, and affordable housing goals on the other. Understanding how and why these disconnects manifest makes possible a discussion of better ways to bridge the divide.

A. *Environmental Disparities, Cleanups, and Gentrification*

The history of government policies combined with discrimination, choices by wealthy urban residents, and the lack of political capital or exit options for negatively impacted communities has meant that low-income residents bear the brunt of adverse urban environmental impacts.<sup>207</sup> The difference in communities' experiences of environmental harms has a number of explanations, often interrelated: intentional siting of environmentally harmful land uses in communities of color,<sup>208</sup> siting decisions that follow the path of least political resistance, selection of the cheapest real estate by those intending to engage in undesirable land uses, or the depressed real estate market that results from proximity to environmental harms.

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206. See, e.g., Lazarus, *supra* note 101, at 854 (“There is some painful truth to the perception of many minorities that environmentalists overlook the plight of humankind in their rush to protect nature.”); cf. GOULD & LEWIS, *supra* note 4, at 13 (environmental gentrification “is a process of creating and reinforcing environmental privilege for elites in the city”).

207. See, e.g., Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Mar. 17, 2016), <https://www.nrdc.org/stories/environmental-justice-movement> [<https://perma.cc/7YJL-DYFW>]; NEJAC REPORT, *supra* note 9, at 1 (noting that “people of color and low-income people faced increased exposure to the pollution that accompanied industrialization”); Famira, *supra* note 10, at 605 (noting heavier concentration of brownfields sites in communities with “high minority or ‘people of color’ populations and low-income populations”); Gochfeld & Burger, *supra* note 10, at S58.

208. Mank, *supra* note 180, at 140–41 (summarizing the findings regarding disproportionate exposure to urban pollution by communities of color). The causal relationship between race and siting decisions is not uncontroverted. *Id.* at 140–41 n.164 (citing Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 *ECOLOGICAL L.Q.* 1, 9, 19–27, 33–34 (1997)).

Whatever the case, a disproportionate number of low-income communities and communities of color suffer the worst environmental impacts in most cities.<sup>209</sup>

Furthermore, environmental laws have not been evenly enforced to address negative environmental impacts on communities. Indeed, as discussed above, “[s]ome studies have found that higher penalties accrue and more rapid and thorough cleanups occur for environmental violations in non-minority communities.”<sup>210</sup> And urban researchers have extensively documented the disparity between access to parks and open space in low-income communities as compared to their more affluent counterparts. Communities of color and low-income communities therefore face heightened exposure to environmental harms without the corresponding mechanisms through which to address them.

Moreover, as described above, a different challenge arises where efforts are made to provide environmental relief to an area. If those cleanup efforts spur gentrification processes, the efforts may not benefit those who have been living with the environmental harms for decades.<sup>211</sup> Home ownership is one of the most important factors in determining the impacts of a rise in property values on an individual. Low-income communities and communities of color have higher percentages of home rental versus ownership.<sup>212</sup> They are therefore at heightened risk for displacement once environmental hazards are removed.<sup>213</sup> When communities that have suffered the consequences of political environmental harms observe that cleanup efforts have

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209. Gochfeld & Burger, *supra* note 10, at S58.

210. UNIVERSITY OF CALIFORNIA-HASTINGS COLLEGE OF THE LAW, PUBLIC LAW RESEARCH INSTITUTE, ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY STATE SURVEY OF LEGISLATION, POLICY, AND CASES, at xii (4th ed. 2010) (citing Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law, A Special Investigation*, 1992 NAT'L L.J. S2).

211. See generally, e.g., Anu Paulose, *Economic Hazards of Environmental Justice for Lower-Income Housing Tenants*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 507 (2015) (discussing the separate but related issue of the perils that may face low-income residents living in public housing when trying to enforce federal environmental guidelines applicable to such housing).

212. David Montgomery, *Who Owns a Home in America, in 12 Charts*, CITYLAB (Aug. 8, 2018), <https://www.citylab.com/life/2018/08/who-rents-their-home-heres-what-the-data-says/566933/> [<https://perma.cc/W7EG-GD5A>].

213. NEJAC REPORT, *supra* note 9, at 1 (“Citizens living in urban, poor, and people-of-color communities are currently threatened by gentrification, displacement and equity loss on a scale unprecedented since the Urban Renewal movement of the 1960s.”).

the potential to undermine their ability to stay in their homes, residents may find themselves caught between advocating for environmental improvements and avoiding displacement.

*B. Environmental and Land Use Law Versus Affordable Housing*

The divide between environmental law and affordable housing has at times been not merely one of inattention but of active antagonism. Opponents of affordable housing measures have used the tools and arguments of environmental law to slow or stop planning processes for housing.<sup>214</sup> This has been done directly through concerted efforts to defeat affordable housing proposals on environmental grounds. It has also been achieved more indirectly, through a focus on historic preservation and other aesthetic factors that, while potentially justifiable for a variety of reasons, make achieving affordable housing goals more difficult.<sup>215</sup> In either case, using environmental law in such a manner may create a false dissonance between advancement of two sets of ambitions: on one hand, affordable housing, and on the other, a healthy environment.

The announcement that a community plans to add affordable housing stock or modify zoning codes to allow for the construction of such housing in the future is often met with resistance by existing residents. Arguments opposing developments of various kinds often receive the appellation “Not in My Backyard,” or “NIMBY.”<sup>216</sup> Reasons for this opposition vary but tend to fall within the ambit of concerns about changing neighborhood character, density or traffic patterns, environmental concerns, and impacts on property values.<sup>217</sup> More recently, such

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214. See, e.g., Ngai Pindell, *Environmental Planning and Review of Affordable Housing Development*, in LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT § 2.IV (Tim Iglesias & Rochelle E. Lento eds., 2d ed. 2011) (“[O]pponents of affordable housing motivated by non-environmental concerns can use these laws to block, delay, change, and increase the costs of affordable housing developments by claiming such proposals will cause environmental harms. Established communities sometimes raise environmental issues to oppose affordable housing as infill development.”).

215. See, e.g., Ziegler, *supra* note 22, at 55 (noting use of environmental controls to block sustainable, high-density forms of housing).

216. Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENVTL. L. 217, 218 (2018).

217. See, e.g., Conor Berry, *Town of Ludlow Seeking Sage Legal Advice to Stop Low-Income Housing Project*, MASSLIVE (Feb. 17, 2017), [http://www.masslive.com/news/index.ssf/2017/02/ludlow\\_asking\\_sage\\_legal\\_advi.html](http://www.masslive.com/news/index.ssf/2017/02/ludlow_asking_sage_legal_advi.html) [<https://perma.cc/8C>]

opposition has even occurred on the basis of fears that additional residential units would serve as a spark for gentrification.<sup>218</sup> Intertwined with some, but not all, NIMBY oppositions are strains of implicit or explicit racism or classism.<sup>219</sup>

Opponents of affordable housing developments have many tools at their disposal. One strategy often employed in attempts to block planned affordable housing developments is the use of environmental concerns or environmental law. For instance, opposition to housing may allege noncompliance with NEPA, SEPA, or both.<sup>220</sup> As detailed above, these statutes require

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DB-WVGW] (detailing resident opposition to affordable housing units); Kriston Capps, *14 Incredible Objections to a Single Boulder Housing Development*, CITYLAB (Jan. 6, 2016), <https://www.citylab.com/equity/2016/01/14-incredible-objections-to-a-single-boulder-housing-development/422724/> [https://perma.cc/Y8FH-T4SA] (same); Brad Durrell, *Housing Proposal Still Bringing Criticism*, STRATFORD STAR (Mar. 1, 2018), <https://www.stratfordstar.com/77680/housing-proposal-still-bringing-criticism/> [https://perma.cc/Y78M-Z3V6] (detailing resident opposition to a developer's plans for a complex that would include affordable housing units); Heidi Groover, *Could Wealthy Neighbors Kill Seattle's Plan to Build Affordable Housing in Magnolia (Again)?*, STRANGER (Dec. 14, 2017), <https://www.thestranger.com/news/2017/12/14/25630833/could-wealthy-neighbors-kill-seattles-plan-to-build-affordable-housing-in-magnolia-again> [https://perma.cc/TF88-XUNP] (describing longstanding neighborhood opposition to the construction of homeless housing in a wealthy neighborhood of Seattle); Mary Huber, *Bastrop Affordable Housing Project Meets Mostly Opposition at Hearing*, STATESMAN (Feb. 1, 2018), <https://www.statesman.com/NEWS/20180201/Bastrop-affordable-housing-project-meets-mostly-opposition-at-hearing> [perma.cc/LXN5-ZBXJ] (same); Janis Mara, *Proposed El Cerrito Housing with 10 Affordable Units Meets Opposition from Locals*, BERKELEYSIDE (Feb. 27, 2018, 10:00 AM), <https://www.berkeleyside.com/2018/02/27/proposed-el-cerrito-housing-10-affordable-units-meets-opposition-locals> [https://perma.cc/R336-ZP56] (same); see also, e.g., Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 78, 90–91 (2002) (pointing out that values conflicts, including, among others, those stemming from persons identifying as “no-growth environmentalists” or those who would rather see a site developed into a park, are responsible for some opposition to affordable housing projects).

218. Steven Wishina, *Inwood Residents Killed a “Trojan Horse for Gentrification”*—*Now What?*, VILLAGE VOICE (Aug. 17, 2016), <https://www.villagevoice.com/2016/08/17/inwood-residents-killed-a-trojan-horse-for-gentrification-now-what/> [https://perma.cc/YK35-QERF].

219. Been, *supra* note 216, at 218 n.1.

220. See, e.g., Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENVTL. L.J. 21, 22 (2018) (detailing research showing that enforcement of the California Environmental Quality Act is often “aimed at promoting the economic agendas of competitors and labor union leaders, or the discriminatory ‘Not In My Backyard’ (NIMBY) agendas of those seeking to exclude housing, park, and school projects that would diversify communities by serving members of other races and economic classes”).

environmental analyses when certain conditions are met.<sup>221</sup> To the extent that NEPA or SEPA requirements apply to a project, opponents of an affordable housing development may argue improper compliance, or that certain factors were not adequately considered.<sup>222</sup> Examples of reliance on NEPA and SEPA to try to block affordable housing developments abound.<sup>223</sup> While typically unsuccessful in obtaining a judicial mandate to halt a project, such efforts may slow the planning process enough to make a difference in whether the housing is actually built.<sup>224</sup>

Another aspect of land use law that may be used to undercut efforts to provide affordable housing is historic preservation. Historic preservation refers to a form of land use control that applies certain restrictions and controls to neighborhoods or individual buildings based on historical, architectural, archaeological, or cultural significance.<sup>225</sup> At the federal level,

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221. See *supra* Part II.

222. See, e.g., *Tyler v. Cisneros*, 136 F.3d 603 (9th Cir. 1998); *Richland Park Homeowners Ass'n v. Pierce*, 671 F.2d 935 (5th Cir. 1982); *Aertsen v. Landrieu*, 637 F.2d 12 (1st Cir. 1980); *Cedar-Riverside Env'tl. Def. Fund v. Hills*, 560 F.2d 377 (8th Cir. 1977); *D'Agnillo v. Hill*, 89 Civ. 5609 (CSH), 1995 U.S. Dist. LEXIS 3099 (S.D.N.Y. Mar. 13, 1995); *Dickeyville Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, 636 F. Supp. 362 (D. Md. 1986); *United Neighbors Civic Ass'n v. Pierce*, 563 F. Supp. 200 (E.D.N.Y. 1983); *Wicker Park Historic Dist. Pres. Fund v. Pierce*, 565 F. Supp. 1066 (N.D. Ill. 1982); *New Hope Cmty. Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, 509 F. Supp. 525 (E.D.N.C. 1981); *Raleigh Heights Homeowners Protective Assoc. v. Reno*, 501 F. Supp. 269 (D. Nev. 1980); *Bd. of Supervisors v. Circuit Court of Dickenson Cty.*, 500 F. Supp. 212 (W.D. Va. 1980); *Carson v. Alvord*, 487 F. Supp. 1049 (N.D. Ga. 1980); *Sworob v. Harris*, 451 F. Supp. 96 (E.D. Pa. 1978); *Neighbors for Fair Planning v. City & Cty. of S.F.*, 158 Cal. Rptr. 3d 681 (Cal. Ct. App. 2013); *Bowman v. City of Berkeley*, 18 Cal. Rptr. 3d 814 (Cal. Ct. App. 2004).

223. See cases cited *supra* note 222.

224. See, e.g., *Groover*, *supra* note 217 (describing how SEPA litigation delayed planning and construction processes for a homeless shelter, which led to further delays due to recession-era budget issues).

225. See JULIA H. MILLER, A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW 1 (1997). Federal criteria for evaluation of significance are set out by regulation. 36 C.F.R. § 60.4 (2018) ("The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may be likely to yield, information important in prehistory or history."). These

historic preservation is governed by the National Historic Preservation Act (NHPA);<sup>226</sup> many state and local preservation statutes and zoning codes exist as well.<sup>227</sup> There is an ongoing debate over whether and to what extent the goals of historic preservation are in tension with affordable housing aims.<sup>228</sup> To be sure, historic preservation efforts have helped to preserve and maintain certain qualities of urban neighborhoods that make them attractive to city dwellers.<sup>229</sup> But to the extent that historic preservation restrictions operate to limit affordable urban housing supplies, they may contribute to gentrification pressures.<sup>230</sup> Affordable housing opponents have at times pointed to violations of NHPA or state and local variations on that Act to challenge the building of such housing.<sup>231</sup> Where these arguments are presented, questions about who the law—and urban neighborhoods—are designed to serve may once again surface. Like when environmental review laws are deployed to defeat affordable housing proposals, the use of his-

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same criteria often serve as the basis for state and local protections as well. See MILLER, *supra*, at 2.

226. See Ryan Howell, *Throw the “Bums” Out? A Discussion of the Effects of Historic Preservation Statutes on Low-Income Households Through the Process of Urban Gentrification in Old Neighborhoods*, 11 J. GENDER RACE & JUST. 541, 545 (2008).

227. *Id.*

228. See, e.g., Lisa T. Alexander, *Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law*, 63 HASTINGS L.J. 803, 857 (2012) (offering suggestions for combining historic preservation protections with community preservation measures); Mangin, *supra* note 195, at 110 (discussing the difficulty in maintaining historic preservation protections while trying to ward off gentrification related housing pressures, as “[y]ou can save buildings or people, but it is hard to save both”); Elizabeth M. Tisher, *Historic Housing for All: Historic Preservation as the New Inclusionary Zoning*, 41 VT. L. REV. 603, 605–06 (2017) (arguing that the two sets of goals can be reconciled).

229. See, e.g., J. Peter Byrne, *The Rebirth of the Neighborhood*, 40 FORDHAM URB. L.J. 1595, 1604 (2013).

230. See, e.g., EDWARD GLAESER, *TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER* (2011) (arguing that historic preservation laws are partly to blame for lack of affordable housing); Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 514 (1981). *But see, e.g.*, Byrne, *supra* note 229, at 1604, 1609 (defending historic preservation laws as creators of value in urban neighborhoods and arguing that “[h]istoric preservation cannot treat development in living neighborhoods with curatorial nicety, but must accommodate new development appropriate to the character of the district”).

231. See, e.g., *Wicker Park Historic Dist. Pres. Fund v. Pierce*, 565 F. Supp. 1066 (N.D. Ill. 1982); J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665, 670 (2012).

toric preservation laws to restrict the building of new housing supplies has the potential to erect perceived barriers between advocates for preservation and those in need of affordable urban homes.

Whether or not the strategy of using environmental and land use law to block affordable housing is ultimately successful, it sets up a tension between the goals of environmental and land use law and the goals of advocates working for greater equity in housing. These types of cases may be perceived as the latest evidence of environmental law's lack of attention to human impacts.<sup>232</sup> They may also help to support a view that environmental law and its protections are no more than a set of principles used by privileged groups to bar access to certain neighborhoods and sets of environmental benefits.<sup>233</sup>

### C. *Environmental Law's Lack of Focus on Affordable Housing*

Finally, at the risk of painting the field with too broad a brush, environmental law advocates and scholars in the United States have not historically been overly concerned with affordable housing. Traditional environmental law does not address housing or other social concerns.<sup>234</sup> And while sustainable development, which has become a large part of the field in the past several decades, does have an explicit focus on equity,<sup>235</sup> sustainable development conversations rarely focus explicitly

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232. See, e.g., DORCETA E. TAYLOR, *THE RISE OF THE AMERICAN CONSERVATION MOVEMENT: POWER, PRIVILEGE, AND ENVIRONMENTAL PROTECTION* 394, 396 (2016) ("From the outset, conservationism and preservationism were divorced from the inequities prevalent in society. . . . Conservationists and preservationists left the impression that they were not very concerned about the poor, blamed them for environmental degradation when possible, and devised laws to criminalize and punish them. Many conflicts resulted, and the poor challenged environmental laws when possible.").

233. Cf. GOULD & LEWIS, *supra* note 4, at 13 (environmental gentrification "is a process of creating and reinforcing environmental privilege for elites in the city"); Kevin C. Foy, *Home Is Where the Health Is: The Convergence of Environmental Justice, Affordable Housing, and Green Building*, 30 PACE ENVTL. L. REV. 1, 2 (2012) ("Environmental benefits are sometimes viewed as a luxury that those with a low or moderate income cannot afford."); Lazarus, *supra* note 101, at 854 ("There is some painful truth to the perception of many minorities that environmentalists overlook the plight of humankind in their rush to protect nature.").

234. See, e.g., Ruhl, *supra* note 127, at 177.

235. *Id.* at 177-78.

on the availability of housing.<sup>236</sup> Instead, the discussion typically centers on issues such as decreasing runoff of polluted water into urban water bodies, increasing renewable energy sources, promoting car-free travel like bicycling and public transportation, and increasing resiliency to climate change.<sup>237</sup>

The smart growth movement, a subset of sustainable development that advocates for better planning practices to help reduce the environmental impacts of low-density land use, has marked a shift toward engagement with housing issues.<sup>238</sup> This movement has long acknowledged that availability of affordable housing is linked to larger environmental concerns, and its proponents have pushed for a more holistic view of “sustainability.”<sup>239</sup> But as with the larger sustainability movement, smart growth practices tend to focus primarily on energy efficiency, water conservation and runoff prevention, climate adaptation, increased green space, public transportation, and transit-oriented development.<sup>240</sup> Such conversations tend to lack a

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236. See, e.g., UNITED NATIONS, INDICATORS OF SUSTAINABLE DEVELOPMENT: GUIDELINES AND METHODOLOGIES 10–14, 50 (3d ed. 2007), <http://www.un.org/esa/sustdev/natlinfo/indicators/guidelines.pdf> [<https://perma.cc/6HQJ-6TXU>] (listing “sustainable development indicators” covering a variety of topics but addressing housing only in the context of slum populations). For an exception to this lack of attention to housing from one scholar, see, e.g., Kushner, *supra* note 29, at 215.

237. See, e.g., GOULD & LEWIS, *supra* note 4, at 18 (noting that, in practice, sustainability “has been equated with environmental improvements and/or protections,” with the result that “social problems associated with environmental protection . . . are replicated in ‘sustainability’ initiatives”); cf. Peter Newman, *Sustainable Cities of the Future: The Behavior Change Driver*, 11 SUSTAINABLE DEV. L. & POLY 7 (2010) (listing “resilient buildings, alternative transportation systems, distributed and renewable energy systems, water-sensitive design, and zero-waste systems” as elements of sustainable cities).

238. See, e.g., Susan R. Jones, *Expanding the Constituency for Affordable Housing Through Smart Growth*, J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 150, 150–51 (2003).

239. See, e.g., *id.* at 151 (“The smart growth movement, which has primarily focused on environment, land use, and physical design of housing, has begun to focus on affordability, supply, and demand.”); cf. James A. Kushner, *Urban Infill Strategies and Smart Growth*, in SUBDIVISION LAW & GROWTH MANAGEMENT § 2:12 (2d ed. 2018); Kushner, *supra* note 29, at 220.

240. See, e.g., *What Is Smart Growth?*, SMART GROWTH AM., <https://smartgrowthamerica.org/our-vision/what-is-smart-growth/> (last visited Nov. 30, 2018) [<https://perma.cc/47WY-BVPB>] (listing the ten principles of smart growth: (1) mix land uses; (2) take advantage of compact design; (3) create a range of housing opportunities and choices; (4) create walkable neighborhoods; (5) foster distinctive, attractive communities with a strong sense of place; (6) preserve open space, farmland, natural beauty, and critical environmental areas; (7) direct development towards existing communities; (8) provide a variety of transportation choices; (9) make development decisions predictable, fair, and cost effective; (10)

larger focus on the relationship between the environment and housing.

*D. The Failures of Keeping Affordable Housing and the Environment Separate*

Due at least in part to the overall lack of engagement with affordable housing by the environmental law community, advocacy for environmental protection has often been perceived to be at odds with advocacy for affordable housing.<sup>241</sup> Where people lack sufficient housing or are priced out of their neighborhoods by governmental policies and market forces, environmentally-sensitive planning may become viewed as a luxury good.<sup>242</sup> This disconnect, both perceived and real, between environmental law and social conditions, is worth remedying for several reasons. First, environmental law's historic lack of engagement with social questions may be partly to blame for the lack of diversity in the environmental law and advocacy arena.<sup>243</sup> Expanding the sphere of entrants into the environmental law field is a necessary part of its evolution. Second, environmental law's lack of diversity and lack of focus on socio-economic issues may be at least partly responsible both for the perception and the reality that environmental protections are predominantly the province of the wealthy.<sup>244</sup> This matters not only for diversity in the field but also for achieving maximum environmental improvements. If communities see environmen-

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encourage community and stakeholder collaboration in development decisions). Only goal number three has a particular focus on affordable housing. *See id.*

241. *See, e.g.*, Russell, *supra* note 27, at 438–40 (explaining some of the historic tensions between advocacy for environmental protection and affordable housing); Frank P. Branconi, *Environmental Regulation and Housing Affordability*, 2 CITYSCAPE: J. POL'Y DEV. AND RES. 81, 81 (1996) (same).

242. *Cf.* Foy, *supra* note 233, at 2.

243. *Cf.* LISA SUN-HEE PARK & DAVID NAGUIB PELLOW, THE SLUMS OF ASPEN: IMMIGRANTS VS. THE ENVIRONMENT IN AMERICA'S EDEN 13 (2011) (“The mainstream environmental movement has been incapable of building a mass following in this nation precisely because it refuses to embrace a broader agenda of social justice.”); *see also* DORCETA TAYLOR, THE STATE OF DIVERSITY IN ENVIRONMENTAL ORGANIZATIONS 32 (2014), [https://orgs.law.harvard.edu/els/files/2014/02/FullReport\\_Green2.0\\_FINALReducedSize.pdf](https://orgs.law.harvard.edu/els/files/2014/02/FullReport_Green2.0_FINALReducedSize.pdf) [<https://perma.cc/U73A-Y7PF>].

244. *See, e.g.*, Foy, *supra* note 233, at 2; GOULD & LEWIS, *supra* note 4, at 4 (noting that when privileged decision-makers live in “environmentally rich” areas, “there is a severed feedback loop between the natural system and the social system” that results in reduced environmental consciousness and environmental improvements).

tal cleanups as just the first step in the process of displacement and gentrification, achieving buy-in from community members is likely to be difficult, regardless of the potential benefits to current residents.<sup>245</sup> Achieving more holistically sustainable environmental protections could also help environmental law evolve into a field that welcomes a more diverse set of entrants and entry points. It could also enhance credibility for projects that work toward a larger ecological good. For several reasons, then, where social equity is left out of the environmental law conversation, overall sustainability goals are diminished.<sup>246</sup>

#### IV. HOW ENVIRONMENTAL LAW COULD BETTER ADDRESS IMPACTS OF ENVIRONMENTAL GENTRIFICATION

The problem as detailed to this point is relatively straightforward. Environmental improvements may have unintended consequences for the surrounding community. The predictable coupling of environmental improvements with gentrification has major consequences for the viability of fulfilling the mandates of both environmental justice and equity. Environmental gentrification as a phenomenon cannot be expected to abate on its own; as noted, market forces dictate that environmental improvements will increase the desirability of property.<sup>247</sup> And environmental law as currently practiced and interpreted does not have a satisfactory response to environmental gentrification.

The divide between those seeking social equity and those advocating for environmental improvements is neither new<sup>248</sup> nor surprising.<sup>249</sup> The question then becomes whether environ-

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245. Cf. GOULD & LEWIS, *supra* note 4, at 3–4 (“In terms of process, for a development trajectory to be sustained it must have buy-in from the community experiencing displacement. Development that is imposed upon residents by outside interests will be resisted or rejected by residents. . . . If the goal of sustainability is to improve the quality of life for residents, while providing rewarding livelihoods, and maintaining a healthy and clean environment, residents must participate in, agree to, and benefit from development plans.”).

246. *Id.* at 4.

247. See *supra* Introduction.

248. Tarlock, *supra* note 129, at 466 (“The current environmental equity movement is only the latest in a series of twentieth century encounters between advocates of environmental quality and social justice.”).

249. *Id.* at 464–65 (explaining the difference in roots of the mainstream environmental movement and the environmental equity movement; notably, “[e]nvironmental equity rests on the constitutional argument that the present application and enforcement of environmental laws violate the equal protection

mental gentrification is a problem for environmental law to solve. Increasingly, it seems that the answer must be in the affirmative. While the tools of environmental law may have been developed to address issues very distinct from housing concerns, the aims of modern environmentalism go beyond pollution control and protection of natural resources. The lens of environmental advocacy has already been widened to include environmental justice, sustainable development, and other elements of adapting to a changing climate and world. Ensuring that processes set in motion by environmental law align with these aims can help produce a more holistic version of environmental protections that combine environmental and social equity.<sup>250</sup>

A. *Environmental Gentrification and the Principles of Environmental Law*

Several frameworks may inform and support extending the sphere of environmental law, including environmental justice and sustainable development. These existing frameworks make clear that environmental law has already been extended to cover many of the concerns raised by environmental gentrification. This Section will make more explicit the close links that exist between environmental law, housing, and questions of place.

1. Environmental Justice

Like gentrification, environmental justice is a concept that lacks one generally accepted definition. Broadly, however, envi-

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rights of those exposed to pollution. In contrast, mainstream environmentalism rests on the New Deal vision of the Constitution as a broad source of affirmative government regulatory power with few judicially enforceable limitations on this power”).

250. Cf. *Sustainable Development Goals*, UNITED NATIONS, <https://www.un.org/sustainabledevelopment/cities/> (last visited Nov. 30, 2018) [<https://perma.cc/YJK2-LUX4>] (including a goal of making cities “inclusive, safe, resilient and sustainable,” and noting that doing so will require “cities of opportunities for all, with access to basic services, energy, housing, transportation and more”); Bryson, *supra* note 115, at 31 (noting the need to address “socio-environmental” issues in planning); Tarlock, *supra* note 129, at 494 (noting that sustainability efforts must include “the continuing scrutiny of gentrification, open space, and biodiversity protection programs to make sure that they are not used to foreclose low and moderate income housing opportunities”).

ronmental justice encompasses the ideas that minority and low-income individuals, communities, and populations “should not be disproportionately exposed to environmental hazards,”<sup>251</sup> should have equal access to green space,<sup>252</sup> and “should share fully in making the decisions that affect their environment.”<sup>253</sup> Put another way, environmental justice encompasses conversations about who is exposed to environmental “bads,” as well as who gets to enjoy environmental “goods.”<sup>254</sup> Thus, where environmental cleanups or improvements result in increased property values without consideration of whether those who have been living with environmental harms for many years will be able to share in the benefits, these activities raise concerns about distributional and reparative justice.<sup>255</sup>

That perspective offers an important counterbalance to what may at times be more of a “frontier mentality” on the part of planners.<sup>256</sup> Frontierism has long been an influence on the environmental protection movement in the United States.<sup>257</sup> When applied to cities, such a mentality suggests an empty city being explored for the first time or views areas in need of environmental remediation or improvements as environmentally ravaged.<sup>258</sup> In either case, such views give insufficient recognition to the experience of the current members of the community. In contrast, equitable recovery of urban spaces requires attention to what is happening to communities in which improvements are occurring.

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251. Michael Gerrard, *Preface to the First Edition of THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS*, at xxxiii (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

252. Curran & Hamilton, *supra* note 19, at 4.

253. Gerrard, *supra* note 251.

254. GOULD & LEWIS, *supra* note 4, at 25–26.

255. Curran & Hamilton, *supra* note 13, at 4.

256. *See, e.g.*, SMITH, *supra* note 6, at xiii (“During the latter part of the twentieth century the imagery of wilderness and frontier has been applied less to the plains, mountains and forests of the West—now handsomely civilized—and more to U.S. cities back East. As part of the experience of postwar suburbanization, the U.S. city came to be seen as an ‘urban wilderness.’”). Such a mentality can be seen when areas in need of environmental improvements are discussed as the “frontier,” and new residents as “urban pioneers.” *See, e.g., id.* at xiii–xiv.

257. *See* TAYLOR, *supra* note 243, at 26–27.

258. *Id.*

Mainstreaming these equity concerns<sup>259</sup> in the conversation about projects that have the potential to trigger environmental gentrification and displacement could go a long way toward addressing the lack of remedies for such displacement. Under this framework, it becomes possible to see how displacement itself might be an environmental justice harm. While no uniform standard is likely to be developed for how such conversations, and any preventive measures, should take place,<sup>260</sup> a critical first step is for environmental law and lawyers to recognize the importance of this issue in the planning process. To the extent it has not yet done so, engagement with environmental justice ought to include a conversation not only about who bears the brunt of negative environmental conditions but also about who gets to enjoy the benefits of environmental improvements.<sup>261</sup> Adapting to these considerations could include statutory amendments, additional steps or stakeholders in the planning processes, and other modifications. Whatever the adjustments, viewing the question of environmental gentrification through the lens of environmental justice makes clear the need for planning around environmental improvement projects and for paying attention to the people to whom the benefits of such projects accrue.

## 2. Sustainable Development

The connection between low-density development and environmental harm has been well documented<sup>262</sup> and need not

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259. Cf. Alice Kaswan et al., *Introduction: Adaptation Planning and Resilience: All Hands On Deck*, in FROM SURVIVING TO THRIVING: EQUITY IN DISASTER PLANNING AND RECOVERY 7, 10 (Alice Kaswan et al. eds., 2018), [http://www.progressivereform.org/articles/survivingthriving\\_0918.pdf](http://www.progressivereform.org/articles/survivingthriving_0918.pdf) [<https://perma.cc/JP9V-HRCA>].

260. See, e.g., Curran & Hamilton, *supra* note 13, at 4 (noting that “aiming for justice is messy,” and suggesting as touchstones “recognition, process, procedure, and outcome”).

261. Such conversations have a natural nexus with those surrounding the right to the city movement. While descriptions and conceptions of the “right to the city” vary, it generally describes the “right of all inhabitants, present and future, permanent and temporary to use, occupy and produce just, inclusive and sustainable cities, defined as a common good essential to a full and decent life.” Nicole de Paula, *The “Right to the City” and the New Urban Agenda*, INT’L INST. FOR SUSTAINABLE DEV. (July 12, 2016), [sdg.iisd.org/commentary/policy-briefs/the-right-to-the-city-and-the-new-urban-agenda](http://sdg.iisd.org/commentary/policy-briefs/the-right-to-the-city-and-the-new-urban-agenda) [<https://perma.cc/9TXC-ULM7>].

262. See, e.g., Been, *supra* note 216, at 235 (summarizing the environmental benefits of high-density land use).

be rehearsed in this Article in full. Briefly, low-density development harms the environment by destroying habitat and displacing wildlife, increasing impermeable surfaces that worsen problems of runoff contamination and water pollution, and making necessary increased vehicle traffic that contributes to increased air pollution.<sup>263</sup> By a variety of metrics, urban areas are more environmentally friendly overall than less dense forms of development.<sup>264</sup> In consequence, reinvestment in urban areas, along with the shift in demographics that reflects affluent residents' return to cities, has been heralded as a means of reversing the detrimental environmental consequences of the growth of the suburbs over preceding decades.<sup>265</sup> Such efforts are often categorized under the umbrella of "smart growth"<sup>266</sup> or "sustainable development."<sup>267</sup> The exact parameters of sustainable development have been debated, but are generally understood to include three key elements: environmental protection, economic growth, and social equity.<sup>268</sup>

Urban environmental cleanup efforts are often viewed as accomplishing multiple goals: remediation of the negative conditions in question and promotion of the secondary environmental benefits that accompany renewed interest in the urban environment.<sup>269</sup> That such cleanups have been championed by environmental advocates, often under the mantle of sustainable development, is therefore unsurprising. But environmental improvement projects that result in displacement may fail to accomplish the intended sustainable development goals.

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263. See, e.g., Sarah J. Fox, *Planning for Density in a Driverless World*, 9 NEW ENG. U. L. REV. 151, 170–73 (2017); Russell, *supra* note 27, at 443 ("One of the major drivers—arguably, the major driver—of environmental risk is intensifying human occupation of the 2.7 billion-acre land area of the United States.").

264. See, e.g., John Nolon, *The Law of Sustainable Development: Keeping Pace*, 30 PACE L. REV. 1246, 1288–89 (noting that "[o]n a per capita basis, urban dwellers produce dramatically less CO<sub>2</sub> and other pollutants than those in surrounding suburbs. This is a critical matter when one considers that, by the year 2039, the population of the United States will have swelled to over 400 million people," and that "[b]y 2040, it is projected that America will add ninety-three million new homes and 137 billion square feet of nonresidential construction to accommodate this growth and to replace obsolete buildings").

265. *Id.*; cf. Been, *supra* note 216, at 235 (summarizing the environmental benefits of high-density land use); Ziegler, *supra* note 22, at 64.

266. See, e.g., Kushner, *supra* note 239.

267. See, e.g., John R. Nolon, *An Environmental Understanding of the Local Land Use System*, 45 ENVTL. L. REP. 10215, 10232 (2015).

268. See, e.g., Ruhl, *supra* note 127, at 179–80.

269. See, e.g., Fox, *supra* note 40, at 1220.

If the growth of urban areas is successful only in turning the dominant dynamic of affluent suburban residents and poorer urban residents into one of affluent *urban* residents and poorer *suburban* residents—as some research is beginning to suggest might be the case<sup>270</sup>—a large element of environmental gains from reinvestment in urban areas will not be realized. Cities themselves may become less contaminated and more sustainable through the kinds of efforts detailed above.<sup>271</sup> But where those efforts are accompanied by housing pressures and displacement, they may also serve to undermine overall environmental goals.<sup>272</sup> In addition to failing the environmental prong of the sustainable development triad,<sup>273</sup> a city that cannot house entrants while also retaining the populations already living there—and retain them in a way that allows existing populations to enjoy environmental benefits—fails the equity prong of sustainable development.<sup>274</sup> In consequence, there is a substantial environmental justification for paying attention to the impacts of environmental gentrification and for looking to how environmental law can better prevent displacement.

Where sustainability in the larger sense is overlaid on plans for environmental improvements, it may impact the kinds of improvements that make sense for different areas of the city. The prospect of environmental gentrification and its displacement effects, for example, may warrant a reimagining of what kinds of environmental improvements are appropriate in a given neighborhood. One response to this problem on the social science front has been to develop the concept of “just green

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270. See, e.g., Heather O’Connell, *Connecting Job Proximity and Gentrification: What’s Going On in Houston?*, KINDER INST. (Mar. 24, 2015), <https://kinder.rice.edu/2015/03/24/27> [<https://perma.cc/6QBJ-R2W4>] (“[N]umerous national studies have documented that residents displaced by gentrification are moving to areas with fewer job prospects, mainly older suburbs with low home values, far-removed from the fastest growing parts of their regions.”).

271. See *supra* Section I.A; see also, e.g., GOULD & LEWIS, *supra* note 4, at 2–3 (noting that measures to improve neighborhood environmental quality contribute to environmental sustainability).

272. Cf. Ngai Pindell, *supra* note 214, at 47 n.171 (“If gentrification occurs, the displacement of lower-income families would lead to an increase in vehicle miles traveled (VMTs), which would negatively affect emissions. Here, environmental and housing planning interests converge.”).

273. Ruhl, *supra* note 127, at 165.

274. See *supra* Section III.D; cf. Cecily T. Talbert, *California’s Response to the Affordable Housing Crisis*, AM. LAW INST. 1491, 1515 (2006) (“Affordable housing can be viewed as a key component of protecting the environment and managing growth.”).

enough.”<sup>275</sup> “Just green enough” advocacy means, at its core, “uncoupl[ing] environmental cleanup from high-end residential and commercial development” to accomplish environmental improvements without displacement.<sup>276</sup> The term was initially coined based on efforts by residents in Greenpoint, Brooklyn, to clean up a contaminated waterway without causing the industrial neighborhood to transform into “luxury housing or parks, cafes, and a riverwalk.”<sup>277</sup> This example may offer a model for environmental improvements created with existing character and residents in mind. While not a foolproof strategy against eventual gentrification,<sup>278</sup> acknowledging that there is a spectrum upon which environmental improvements can occur is an important step in achieving overall urban sustainability.

Employing the frameworks of environmental justice and sustainable development to think about gentrification helps make clear that, to the extent that environmental improvement projects are triggering displacement, those impacts are a project for environmental law. While environmental law has not historically been structured to address these challenges, expanding the scope of what falls under the umbrella of environmental law and lawyering can be part of the field’s evolution. Adapting strategies for environmental improvements so that they can be enjoyed by larger portions of the population helps ensure that these improvements achieve overall environmental gains and sustainability.

### *B. Strategies for Better Outcomes*

The frameworks set out above offer several existing lenses through which to view the interaction of environmental law and gentrification, as well as reasons to believe it is an issue worth taking on through some combination of environmental, land use, and planning law. Beyond attention to and awareness of a wider range of factors when engaging in environmental cleanups, it may be useful to suggest some concrete steps that could be taken to address the question of environmental gentri-

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275. See generally Curran & Hamilton, *supra* note 13.

276. See, e.g., *id.* at iii.

277. See, e.g., Curran & Hamilton, *supra* note 19, at 32.

278. See, e.g. Winifred Curran & Trina Hamilton, *Just Green Enough: Contesting Environmental Gentrification in Greenpoint, Brooklyn*, 17 *LOC. ENV'T* 1027, 1035 (2012) (discussing gentrification in neighborhoods resulting from rezoning from industrial to commercial and residential uses).

fication during the planning processes that often serve to jump-start the phenomenon.

This Section will discuss some broad categories of tools that could be employed to better integrate concerns about environmental gentrification into the aspects of the planning process that touch on environmental law. Extensive literature has been dedicated to land use policies that can further affordable housing goals more effectively.<sup>279</sup> Efforts surrounding environmental improvements are inevitably place-specific.<sup>280</sup> The purpose of this Section is not to provide an exhaustive list of all possible options. Instead, it will point out the ways in which environmental planning could be tied to other land use tools to better protect against environmental gentrification and its potential negative impacts. It will also provide recommendations for environmental lawyers, planners, and advocates going forward. By examining several of the tools available, the potential of land use planning to address both the need for environmental improvements and the fear of displacement may become clearer.

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279. See, e.g., Megan E. Bedell, *Inherently Beneficial or Particularly Well Suited? Reconsidering the Treatment of Affordable Housing in Use Variance Applications*, 41 SETON HALL L. REV. 319 (2011); Timothy J. Choppin, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L.J. 2039 (1994); Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 743 (1993); Catherine Durkin, *The Exclusionary Effect of "Mansionization": Area Variances Undermine Efforts to Achieve Housing Affordability*, 55 CATH. U. L. REV. 439 (2006); Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U. SAN FRANCISCO L. REV. 971 (2002); Brian R. Lerman, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383 (2006); Jennifer M. Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359 (1995); Ngai Pindell, *Developing Las Vegas: Creating Inclusionary Affordable Housing Requirements in Development Agreements*, 42 WAKE FOREST L. REV. 419 (2007); Molly A. Sellman, *Equal Treatment of Housing: A Proposed Model State Code for Manufactured Housing*, 20 URB. LAW. 73 (1988).

280. Cf. Curran & Hamilton, *supra* note 13, at 5 ("Working toward justice necessarily results in context-specific 'highest and best uses' that are not always tied to current market (especially speculative) values."). That calculations are place-specific does not necessarily mean that they are site-specific; indeed, it may be necessary to consider cumulative impacts in an area in order to capture the true environmental and social consequences of a project. See, e.g., Eisen, *supra* note 201, at 214 ("The site-specific inquiry is antithetical to the community-wide approach of evaluating environmental impacts that sustainable development requires."). Nonetheless, whether on a site, neighborhood, or city scale, individualized determinations must be made about the appropriate response to projects that may induce environmental gentrification.

### 1. Planning Processes

The kinds of environmental improvement projects that trigger environmental gentrification tend to be the result of years of advocacy, planning, and funding decisions. Such planning processes may involve federal, state, or local government actors—or often some combination of those three. The importance of public participation and community involvement in planning for environmental remediation—particularly in the early stages of a project<sup>281</sup>—has also been emphasized repeatedly.<sup>282</sup> Beyond that, the use of more comprehensive planning measures as a way of cutting across silos in planning may be effective in making sure that planners consider the full impacts of environmental improvements. Given the amount of work that goes into the planning process ahead of time, there is enormous potential for incorporation of different perspectives that may influence the ultimate shape of the projects. Thus, the planning process itself could make a meaningful difference in dictating whether and how displacement results from environmental improvements.

Environmental planning processes incorporate public participation in a variety of ways, both formal and informal. For instance, cities often engage with communities through informal contacts, forums, task forces, advisory groups, and others. These can provide useful and necessary ways of hearing from community members about plans for environmental improvements.<sup>283</sup> Beyond that, as noted, certain projects require analysis under NEPA and SEPAs, which have their own requirements for public participation and consideration of social impacts.<sup>284</sup> Where NEPA or SEPAs are applicable, acknowledgment of the environmental justice implications of environmental gentrification may provide an additional layer of consideration of human environmental impacts in the planning process.<sup>285</sup>

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281. See, e.g., GOULD & LEWIS, *supra* note 4, at 162–63 (noting that the timing of community participation in planning processes influenced outcomes).

282. See, e.g., Curran & Hamilton, *supra* note 13, at 6; Famira, *supra* note 10, at 615; Mank, *supra* note 180, at 171.

283. Cf. GOULD & LEWIS, *supra* note 4, at 4.

284. See *supra* Section II.B.

285. Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENVTL. AFF. L. REV. 601, 624 (2006) (“The promise of NEPA as a tool for environmental justice depends on how seriously

An arguably more important part of managing the problem of environmental gentrification, however, may be the larger project of fostering recognition of the interrelationship between housing and the environment. As noted, the separation between concerns about affordable housing and concerns about the environment has led to undesirable results.<sup>286</sup> As long as those tasked with advocating for and making environmental improvements do not also have a mandate to consider housing questions, siloed decision-making will continue to be the norm.<sup>287</sup> Making housing a more integrated part of environmental conversations, and vice versa, could avoid unintended negative consequences for both fields.

While restructuring decision-making frameworks may be one way to get at this change, there are useful mechanisms available short of such reconfigurations. For instance, measures such as comprehensive plans may be useful in this effort. Comprehensive plans offer a form of long-term planning that guides subsequent zoning and other decisions.<sup>288</sup> Such plans are required in many states<sup>289</sup> and offer a “blueprint for development” in cities that adopt them.<sup>290</sup> Because these plans are both flexible and explicitly designed to make connections between topics like housing and the environment, they may be well suited to the challenge of addressing environmental gentrification.<sup>291</sup> For instance, comprehensive plans may be re-

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federal agencies use it for that end. Judicial review under NEPA has shaped agencies’ approach to compliance not by forcing particular results on a case, but by keeping agencies honest and clarifying their NEPA obligations. If courts begin to include environmental justice in their NEPA review with less apprehension, the depth of agencies’ treatment of the issue will likely improve incrementally, just as it has in other areas reflected in the vast body of NEPA case law.”).

286. See *supra* Section III.D; cf. Rigolon & Nemeth, *supra* note 106, at 2.

287. Rigolon & Nemeth, *supra* note 106, at 2.

288. Nolon, *supra* note 267, at 10216 (“The planning process offers an opportunity to look broadly at local programs such as housing, economic development, provision of public infrastructure and services, as well as environmental protection.”).

289. See, e.g., Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 101 (2015).

290. Nolon, *supra* note 267, at 10216.

291. See, e.g., *Information Sheet 9: Considering Environmental and Housing Issues Through Comprehensive Planning and Ordinances*, METRO. DESIGN CTR.: DESIGN FOR HEALTH (2007), [http://designforhealth.net/wp-content/uploads/2012/02/BCBS\\_IS9EnvHousing\\_053007.pdf](http://designforhealth.net/wp-content/uploads/2012/02/BCBS_IS9EnvHousing_053007.pdf) [<https://perma.cc/2CGD-CBEJ>] (suggesting ways for comprehensive plans to integrate these concerns); *Comprehensive Plan Review Checklist*, DESIGN FOR HEALTH (2007), <http://designforhealth.net/wp-content>

quired to address environmental justice; such plans also often incorporate sustainable development principles.<sup>292</sup> To the extent that these frameworks are already recognized within the context of comprehensive planning, it should be possible for planners to acknowledge and better integrate the relationship between environmental improvements and concerns about displacement. Put another way, sustainable development and environmental justice require consideration of housing and the environment together. Thus, when planning takes account of environmental principles and attempts to address them, the potential for displacement should be considered at the same time. Through structural changes and meaningful engagement with effected communities, planning for the environment can start to better realize the principles of environmental justice and the goals of sustainable development.

## 2. Land Use Tools

Once implemented, consideration of both environmental and housing concerns in the planning process may lead to the recognition that environmental improvements should be accompanied by measures to address possible displacement. Where such improvements seem likely to give rise to undesirable displacement, there may be elements of land use law that provide a helpful nexus between environmental and housing concerns. In determining how to move forward with environmental improvements, best practices will vary by community.

This Article explores the phenomenon of environmental gentrification in the context of environmental law. Ultimately, however, the specific tools used to account for and combat displacement from environmental gentrification will not differ greatly from those used more broadly to alleviate displacement concerns. Land use tools such as community land trusts,<sup>293</sup>

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/uploads/2012/12/BCBS\_CompChecklist\_092607WithIntro.pdf [https://perma.cc/PCU3-AAE9].

292. *E.g.*, *Environmental Justice Through Planning*, AM. PLANNING ASS'N, <https://www.planning.org/blog/blogpost/9101589/> (last visited Jan. 29, 2019) [https://perma.cc/CDJ5-TR72].

293. Community land trusts are, very generally, “nonprofit entities that acquire land with the goal of maintaining control in perpetuity for a community use such as affordable housing.” Julie Gilgoff, *Local Responses to Today’s Housing Crisis: Permanently Affordable Housing Models*, 20 CUNY L. REV. 587, 589 (2017). While not a new innovation, these trusts have come into increased use by a number of communities to combat unsustainable rises in housing prices that

inclusionary zoning,<sup>294</sup> community benefit agreements,<sup>295</sup> and others may play a useful part in planning for projects likely to

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might otherwise lead to displacement. *See, e.g.*, Greg Beato, *Communities Come Together to Make Homes More Affordable*, N.Y. TIMES (Nov. 3, 2015), <https://www.nytimes.com/2015/11/08/giving/communities-come-together-to-make-homes-more-affordable.html> [<https://perma.cc/TAW2-8VBN>]. The classic ownership model for community land trusts divides traditional property ownership in two: title to the land is held by the land trust, and title to the house and improvements is held by the resident. David Abromowitz, *An Essay on Community Land Trusts: Toward Permanently Affordable Housing*, in PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 213–31 (Charles Geisler & Gail Daneker eds., 2013). Under this model, the purchaser of the home agrees in advance to a cap on any profits made on the sale of the home. *Id.* In this way, the trust is able to maintain the long-term affordability of the property. Community land trusts may also be used to operate rental units, offering a means by which to stabilize rental prices. Stephen R. Miller, *Community Land Trusts: Why Now Is the Time to Integrate this Housing Activists' Tool into Local Government Affordable Housing Policies*, 23 ZONING & PLAN. L. REP. 349 (2015). Community land trusts have started to gain particular recognition as an avenue for combatting environmental gentrification. For instance, as noted, a planned park project in Washington, D.C. has spurred fears of gentrification in Anacostia, a historically African American neighborhood. In response, the public-private partnership in charge of the park development is also working to create a community land trust. *See* Mary Hui, *In Bid to Keep Homes Affordable, Anacostia Will Have Its First Community Land Trust*, WASH. POST (Sept. 24, 2017), <https://www.washingtonpost.com/local/in-bid-to-keep-homes-affordable-anacostia-will-have-its-first-community-land-trust/2017/09/24/> [<https://perma.cc/PZ74-AED4>].

294. Inclusionary zoning is another tool that local governments may consider in addressing the impacts of environmental gentrification. Jon Christensen & Alessandro Rigolon, *Can L.A. Build New Parks and Public Spaces Without Gentrifying Away Low-Income Residents?*, L.A. TIMES (Oct. 12, 2018, 4:05 AM), <http://www.latimes.com/opinion/livable-city/la-oe-christensen-parks-green-gentrification-20181012-story.html> [<https://perma.cc/DDV5-344N>]. This kind of zoning involves imposing either mandatory or voluntary controls on new development. Benjamin Powell & Edward Stringham, *The Economics of Inclusionary Zoning Reclaimed: How Effective Are Price Controls?*, 33 FLA. ST. U. L. REV. 471, 474 (2005). Such controls may take the form of a fee attached to new developments collected in a fund for mitigating the effects of development, or a requirement that “a predetermined percentage of the housing units in new real estate developments be reserved and sold at a price that is affordable to low- and moderate-income households.” Tim Iglesias, *Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and Its Potential to Meet Affordable Housing Needs*, 36 ZONING & PLAN. L. REP. 1 (2014); Michael Floryan, *Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning Practices*, 37 PEPP. L. REV. 1039, 1044 (2010). In their various forms, inclusionary zoning measures offer a means by which local governments can attempt to offset anticipated displacement. *See, e.g.*, Iglesias, *supra*; GOULD & LEWIS, *supra* note 4, at 58 (describing efforts by community members in Prospect Lefferts-Gardens, Brooklyn, to oppose inclusionary zoning measures out of fear that they would lead to the construction of high-rise apartment buildings and the eventual displacement of current residents). Nonetheless, inclusionary zoning may be appealing to some local governments facing likely environmental gentrification. These kinds of measures have the benefit of directly targeting the question of availability of

spur environmental gentrification. These tools have been discussed extensively in the context of gentrification more broadly. When paired, however, with better coordination in planning, public participation, and understanding of the relationship between environmental improvements and housing, they may serve an important function in addressing community change that stems from environmental improvements.

## CONCLUSION

Through adaptations in strategy, advocates and lawyers may be able to include the environmental consequences of displacement as part of the conversation surrounding housing. The goals of this Article are to illustrate how environmental gentrification is generally overlooked by environmental law and to make the case for why that should change. Looking at environmental gentrification through the lens of environmental justice and sustainable development may help to move land use and zoning decisions to a place where environmental impacts, economic concerns, and community impacts all receive consideration. And looking to more specific tools that could be used in conjunction with environmental improvements would allow community impacts to become the province of environmental advocates in a way they have not been in the past. Success in achieving greater integration between housing and the environment would bring important advances in achieving genuinely sustainable cities in the future.

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affordable housing, and of passing on some of the costs in the process to private developers. As such, they may have their place in a strategy to ensure that low-income residents in communities gaining environmental improvements will continue to have some stake and presence in what may otherwise be a changing neighborhood.

295. See generally, Patricia Salkin, *Community Benefits Agreements: Opportunities and Traps for Developers, Municipalities, and Community Organizations*, 59 PLAN. & ENVTL. L. 3, 3 (2007) (“A Community Benefits Agreement (CBA) is a private contract negotiated between a prospective developer and community representatives. In essence, the CBA specifies the benefits that the developer will provide to the community in exchange for the community’s support of its proposed development. A promise of community support may be especially useful to a developer seeking government subsidies or project approvals.”). CBAs have been suggested as a possible solution to combatting some of the ills associated with gentrification pressures. Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENVTL. L. & POLY 291, 293 (2008).

Rethinking the relationship of environmental law to environmental justice and urban areas is a constant project.<sup>296</sup> The framework set out in this Article may assist in the development of possible solutions to questions of displacement and disenfranchisement that often accompany environmental remediation and sustainability efforts in the urban core. Questions of sufficient (and sufficiently affordable) housing fall beyond the traditional boundaries of environmental law and policy. But integrating new goals and paradigms into the field is a critical part of advancing its goals going forward. Further, the lack of attention—and, at times, outright hostility—from environmental law toward housing concerns can create a divide between communities who have long suffered the ill effects of environmental pollution on the one hand, and those motivated by gleaming visions of urban sustainability on the other. The project of environmental law has come to encompass questions of environmental justice and equity, and discussion of who gets to benefit from environmental improvements goes to the core of that conversation. Similarly, environmental advocates for the past several decades have advanced the goal of making cities sustainable for the future. But the challenge of creating sustainable cities can be achieved only if advocates find a way to make cities environmentally healthier while simultaneously making environmental benefits available to all and maintaining cities' abilities to house expanding populations.

While environmental law may not be a perfect tool to accomplish all of these goals, it can help further them in some of the ways described above. And to the extent that environmental law and lawyers are working at cross-purposes with these goals, better investments of time, planning resources, community involvement, and strategic thinking should be used to bridge that gap. The solution to the problem of environmental gentrification cannot, of course, be to leave urban populations at risk from contamination, lack of green space, and other issues. Instead, to create better partnerships and achieve the goals of both environmental justice and environmental sustainability, environmental law and its advocates must pay attention to the housing concerns of those impacted by improvement

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296. See, e.g., Gregg P. Macey, *Boundary Work in Environmental Law*, 53 HOUS. L. REV. 103, 192 (2015).

projects.<sup>297</sup> In doing so, they can help to achieve a greater degree of both justice and environmental health.

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297. Jacobs, *supra* note 98 (“The answer to this problem can’t be to not improve communities. The answer is not to not build parks and trails and transit and grocery stores. You don’t hold a neighborhood down just to keep it affordable.” (quoting Ryan Gravel, who was heavily involved in the Belt Line project in Atlanta)).