



*Journal of*  
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*& Community Development Law*

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AND COMMUNITY DEVELOPMENT LAW**

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# *From the Editor-in-Chief*

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*Tim Iglesias*

As we gather for our annual conference, the world of affordable housing, fair housing, and community development continue to be unsettled, which appears to be the norm historically. In this context, the *Journal's* role is to assist Forum members and others concerned about our issues to pay attention to and learn about what matters together, to avoid being sidetracked by the irrelevant or shiny objects, and to continue building and strengthening a community of practitioners. Originally, there was no intentional theme to this issue, but the theme that emerged is collaboration. As we all appreciate, our work almost always has a collaborative dimension. That reality finds expression in this issue because many of the contributions were written by several authors.

This issue includes a new occasional feature, which we are calling “Letters to Regulators.” Forum members and committees often engage government regulators both in an informal manner and in the more formal regulatory process regarding programs that affect affordable housing, fair housing, and community development. From time to time, this work includes drafting letters to regulatory agencies. While these letters do not state the official positions of the ABA, the Forum, or a Forum Committee, they can express valuable perspectives, analyses, and proposals. For this reason, the *Journal* is pleased to publish them when it appears that they would be timely and benefit Forum members. In this issue, we feature two letters regarding Qualified Opportunity Zones, a new tax incentive created by the 2017 Tax Act. The letters were drafted by Glenn A. Graff of Applegate & Thorne-Thomsen, Forrest David Milder of Nixon Peabody LLP, and Susan Wilson of Enterprise Community Partners, who all serve on the Forum’s Tax Credit Committee. After a brief introduction to the Qualified Opportunity Zones program, the two letters are printed in their entirety as they were delivered without edits. The letters were written in response to the large gaps in the highly technical rules that were preventing investors from taking on the incentive, and the letters present a particular eye towards expanding the likelihood that the Qualified Opportunity Zones program could be used to develop affordable housing and promote community development. As of this writing, the intervention has already been successful—a wonderful testimony to the fruits of collaboration within the Forum. The *Journal* invites other Forum committees to submit their own letters to regulators in the future.

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*Tim Iglesias is Professor of Law at the University of San Francisco School of Law. He is co-author of the Legal Guide to Affordable Housing Development Law (ABA 2011) and numerous articles. He welcomes comments from readers at [iglesias@usfca.edu](mailto:iglesias@usfca.edu).*

Unfortunately, this issue does not include one of our standard features, the “Heard from HUD” column. This omission was due to the partial government shutdown, which prevented our friends at HUD from participating during the time when that feature needed to be written. Thanks to Schuyler Armstrong and Cynthia Langelier Paine, both of Katten Muchin Rosenman LLP, for their continued collaboration producing this column.

Carlie J. Boos of the Legal Aid Society of Columbus has contributed “GAO Versus LIHTC: The Showdown That Wasn’t.” Carlie tells the story of the GAO investigation to “review the cost-efficiency and effectiveness of the LIHTC program” that Senator Chuck Grassley initiated and that resulted in four GAO reports. In this article, Carlie writes in her lively style and draws on her extensive prior work as the Program and Policy Manager at the Ohio Housing Finance Agency Program and her thoughtfully informed opinions. She carefully reviews and critiques the investigation’s methodology, analysis, and recommendations.

In “Uprooted: Local Efforts to Mitigate Displacement in Gentrifying Neighborhoods,” Heather Way, Elizabeth Mueller, and Ben Martin, all of The University of Texas, share the results and recommendations of their important study of gentrification. Affordable housing developers, fair housing advocates, and community development practitioners can come into significant and difficult conflicts in communities subject to gentrification. Building on prior case studies conducted nationally, this article features case studies from Austin, Texas, Washington, D.C., and Portland, Oregon. It offers state-of-the-art cross-cutting lessons from these case studies to help housing and community development stakeholders act strategically in tackling the displacement pressures in their communities.

Another collaborative article, “Building by Right: Social Equity Implications of Transitioning to Form-Based Code,” is coauthored by Daniela A. Tagtachian, Natalie N. Barefoot, and Adrienne L. Harreveld, all of University of Miami School of Law. Form-based codes have generally been perceived as a progressive fix to the errors of Euclidean zoning. However, using several case studies, the authors highlight a potential dark side: whether and how a municipality adopts and implements form-based codes in ways that ignore or prevent community participation and can have a discriminatory impact. This article also offers mechanisms to address these social equity issues that can be tailored to each community’s unique experiences and needs.

I want to extend my sincere gratitude to Brandon Weiss, Associate Professor of Law at the University of Missouri at Kansas City, who has served very generously and professionally as one of the *Journal’s* Associate Editors for four years, since June of 2015. He always was quick to volunteer for editing assignments, had led the Legal Educators Committee, and has led the committee of judges for the Forum’s Law Student Legal Writing Competition for the last two years. Thankfully, Matthew Rossman, Professor of Law at Case Western Reserve University School of Law, has agreed to join

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the Editorial Board starting in July 2019. Matt currently leads Case Western's Community Development Clinic, teaches in its Urban Development Lab (which he founded), and is deeply involved in his own community, including the Cleveland Roundtable on Affordable Housing and Community Development Law. As such, he brings a wealth of expertise and skills to serve in this position. I am thrilled (and relieved) to announce that Laurie Hauber of the Oregon Law Center, Emily Blumberg of Klein Hornig LLP, and Sara Silverstein Ferrara of Klein Hornig LLP have generously agreed to continue to serve as editors. Their work helping to plan issues, recruiting authors, editing contributions, and generally aiding and advising me is invaluable and absolutely critical to every issue of the *Journal*. If you see Brandon, Matt, Laurie, Emily, or Sara at the Annual Meeting, please let them know how much you appreciate their contributions to the *Journal*.





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# From the Chair

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*George Weidenfeller*

One of the responsibilities of the Forum Chair is to write the *From the Chair* column for each issue of the *Journal*. While I appreciate the merit in such an undertaking, the fact that the column has to be finished about four months in advance of publication creates some serious challenges in making timely and relevant remarks. That matter of fact, combined with the fact that five months into my term as Chair, I am compelled to write my final Chair's statement for the *Journal*, brings me to another point I have been pursuing as Chair, which is that a one-year term for officers of the Forum is too short for serious accomplishment. While the ink is not dry on the Forum's Strategic Plan, it is anticipated that the final version will be completed by the time of the Forum's Annual Meeting in May and will include an objective to expand the term of Forum officers to two years. Lest one think I am looking to extend my tenure, that is not the case. The two-year term for Forum officers would not take effect until after the current officer's term expires. It is my intent that an amendment to the bylaws to effect this change will be presented to the Forum Membership for approval at this year's Annual Meeting.



George Weidenfeller

I hope that the final version of the Strategic Plan will also include a provision for the establishment of a Leadership Advisory Board (LAB). It is contemplated that the LAB would include the Governing Committee officers and would be made up of a specified number of people who have actively participated in Forum activities, such as Officers, Governing Committee members, Committee or Conference Chairs, and Liaisons or others who have made valuable contributions. The LAB's objective would be to support the Governing Committee in a variety of ways, which may change over time, and could include suggestions for initiatives, issues to be addressed, publication topics, future leadership, mentoring, and law firm opportunities. Perhaps one of the biggest underlying concerns dealt with in the Strategic Plan relates to the American Bar Association (ABA), and the challenges the ABA is facing, especially with respect to its finances and the impact that the ABA finances will have on ABA entities such as the Forum. The LAB might be particularly helpful in addressing some of those concerns as they develop.

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*George Weidenfeller (gweidenfeller@telesiscorp.com) is General Counsel of Telesis Corporation in Washington, D.C.*

While the forgoing focuses primarily on internal matters, the Strategic Plan is primarily targeted to assure that the Forum remains relevant to members and continues to be a mission-driven organization focused on the education and career-development opportunities associated with the law of affordable housing, fair housing, and community development. The substantive challenges currently presented are as daunting as ever. They include the continued effects of federal tax reform, implementation of Opportunity Zones, changes to enforcement of Fair Housing laws, disaster assistance funding, infrastructure demands, Government-Sponsored Enterprises (GSE) reform, elimination of Federal Financing Bank affordable housing activities, the HUD budget, and, at this writing, the longest ever Government shutdown.

Any one of the above-mentioned topics could consume an entire session, and they will all be considered for discussion at future Forum events. During the past year, the Forum conducted a “Boot Camp” in Boston, which provided a large audience with both introductory and advanced trainings by experienced practitioners and by federal, state, and local government officials. Some of the panels, such as the one on housing and healthcare, were so successful that they are being repeated at the upcoming Annual Meeting. The Forum also conducted webinars on Opportunity Zones and Community and Economic Development, both of which were extremely well attended and well received. Additional sessions are being undertaken on Hybrid 9%/4% Low Income Housing Tax Credit (LIHTC) transactions, HUD Rental Assistance Demonstration (RAD) initiatives, and Fair Housing. All are encouraged to participate. This past year also saw continued cooperation between the Forum and the Mortgage Bankers Association on efforts to improve the Federal Housing Administration (FHA) closing process. It is anticipated that, by the time that this issue appears, the joint effort will have already resulted in the submission of joint comments to HUD as it revises the HUD Closing Guide. And we hope that HUD will incorporate many of the industry suggestions. The Forum continues to maintain its close working relationship with government agencies—especially HUD and the IRS—and looks forward to the opportunity for positive input on other matters of importance to the agencies and the industry in the future.

The Forum is always interested in adding members, at all levels of their career and in all aspects of the practice. The government—and HUD in particular—have placed an emphasis on hiring most of its attorneys right out of law school through its Legal Honors Program. The Forum welcomes these attorneys and government attorneys at all levels to join the Forum, at the special government rate. This practice area offers exciting possibilities through a variety of platforms. And the Forum is an excellent vehicle to network with other professionals pursuing similar interests.

Anticipating that by May I would have a lot more to say, but not having a crystal ball, I will use the space to extend my gratitude to all who have, on a regular and voluntary basis, worked so hard during the years that I have been associated with the Forum. Rather than actually

naming people—mostly for fear of inadvertently not mentioning someone I should—I will just say it has been an extreme pleasure to work with the members of the Governing Committee, Committee Chairs/Co-Chairs, Liaisons, publication authors, journal editors, government representatives, and Forum members who have participated in the activities provided. One name that I will mention is Dawn Holiday, the Forum's Administrative Director. She is the glue who holds the Forum together, makes the trains run on time, and generally provides the support that officers and members rely upon daily. Dawn is a gem, who should be treasured and appreciated by all who are involved with the ABA and especially the Forum.

It has been an honor to be associated with the Forum for over twenty-five years. And I look forward to continuing the engagement—as a member and maybe as part of the above-mentioned LAB!



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# Letters to Regulators

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Glenn A. Graff, Forrest David Milder, and Susan Wilson

## Introduction<sup>1</sup>

The 2017 Tax Act (often referred to as the “Tax Reform and Jobs Act” or PL 115-97) created a tax incentive for investments by Qualified Opportunity Funds (QOFs) in Qualified Opportunity Zones (QOZs). These tax benefits can be used for virtually any type of investment and can be “twinned” with other tax incentives, such as the Low-Income Housing Tax Credit (LIHTC), the New Markets Tax Credit (NMTC), and the Historic Tax Credit (HTC).

QOZs are a new tax incentive for taxpayers who own appreciated assets. If they sell such an asset, and invest an amount equal to the resulting capital gain in certain low-income areas in accordance with certain requirements, they can delay payment of the tax liability. And they may also eliminate tax on a subsequent sale of the investment. The purpose of the QOZ tax benefits is to incentivize investment and increase the economic growth in such low-income areas. There are very few restrictions on the type of investment and qualifying investments that can qualify for deferral of existing gains and permanent avoidance of some gains. The QOZ provisions are contained in Internal Revenue Code Sections 1400Z-1 (Designation of Qualified Opportunity Zones) and 1400Z-2 (Special Rule for Capital Gains Invested in Opportunity Zones).

There are many open issues about QOFs for which guidance is needed, and issuing guidance about QOFs has been a priority for the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (IRS). As active

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1. Editor’s note: Forum members and committees often engage government regulators both informally and in the regulatory process regarding programs that affect affordable housing, fair housing, and community development. From time to time, this work includes drafting letters to regulatory agencies. While these letters do not state the official positions of the ABA, the Forum, or a Forum Committee, they can express valuable perspectives, analyses, and proposals. For this reason, the *Journal* is pleased to publish them when they may be timely and benefit Forum members.

members of the Tax Credit and Equity Financing Committee (Committee) of the Forum on Affordable Housing and Community Development Law (Forum), we submitted one letter to Treasury and a follow-up letter to both Treasury and the IRS. These letters requested guidance on the program in order to advance the ability of this new incentive to be used with affordable housing and community development programs. We note that these letters are not official positions of the ABA, the Forum, or the Committee, but represent the views of the authors after discussions with other members of the Committee.

Below is a very basic overview of the new QOZ incentive, followed by the two letters that have been submitted.

### **Quick Summary of Qualified Opportunity Zones**

**Basic Overview of Tax Benefits.** Taxpayers who have a capital gain from a sale or exchange of property (Eligible Gain) can qualify for three types of tax benefits if they invest the amount of gain in a QOF that makes an investment in a QOZ Business Property or in stock or partnership interests in a QOZ Business:

- a) **Deferral of Tax on the Eligible Gain**—Eligible Gain from the sale or exchange of property that is invested in a QOF within 180 days of such sale or exchange will have the tax due as a result of the Eligible Gain deferred until the earlier of (i) December 31, 2026, or (ii) when the investment in the QOF is sold or exchanged. The tax due on such date is based upon the excess of (i) the lesser of amount of capital gain deferred or the fair market value of the investment in the QOF, over (ii) the taxpayer's basis in the QOF investment.
- b) **Permanent Reduction in Tax on the Eligible Gain**—The taxpayer's basis in its QOF interest starts at zero, and it is increased by 10% or 15% for investments in a QOF held for five or seven years, respectively. This effectively reduces the potential tax liability on Eligible Gains by these percentages.
- c) **Permanent Avoidance on New Gain**—If the taxpayer sells its QOF interest after holding it for ten years or more, it can step the basis of the investment up to its fair market value. As a result, there generally should be no gain on the sale of a QOF investment held for ten or more years.

**Qualified Opportunity Fund Requirements.** Other than certain organizational requirements, the primary requirement of QOFs is that they invest at least 90% of their assets in Qualified Opportunity Zone Property (QOZP). QOZP consists of either Qualified Opportunity Zone Business Property (QOZBP) or stock or partnership interests in Businesses (QOZB) in which substantially all of the QOZBP's tangible property is QOZBP.

**Qualified Opportunity Zone Business Requirements.** In addition to investing in property that directly qualifies as QOZBP, QOFs can invest

in corporations or partnerships that qualify as QOZBs. Investments in corporations that qualify as QOZBs must be received directly from the corporation at its original issue (directly or through an underwriter). Interests in partnerships that qualify as QOZBs must be acquired directly from the partnership in exchange for cash.

For a corporation or partnership to qualify as a QOZB, the entity must be a trade or business that (i) has substantially all of its tangible property owned or leased by QOZBP; (ii) satisfies requirements of Section 1397(C)(b) subsection (2) (50% of gross income derived from active conduct of a trade or business), subsection (4) (substantial portion of intangible property used in active conduct or a trade or business), and subsection (8) (less than 5% of assets are Non-Qualified Financial Property); and (iii) is not a sin business as described in Section 144(c)(6)(B).

**Qualified Opportunity Zone Business Property Requirements.** The primary requirements to be QOZBP consists of being (i) tangible property located in a QOZ, that is (ii) purchased from an unrelated party (i.e., essentially no more than 20% common ownership using the rules of Section 267 and 707 of the Code); (iii) the QOF (or the subsidiary entity that owns the project, if there is one) must either be the first user of the property, or during a thirty-month period, its capital expenditures with respect to the property must exceed its preconstruction basis in the property; and (iv) during substantially all of the QOF's or QOZB's holding period, substantially all of the use of the property was in a QOZ.

**No Competition and No Limits.** In contrast to Low-Income Housing Tax Credits or New Markets Tax Credits, there is no cap on the amount of benefits and no need to submit an application or compete for the tax benefit—any investment in almost any kind of business that is located in a QOZ can qualify for the tax benefits if the appropriate rules are followed. In this regard, QOZs are similar to Historic Tax Credits in that a HTC building is eligible for the credits automatically if the various HTC and National Park Service rules are followed. Still, it must be remembered that the incentive is only available if the investor makes its investment through a QOF. Direct ownership by the taxpayer will not satisfy these requirements.

**Twinning with Other Programs.** Unlike the NMTC, there is no prohibition on investments in residential rental housing. Thus, twinning QOZ and LIHTC is possible. QOZs can also be used with Historic Tax Credits and New Market Tax Credits, although combining these credits with QOZ investments can be complex and may be impacted by forthcoming guidance.

**Why Did Forum Members Write to Treasury?** As noted above, the rules are highly technical, and yet they had large gaps that were preventing investors from taking on the incentive. For example, sponsors needed to know whether a project that is under construction (and, therefore, not yet in business) can qualify as QOZ business property and how much time is allowed to complete such a project. They needed to know how to handle the 180-day period for investing if their capital gain was derived from

a partnership that might not actually allocate the gain to them until the partnership's year end. And, there were many other questions as well.

With those and similar questions in mind, we set out to write a letter to Treasury even before any regulations were issued, both raising questions and providing suggested answers to some of the biggest problems. And, we are pleased to say that the IRS listened. Ideas that the IRS adopted, such as the written plan to build or rehabilitate a project and allowing the 180-day period to run from the end of a partnership's taxable year, were suggestions that we made and that appear in the proposed regulations. Similarly, we submitted a second letter with further suggestions and recommendations, after the proposed regulations were published. Appearing below are the two letters.



July 3, 2018

Michael Novey  
United States Department of the Treasury  
Washington, DC

Re: Opportunity Zones

Dear Mike:

Thank you for meeting with us on behalf of the Tax Credit and Equity Financing Committee (“Tax Credit Committee”) of the American Bar Association Forum on Affordable Housing and Community Development Law (“ABA Forum”)<sup>1</sup>. It was a pleasure discussing issues related to qualified opportunity zones. You asked us to highlight issues that were preventing investments from closing, as these would be the highest priority for government guidance. Here is our list of priority items:

1. What Taxpayer must do the investing, and when? Many capital gains arise in partnership contexts, where the gain to the partner arises by allocation from the partnership. As a result, investors don’t know whether the investment in a QO Fund must be made by the partner or the partnership. Similarly, in the case of consolidated groups, investors are unsure whether the group investment must be made by each member in accordance with its particular gain, or can one investment be made by a member of the group? Finally, can a group of investors who have gains form a partnership, and have that invest, alongside other investors, in an Opportunity Fund? Or does the “taxpayer” have to be the direct investor in the QO Fund?

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<sup>1</sup> The three of us hold or have held positions in the ABA Forum, and we are all active in the Tax Credit Committee. In preparing this letter, we consulted with many of our colleagues and members of the Tax Credit Committee. However, we prepared this letter in our own capacities, and it does not represent an official statement or position of the American Bar Association or any of its Sections, Forums, or Committees.

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Our recommendation is that the investment might be made by any of the foregoing; in the case of an investment by a partner, it should be able to rely on any reasonable method to determine the gain it will be allocated and the start of the 180-day period in those situations where it has not yet received a K-1 at the time of the investment. As you might imagine, this is a fundamental question to closing transactions, because taxpayer have to know who should be signing the agreements and providing the investment.

2. What kind of entities can a Qualified Opportunity Fund Be? We would like to think that this question has an obvious answer. The answer should be any entity that qualifies as a corporation or a partnership for federal income tax purposes can be a QO Fund. However, Section 1400Z-2(d) refers to “any investment vehicle **organized as** a corporation or partnership,” and many investors are worried that limited liability companies (whether having two or more members and taxed as partnerships, or electing to be taxed as corporations) are ineligible because they are not “organized” as corporations or partnerships. This question is “on the edge” as far as preventing investments from closing, since investors can assure the treatment by simply not using LLCs. Of course this is inefficient in many circumstances, and it’s hard to imagine that there is a reason to not apply Section 7701 principles to this question. We would hope that this would be easily addressed in an FAQ, but we would understand if it doesn’t meet your standard.
3. What gains are eligible for Opportunity Fund tax deferral? The title of Section 1400Z-2 refers to “capital gains,” but the actual statute only refers to “gains.” While a sale of corporate stock almost always gives rise to capital gain, sales of other assets may give rise to 1231 gain, or depreciation recapture under Section 291, 1245 and 1250. Sections 1245 and 1250 include words to the effect of “such gain shall be recognized notwithstanding any other provision of this subtitle.” Section 291 refers to 20% of gain associated with previously taken depreciation, and it provides that that it “shall be treated as gain which is ordinary income under Section 1250 ...” And, there are other provisions of law which address gains that are not accorded “capital gain” treatment, most notably Section 582(c), which provides that sales or exchanges of bonds, debentures, notes or certificates or other evidences of indebtedness by certain financial

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institutions are not considered the sale or exchange of a capital asset.

Accordingly, potential investors are unsure of how much they should be investing, and this is slowing or stopping transactions from closing. In this regard, we note that Section 1031 (like kind exchanges) has a statutory exception from the application of Sections 291, 1245 and 1250, but many have observed that the principles should be the same. Of course, having the new provisions override these provisions will maximize the amount of investment; while we are not writing as advocates, we do observe that investors need a clear statement of the law in order to move these transactions to closure. One possible interpretation is that gains that are subject to depreciation recapture or ordinary income treatment are eligible for inclusion in a fund, and most of the favorable treatment, but they will be treated as giving rise to ordinary income when the taxable event (or December 31, 2026) occurs.

4. Eligibility of property which is being newly constructed, rehabilitated or augmented. Answering this question is very crucial to closing investments. Many proposed transactions involve new construction which will take time, or the rehabilitation of existing facilities, based on the 30-month test of 1400Z-2(d)(2)(D)(ii). That section considers property substantially improved only if during “any 30-month period beginning after the date of acquisition ... additions to basis with respect to such property in the hands of the qualified opportunity fund exceed an amount equal to the adjusted bases at the beginning of such 30-month period ...” This raises several important questions:
  - a. Evidence of the Planned Activity. Section 1400Z-2(d)(2)(B)(iii) and (C)(iii) requires that “during substantially all of the qualified opportunity zone fund’s holding period for the such stock/interest, such corporation/partnership qualified as a qualified opportunity zone business.” Accordingly, if a corporation or partnership acquires property with a plan to undertake new construction or to make additions to basis over any 30-month period after acquisition, is the property a “qualified opportunity zone business” while it is awaiting construction or rehabilitation? Does the rehabilitation have to be “in place”, with actual tenants or use while the rehabilitation is going on?

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Our recommendation is that if a taxpayer has reasonable written evidence of a plan to meet the additions to basis requirement within 30 months of acquisition (or perhaps longer, e.g., five years, because the statutes refers to “any” 30-month period), then there shall be a presumption that the business is a qualified opportunity zone business unless subsequent facts make clear that this presumption was not warranted.

- b. Additions to Basis with Respect to Such Property. The statute refers to “additions to basis *with respect to* such property,” indicating that the additional work need not be a rehabilitation. Is it sufficient if a Fund buys a housing development and also constructs an adjacent and appropriately sized community center or playground that passes the basis requirements? The second building or improvement would seem to be “with respect to” the first. We recommend that the basis in new construction and improvements be applied to pass the 30-month test if the Fund can reasonably demonstrate that these items are with respect to the used property. Another alternative might be to apply the “substantially related and subordinate” rules that apply to tax-exempt bond transactions.
- c. Reasonable Working Capital. While new construction, rehabilitation or “with respect to” construction is pending, are the funds which will pay for the “new construction/rehabilitation/construction with respect to” exempt from the “nonqualified financial property” (“NQFP”) rules of Section 1397C(b)(8)? Failure to have such an exemption would cause most investments in Qualified Opportunity Zone Stock or Qualified Opportunity Zone Partnership Interests that invest in construction projects to have more than 5% NQFP. Thus the entire investment would fail to be Qualified Opportunity Zone Property and cause a catastrophic failure of the 90% penalty test.

We recommend that such funds be considered reasonable “working capital” (and therefore, *not* nonqualified financial property) if used to pay for the costs of a reasonable and diligently undertaken project that meets requirements like those we have suggested for the 30-month rule,

Michael Novey, US Treasury  
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as described above. We would be pleased to provide you with an illustration of similar rules that apply to new markets tax credit transactions. Similarly, for QO Funds that invest directly in Qualified Opportunity Zone Business Property, where the new construction, rehabilitation or “with respect to” construction is pending, we recommend that such funds be considered reasonable working capital using a 30-month rule and therefore not negatively impact the 90% test during the 30-month period. We note that Section 1400Z-2(f)(3) provides that no penalty for failing to meet the 90% test shall be imposed where there is reasonable cause for such failure. Combined with the regulatory authority provided to the Service under Section 1400Z-2(d)(4), we believe the Service has the authority to promulgate regulations providing for reasonable working capital.

5. Pre-Investment Financing. All projects require the certainty of an investment. However, typically, taxpayers cannot easily dispose of assets (to generate gains) on such a certain schedule. For example, many housing developments take more than a year to build, and call for capital investments in installments. Because this time frame extends over more than 180 days, taxpayers wanting to maintain these long-settled timelines would be unable to use a particular gain to fund all the contributions required. In anticipation of this problem, developers might arrange financing in anticipation of these capital contributions, or the investor might loan amounts into the project entity, to be replaced by gain investments as the investor generates them, provided that the actual partnership or stock interest is acquired for cash, as required by the Code provision. We believe that this is consistent with the requirements of Section 1400Z-2, but we are identifying this in case it inspires any special interest from the IRS or Treasury.
6. Grace Periods for Investing and the Measurement Dates. Section 1400Z-2(d)(1) requires that the QO Fund hold at least 90 percent of its assets in QOZ property, determined by the average of the percentage of qualified opportunity zone property held in the fund as measured (A) on the last day of the first 6-month period of the taxable year of the fund, and (B) on the last day of the taxable year of the fund. This raises several questions that are impeding investment, with

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taxpayers unwilling to invest until they know how the measuring dates will work:

- a. How does averaging work? The averaging requirement raises many questions. First, does the fund just determine its percentages on the two dates? We note that the 6-month reference appears to only apply to the “first” such date, or is it supposed to be the earliest possible 6-month period *each year* of the QO Fund’s existence? What is being averaged? The fair market value of the assets? Their basis? Their original basis at the time of their acquisition by the fund? Our suggestion is that a fund determine its percentage of QOZ property six-months after formation, and the last day of the taxable year, and that this average must equal or exceed 90 percent to avoid the penalty of subsection (f).

For example, if the fund was a calendar year taxpayer formed on March 1, and it had 80 percent of its assets in QOZ property on September 1 (i.e., 6 months later), and 100 percent on December 31 (i.e., the end of the year), then the average would be 90 percent, and the test would be passed. We do not have a good suggestion for valuation. In the spirit of using “any reasonable method,” perhaps computations should be made using “unadjusted basis” (recognizing that adjusted basis could yield nonsensical results on account of bonus depreciation), unless and until the taxpayer elects to obtain an appraisal and use *that*.

- b. How is the first 6-month period measured? If an investment closes on June 27 for a calendar year fund, does the 6-month period end on June 30, or December 27? And if it is the latter, does the fund apply the test on both December 27 and again on December 31, just 4 days later? We recommend that (i) for the first time, the test should be first performed on the date that is six months after the entity is formed and at the end of the tax year that immediately follows that date, and (ii) in subsequent years, the test should be performed on the date that is six months from the start of the tax year, and the final day of such taxable year. For example, a calendar year fund formed on October 1, 2018 would

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measure compliance on April 1, 2019 and December 31, 2019, and then on June 30 and December 31 of each year thereafter.

7. Other Technical Issues. These are other questions and technical points that we would hope could be addressed in guidance.

- a. Active Business. The guidance should confirm that leasing activities, particularly the leasing of residential real estate constitutes a QOZ business. As you know, Section 1400Z-2 points the reader to certain subsections of 1397C for additional definitions. While the pointers do *not* send the reader to the subsections of Section 1397C that limit potential leasing (including residential and certain personal property leasing) activities, investors are concerned that the IRS might apply such rules.

For example, many Code sections send the reader to the related party rules of Section 267(b), and tax practitioners generally apply the rules of section 267(c) as well, even though they are not incorporated by the original pointer. The lack of guidance on this point is preventing those who often invest in Section 42-eligible housing developments from investing their gains in Opportunity Zones, seeming to frustrate the purpose of the section. It would be sufficient for guidance to note that, of the provisions in Section 1397C, only those specifically identified in Section 1400Z-2 (i.e., paragraphs (2), (4), and (8) of section 1397C(b)) apply.

- b. “Non-permitted businesses”. Section 1400Z-2 refers to Section 144(c)(6)(B) for a list of businesses that are not permitted for Opportunity Zone businesses. Section 1397C has the same reference to Section 144(c)(6)(B), plus it adds many farming businesses to the excluded list. For the same reasons as discussed in the preceding paragraph, it might be helpful for the IRS to say that only the list in Section 144(c)(6)(B) is prohibited, or to observe that “farming businesses are a permitted investment.”

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- c. References to “Substantially all.” As we have discussed, the Code provision includes the phrase “substantially all” five times, and we recommend that the IRS publish guidance defining this term for purposes of section 1400Z-2. Where the reference is to time, we recommend that the phrase be applied with a combination of a percentage, along with an initial phase-in and exceptions for reasonable cause.
- d. Separate funds of non-gains money. It is possible to read 1400Z-2 to provide that *separate* funds that make use of only non-gains money can qualify for the benefits of the post-10-year basis step-up of subsection (c). That seems inconsistent with the implication of subsection (e), but that subsection actually addresses *joint* funds of both gain and non-gain money, while subsection (c), read by itself, simply states that benefit is available without referring to the source of the investment. The IRS could settle this question by issuing guidance on this point.
- e. Taxing the Operation and Distributions of the Opportunity Zone Business. We are anticipating that when an Opportunity Fund owns a partnership interest or corporate stock or Opportunity Zone Business Property, this investment will generally be taxed in the ordinary way. For example, if a partnership in which the fund invests generates income, the Opportunity Fund will get a K-1, and report its share of the income; if such a partnership borrows money and makes a distribution to its partners, including the Opportunity Fund, this will be taxed or not under the usual rules that apply to distributions to partners (e.g., a distribution in excess of basis generally results in capital gain to the partner). Similarly, if the corporation in which the fund owns stock generates corporate level income, it will be subject to the applicable tax rules for corporations; if it makes a distribution to its stockholders, including the Opportunity Fund, this distribution will be subject to the normal tax rules that apply to distributions to stockholders. We see people making various assertions about alternate tax treatments for these items that goes beyond the specific deferrals and non-taxability that appears in Section 1400Z-2, and it may be useful for the IRS to clarify this tax treatment or identify those situations where a special rule might apply.



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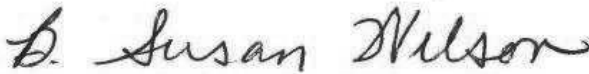
- f. Any Reasonable Method. Several of the questions we and others have raised might be best addressed by the IRS adopting an “any reasonable method” or “any reasonable method, consistently applied” standard. The IRS has used this standard many times; for example, a brief review of the Treasury Regulations indicates that this phrase appears 119 times.

We hope that these are useful observations that will assist in the preparation of FAQs or other guidance. As indicated, answers to these questions would go a long way towards getting these transactions to close. Of course you should not hesitate to contact us with your thoughts and questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Forrest David Milder". The signature is fluid and cursive, with a long horizontal line extending to the right.

Forrest David Milder, Nixon Peabody, LLP, Former Chair of the ABA Forum  
and member of the Tax Credit Committee of the ABA Forum

A handwritten signature in black ink, appearing to read "B. Susan Wilson". The signature is cursive and somewhat stylized, with a large "B" and "W".

B. Susan Wilson, Enterprise Community Investment, Inc., Co-chair of the Tax  
Credit Committee of the ABA Forum

A handwritten signature in black ink, appearing to read "Glenn A. Graff". The signature is cursive and somewhat stylized, with a large "G" and "A".

Glenn A. Graff, Applegate & Thorne-Thomsen, P.C., Member of the Governing  
Committee of the ABA Forum and former Co-chair and current member of the  
Tax Credit Committee of the ABA Forum

December 28, 2018

CC:PA:LPD:PR (REG-115420-18) Room 5203

Internal Revenue Service

P.O. Box 7604

December 28, 2018

Ben Franklin Station

Washington, DC 20044

Attention: Erika C. Reigle of the Office of Associate Chief Counsel (Income Tax and Accounting), Kyle C. Griffin of the Office of Associate Chief Counsel (Income Tax and Accounting),

Michael Novey, U.S. Department of the Treasury, [Michael.Novey@Treasury.gov](mailto:Michael.Novey@Treasury.gov)

and uploaded to the Federal Rulemaking Portal at

<https://www.regulations.gov/comment?D=IRS-2018-0029-0001>

**Re: Guidance Regarding Investing in Qualified Opportunity Funds (Reg-115420-18)**

Dear Ms. Reigle, Mr. Griffin and Mr. Novey:

As active members of the Tax Credit and Equity Financing Committee of the American Bar Association Forum on Affordable Housing and Community Development Law,<sup>1</sup> we wish to submit the following comments on the proposed regulations on Qualified Opportunity Zones (“QOZs”).

**1. Residential Rental Housing for Qualified Opportunity Zone Businesses (“OOZBs”)**

Based on our experience in affordable housing and community development, we believe that the Qualified Opportunity Zone incentives have the potential to be helpful in the development of affordable housing and workforce housing in QOZs. We were encouraged by Revenue Ruling 2018-29 which addressed a Qualified Opportunity Fund (“QOF”) owning residential rental housing. However, this ruling did not address the ownership of such rental housing by a partnership or corporation qualifying as a QOZB. Given that Revenue Ruling 2018-29 already allows residential rental housing, we think that it is a

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<sup>1</sup> The three of us hold or have held positions in the ABA Forum, and we are all active in the Tax Credit and Equity Financing Committee. In preparing this letter, we consulted with many of our colleagues and members of the Tax Credit and Equity Financing Committee. However, we prepared this letter in our own capacities, and it does not represent an official statement or position of the American Bar Association or any of its Sections, Forums, or Committees.

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small change to explicitly provide that a QOZB can own residential rental housing (and even non-residential rental housing) to the same extent as a QOF. We note that one of the requirements to be a QOZB is that 50% of the gross income of a QOZB be derived from the active conduct of a trade or business in a QOZ. See Prop. Treas. Reg. § 1.1400Z-2(d)-1(d)(5)(i). However, the regulations addressing the active conduct of a trade or business have been reserved. Prop. Treas. Reg. § 1.1400Z-2(d)-1(d)(5)(ii)(B).

The term active conduct of a trade or business is used in a number of different parts of the Internal Revenue Code and the Treasury Regulations issued thereunder (the “Regulations”). We think the one that makes the most sense to apply in this context is the one that is used with respect to New Markets Tax Credits (“NMTC”) in I.R.C. Section 45D. In arriving at this conclusion, we note that census tracts that qualify for QOZ benefits must meet the NMTC requirements for qualifying census tracts in Section 45D. NMTCs also have a similar purpose of trying to drive investment into low-income communities. Furthermore, while there are significant additional provisions in Section 45D and the applicable Regulations which interpret and modify the definition of a “qualified active low-income community business,”<sup>2</sup> the NMTC requirements apply an active conduct test in I.R.C. Section 45D(2)(A)(i) which is nearly identical to the active conduct test in Section 1397C(b)(2) relevant to QOZs. Therefore, in the absence of guidance, it makes sense to apply an active conduct of a trade or business standard that is similar to those used for NMTC purposes.

As provided in Regulations Section 1.45D-1(d)(4)(iv), the conduct of a business by a qualified low-income community business will be considered to be “active” for purposes of I.R.C. Section 45D if, at the time a qualified community development entity makes a capital or equity investment in, or loan to, the entity, the community development entity reasonably expects that the entity will generate revenues (or, in the case of a nonprofit corporation, engage in an activity that furthers its purpose as a nonprofit corporation) within 3 years after the date the investment or loan is made. Similarly, we believe that the active conduct requirement for a QOZB should be satisfied if at the time the QOF makes the investment into the QOZB, the QOF reasonably expects the QOZB will generate revenue within 3 years after the QOF’s investment is made.

## 2. Applicable Financial Statements

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<sup>2</sup> We note that I.R.C. § 45D specifically excludes the rental of residential rental property from the definition of a qualified business for NMTC purposes by reference to I.R.C. § 1397C(d). In contrast, I.R.C. § 1400Z-2 notably does not include any cross reference to I.R.C. § 1397C(d) or otherwise prohibit the rental of residential rental property. We believe that this signals Congressional intent that QOZBs may engage in residential rental property.

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The QOZ incentive requires that QOFs invest 90% of their assets in Qualified Opportunity Zone Property (“QOZP”) and that at least 70% of the tangible property owned or leased by QOZBs must be Qualified Opportunity Zone Business Property (“QOZBP”) (respectively, the “90% Test” and the “70% Test”). I.R.C. § 1400Z-2(d)(1) & (3)(A); Prop. Treas. Reg. § 1.1400Z-2(d)-1(d)(3). I.R.C. Section 1400Z-2 is silent as to how such measurements are to be made. The Proposed Regulations require that QOFs and QOZBs that have Applicable Financial Statements (“AFS”) as defined in Regulation Section 1.475(a)-4(h), use the values on such AFS and that those without an AFS use the cost of the assets. See Prop. Treas. Reg. § 1.1400Z-2(d)-1(b) & (d)(3).

We believe it is inappropriate to require that QOFs and QOZBs use AFS. First, AFS are defined as being on U.S. GAAP. U.S. GAAP may reflect different assets than are recognized for federal income tax purposes and the methods of capitalizing such assets can differ significantly. For example, Accounting Standards Codification Topic 842 effectively requires lessees to capitalize every long-term lease on their balance sheets. This would be true even for operating leases which are not considered an asset for federal income tax purposes. Thus, under a U.S. GAAP approach, there will be lease assets on a balance sheet that would not be present for federal income tax purposes. We do not think there was a Congressional intent to delegate to U.S. GAAP accounting the determination of assets and asset amounts to be used for the 90% and 70% Tests, especially when U.S. GAAP can have significantly different asset types and methods of capitalization.

Second, U.S. GAAP accounting mandates the use of depreciation, amortization and impairment. The use of such an approach could result in a QOF or QOZB failing their respective 90% or 70% Test merely from the non-cash occurrence of depreciation.

### **Example 1**

Assume T has a \$10,000,000 capital gain and elects to defer such a gain as provided in I.R.C. Section 1400Z-2. The \$10,000,000 is invested on July 15, 2018 into a new QOF and such date is within 180 days of the date of the sale or exchange that generated eligible capital gain. The QOF files IRS Form 8896 and selects July 2018 as the first month of QOF status. The QOF immediately invests \$9,000,000 into newly constructed residential rental property that has never been placed in service and otherwise qualifies as QOZBP and thus also qualifies as QOZP. The remaining \$1,000,000 is held in non-interest-bearing cash accounts for use as operating deficits reserves and replacement reserves. On its face, 90% of the QOF’s assets have been invested in QOZP and would seem to meet the statutory requirements. However, for U.S. GAAP purposes, there would be some depreciation on the residential property. Any amount of depreciation would

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result in less than 90% of the QOF assets being invested in QOZP. We do not believe that reflection of GAAP depreciation should cause a QOF or QOZB to fail their respective 90% and 70% Tests.

Third, we note that Regulation Section 1.475(a)-4(h) is a provision that applies to dealers in securities. The provision has many requirements to have an AFS and we would expect hardly any QOFs or QOZBs would meet the requirements to have an AFS. Thus, there is substantial uncertainty as to how and when a QOF or QOZB would have an AFS.

We believe that the proper approach is for QOFs and QOZBs to be allowed to use the original unadjusted cost of acquiring their assets as provided in Section 1012. Such an approach would use the actual outlay of funds to acquire such assets and reflects the Congressional desire that QOFs and QOZBs invest their assets in appropriate property. It also allows for normal federal income tax rules to be used as to defining assets and the proper capitalization into such assets. An analogous approach is used under the NMTC requirements for purposes of calculating the percentage of tangible property used in an NMTC qualifying census tract. See Treas. Reg. § 1.45D-1(d)(4)(i)(B). In addition, this approach will avoid the unintended consequence that QOFs and QOZBs may choose not to have U.S. GAAP financial statements in order to avoid being forced to use AFS.

To the extent there is a concern that property may over time no longer be used and be inappropriately included in the 70% and 90% Tests, we note that assets that are not used in a trade or business of the QOF or QOZB would be non-qualifying assets for purposes of these tests. See I.R.C. § 1400Z-2(d)(2)(D)(i) (“The term qualified opportunity zone business property means tangible property used in a trade or business of the qualified opportunity fund if . . .”) (emphasis added). Thus, the statute has already addressed such a concern by requiring that assets no longer used in the trade or business will not help a QOF or QOZB satisfy the applicable 90% or 70% Test.

### **3. Aggregation of Assets for Purposes of the Substantial Improvement Requirement**

QOFs and QOZBs are allowed to have property that was previously used in a QOZ if they substantially improve the property by having additions to basis with respect to such property in excess of the adjusted basis of such property prior to the beginning of the 30-month period. I.R.C. § 1400Z-2(d)(2)(D)(ii). However, it is unclear how this requirement is applied where a QOF or QOZB may use multiple assets in its trade or business.

#### **Example 2**

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Assume that a QOZB acquires a factory building and land for \$5,000,000 with \$500,000 allocable to land and \$4,500,000 allocable to the building. The QOZB plans to invest \$5,000,000. Of this amount, \$2,000,000 will be used on roof repair and other improvements capitalized into the building. The QOZB will spend another \$2,000,000 on bringing machinery into the building to be used for the manufacture of goods. The machinery is not permanently affixed to the building and would not be classified as a part of the building for federal tax purposes. An additional \$1,000,000 will be used to build an adjacent building that will also be used in the manufacturing trade or business.

If the substantial improvement test only looks to additions to basis with respect to the building itself, the building would not be deemed to be substantially improved and would not qualify as QOZBP.

On the other hand, the QOZB is in the manufacturing business and the acquired building is part of that business. If the QOZB is allowed to aggregate all of the capital expenditures it incurs within 30 months that relate to or expand that manufacturing trade or business carried on at that building, then the building, the new equipment and the new adjacent building would all qualify.

We think the above example illustrates how a restrictive interpretation of the substantial improvement requirement will prevent many businesses from being formed or expanding in a QOZ. We also note that Congress stated that the additions to basis have to be “with respect to such property”. The phrase “with respect to” is an unusual choice of words with the phrase commonly meaning “concerning” or “with regard to”. We think this phrase is broad enough to refer to improvements that relate to the property but are not physically part of the property. For these reasons, we believe that for purposes of the substantial improvement requirement, an asset should be considered to be substantially improved if there are additions to basis by the QOF or QOZB with respect to the specific asset or other assets used in the trade or business.

#### **4. Reasonable Working Capital for QOFs**

Due to the stringent 180-day requirement for taxpayers to invest into a QOF, QOFs cannot rely on capital calls from investors who may not know if they will have timely gains to invest while a QOF substantially improves property. Congress provided for a 30-month rehabilitation period for property regardless of whether the property was held directly by a

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QOF or by a subsidiary entity qualifying as a QOZB. Cash needed to implement a 30-month rehabilitation should be considered QOZBP for purposes of the 90% Test because the QOF has reasonable cause to hold such funds. Proposed Regulation Section 1.1400Z-2(d)-1(d)(5)(vii) provides a safe harbor for working capital assets held by a QOZB, but this safe harbor does not apply to working capital held at the “upper tier” by a QOF. To fulfill the Congressionally mandated ability for a QOF to rehabilitate property directly, we recommend that the Internal Revenue Service exercise its regulatory authority under Section 1400Z-2(d)(4) and designate that under rules similar to those provided in Proposed Regulation Section 1.1400Z-2(d)-1(d)(5)(vii), a QOF has reasonable cause and will not be subject to a penalty for failure to meet the 90% Test due to holding reasonable working capital for construction of new buildings or rehabilitation of existing buildings or other creations or expansions of businesses.

### **Example 3**

Investors have \$20,000,000 of capital gain on July 15, 2018. Investors invest the \$20,000,000 of capital gain in OZ Rehab Fund on August 1, 2018. OZ Rehab Fund has a purpose of investing in QOZBP and will self-certify as a QOF starting on July 1, 2018. On August 1, 2018 OZ Rehab Fund spends \$5,000,000 to purchase land and a building located in a QOZ. OZ Rehab Fund spends the remaining \$15,000,000 on rehabilitation costs, \$500,000 a month for 30 months.

Assets as of December 31, 2018

\$5,000,000	Acquired Building
<u>\$2,500,000</u>	Rehabilitation Work in Process
\$7,500,000	Total Qualified Opportunity Zone Business Property
\$12,500,000	Remaining cash to be spent on rehabilitation.

37.5% of assets are QOZBP as of 12/31/18.

62.5% of assets held in cash waiting to be spent on rehabilitation, as of 12/31/18.

Because OZ Rehab Fund has less than 90% of its assets invested in QOZB at the end of the year (there is only one measuring period for OZ Rehab Fund in 2018 pursuant Proposed Regulation Section 1.1400Z-2(d)-1(a)(2)(i)), OZ Rehab Fund would be subject to penalties under I.R.C. Section 1400Z-2(f). By the implementation of a reasonable cause exception for QOF that is substantially similar to the working capital rules for QOZBs,

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this result is avoided and QOFs would be able to invest directly in constructing assets to a similar extent as QOZBs.

#### **5. Delays and Reasonable Working Capital**

For purposes of the reasonable working capital safe harbor for QOZBs, the Proposed Regulations do not address the consequences of delays that are beyond the control of the business. We recommend that there should be permitted exceptions. We observe that there is precedent in the somewhat similar safe harbor that applies to the “begun construction” test that applies to many renewables. Notice 2018-59 provides a lengthy list of permitted delays, including delays due to: severe weather conditions, natural disasters, difficulties in obtaining permits or licenses, government requests regarding public safety, security, or similar concerns; problems with the manufacture of custom components or specialized equipment of limited availability, labor stoppages, the presence of endangered species, problems with financing, and supply shortages.

#### **6. Status of Projects During 31-month Working Capital Period**

We recommend that the regulations state that projects under development in accordance with the 31-month safe harbor are considered to be qualified, regardless of the non qualified financial property test or whether they are owned directly or indirectly. This could be accomplished by revising Section 1.1400Z-2(d)-1(d)(5)(vii) to read as follows: “(vii) Safe harbor for property developed in compliance with requirements. If a project is developed in compliance with the three requirements of paragraph (d)(5)(iv)(A)-(C) and if the tangible property referred to in paragraph (d)(5)(iv)(A) is expected to satisfy the requirements of section 1400Z-2(d)(2)(D)(1), that tangible property is not treated as failing to satisfy those requirements solely because the scheduled consumption of the working capital is not yet complete, or the property is not yet used in a trade or business.”

#### **7. Beginning Testing Date for 90% Test**

A QOF is tested for compliance with the 90% requirement of Section 1400Z-2(d) at the last day of the first 6-month period of the taxable year of the Fund. The Regulations do not specify what is to be done for a month that starts (and therefore, typically ends) in the middle of a calendar month. We recommend that the IRS offer taxpayers the opportunity to choose *either* the corresponding day of the month that is 6 months later or the end of the last month that is not more than 6 months later. The regulations for making Subchapter S elections provide that the days are computed in this way.



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**8. Testing Dates for QOFs Begun In the Second Half of a Year**

The Proposed Regulations adopt a rule requiring a QOF to undertake the 90% Test at the end of its first year, if this is earlier than six months after formation. We recommend that the first 6-month testing date be the end of the first six-month period, even if it would extend into the next calendar year, unless the taxpayer elects to use the final day of its tax year. Failure to make such a change may serve to strongly discourage taxpayers from forming funds or investing in the second half of each year, since the fund will have far less time to deploy its funds.

Very truly yours,



Glenn A. Graff, Applegate & Thorne-Thomsen, P.C., Member of the Governing Committee of the ABA Forum and former Co-chair and current member of the Tax Credit and Equity Financing Committee of the ABA Forum



Forrest David Milder, Nixon Peabody, LLP, Former Chair of the ABA Forum and member of the Tax Credit and Equity Financing Committee of the ABA Forum



B. Susan Wilson, Enterprise Housing Credit Investments, LLC, Co-chair of the Tax Credit and Equity Financing Committee of the ABA Forum



# GAO Versus LIHTC: The Showdown That Wasn't

*Carlie J. Boos*

We are living in an affordable housing crisis. Full stop.

A minimum wage worker needs to clock 122 hours per week, every week of the year, just to afford a typical two-bedroom apartment.<sup>1</sup> As a country, we are missing 7.2 million homes.<sup>2</sup> For the second year in a row, homelessness is on the rise.<sup>3</sup> Despite intense demand, the market is not reacting to fill the need; housing investments decreased in 2018, the longest decline since 2009.<sup>4</sup>

While the statistics and the stories are devastating, there is room for optimism. One source of hope continues to be the Low Income Housing Tax Credit (LIHTC or HTC) program, a cornerstone of the American housing system. Recondite, but powerful, this financing mechanism created over 3 million housing units in the last thirty years.<sup>5</sup> And its impacts go beyond merely expanding housing access; it provides a jumping-off point for community development aspirations, houses service platforms that offer a permanent route out of poverty, and catalyzes residents for their own self-empowerment.

The embodiment of the much sought-after “public-private partnership” designation, the program functions outside the budget process with investor support that is exchanged for a dollar-for-dollar reduction in

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Carlie J. Boos (carlie.boos@gmail.com) is an attorney at the Legal Aid Society of Columbus, Ohio, focusing on community development issues. Previously, she worked at the Ohio Housing Finance Agency, overseeing affordable housing programs and setting the agency's policy agenda. The opinions, findings, conclusions, or recommendations expressed herein are those of the author and do not necessarily represent the views of any other organization.

1. Andrew Aurand PhD, Dan Emmanuel MSW, Diane Yentel MSSW, Ellen Errico, Jared Gaby-Biegel & Emma Kerr, *Out of Reach The High Cost of Housing*, National Low Income Housing Coalition, NATIONAL LOW INCOME HOUSING COALITION 1 (2018), [https://nlihc.org/sites/default/files/orr/OOR\\_2018.pdf](https://nlihc.org/sites/default/files/orr/OOR_2018.pdf).

2. *Id.* at 6.

3. Meghan Henry, Anna Mahathey, Tyler Morrill, Anna Robinson, Azim Shivji & Rian Watt, *The 2018 Annual Homeless Assessment Report (AHAR) to Congress*, U.S. DEPT. OF HOUSING & URBAN DEV'T (DEC. 2018), <https://www.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>.

4. Abigale Lormen, *U.S. Single-Family Housing Still Low While Homebuilding Begins to Rise*, MARKET TACTIC (Dec. 23, 2018), <https://markettactic.com/u-s-single-family-housing-still-low-while-homebuilding-begins-to-rise/966>.

5. U.S. DEPT. OF HOUSING & URBAN DEV'T, *LOW-INCOME HOUSING TAX CREDITS* (rev. June 6, 2018), <https://www.huduser.gov/portal/datasets/lihtc.html>.

federal tax liability. Built on a strong federalism frame, programmatic control is bifurcated between the states and the federal government. Local Housing Finance Agencies (HFAs) retain almost exclusive control over the policy agenda and program structure, while the Internal Revenue Service (IRS) guarantees adherence to the more narrowly honed tax provisions. Long-term compliance is also divided, with HFAs acting as the first line of defense in daily oversight and federal regulators taking a bigger-picture and escalation-contact role. This strong deference to local authority, uncommon in national legislation, is a hallmark of the program and critical to the success of an enterprise that is so thoroughly shaped by microeconomic conditions and hyper-local housing opportunities.

With the stakes so high, and power so acute, it is no surprise that the HTC program drew some skeptics. Most notable among them is Senator Charles Grassley of Iowa. One could categorize his opposition as technical, not absolute. He objects to the administrative complexity. He objects to the local predominance in program oversight. In matters across the political spectrum,<sup>6</sup> including with respect to the HTC program, he is a stalwart defender of transparency as a means to prevent abuse. But Senator Grassley is not an anti-housing ideologue, recently penning an open letter that plainly conceded “housing is one of the most basic needs of all individuals,” while taking a public stand against veteran homelessness.<sup>7</sup> His initial HTC apprehensions were likely aggravated by two isolated but troubling fraud reports out of Florida. In response, Senator Grassley, one of the most commanding legislators and Chairman of the Senate Judiciary Committee, directed the Government Accountability Office (GAO) to investigate the HTC and route out weaknesses. Specifically, he commissioned the GAO to “review the cost-efficiency and effectiveness of the LIHTC program,” resulting in a provoking four-part report.<sup>8</sup>

Some in the housing industry painted this investigation as the start of a war, preparing themselves for battle with talking points and

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6. *Chuck Grassley's Public Statements on Issue: Housing and Property*, VOTE SMART (last visited Jan. 19, 2019), <https://votesmart.org/candidate/public-statements/53293/chuck-grassley/39/housing-and-property#.XCuiL1xKjDc>.

7. Letter from Sen. Charles E. Grassley & Sen. Joni K. Ernst to Sec. Robert Wilkie, U.S. Dep't of Veterans Affairs (Nov. 5, 2018), [https://www.ernst.senate.gov/public/\\_cache/files/a2775638-09be-4fc9-905a-0d673dc2b125/7D4EC6BE4AE6F6A5758AB659D9F8A451.letter-to-the-dept.-of-veterans-affairs-regarding-veteran-homelessness.pdf](https://www.ernst.senate.gov/public/_cache/files/a2775638-09be-4fc9-905a-0d673dc2b125/7D4EC6BE4AE6F6A5758AB659D9F8A451.letter-to-the-dept.-of-veterans-affairs-regarding-veteran-homelessness.pdf).

8. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-330, *LOW-INCOME HOUSING TAX CREDIT: JOINT IRS-HUD ADMINISTRATION COULD HELP ADDRESS WEAKNESSES IN OVERSIGHT* (2015); U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-360, *LOW-INCOME HOUSING TAX CREDIT: SOME AGENCY PRACTICES RAISE CONCERNS AND IRS COULD IMPROVE NONCOMPLIANCE REPORTING AND DATA COLLECTION* (2016); U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-285R, *LOW-INCOME HOUSING TAX CREDIT: THE ROLE OF SYNDICATORS* (2017); U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-637, *LOW-INCOME HOUSING TAX CREDIT: IMPROVED DATA AND OVERSIGHT WOULD STRENGTHEN COST ASSESSMENT AND FRAUD RISK MANAGEMENT* (2018).

counter-narratives. For many years, one could not attend a housing conference without speakers in hushed voices warning that political opportunism or bureaucratic incompetency would corrupt the report and topple the HTC. Certainly, one can argue that witch hunts happen, that maligned politicians can derail a good program for bad reasons. But to superimpose that storyline into this situation does a disservice to Senator Grassley as well as all the HFAs that are just as heavily invested in rooting out waste and promoting efficiency as he is. And, behind the scenes, that collaboration and respect for each other's work are exactly what happened in the audit process.

The GAO auditors approached their subject with seriousness. They asked the right questions, they requested the right documents, and they built a dialogue with officials in the industry that facilitated honest and forthright discussion. They encountered data challenges, acknowledged these obstacles in their reports, and worked collaboratively and exhaustively with local experts to create crosswalks around them. While individual HFAs were not given an advance copy of the full report,<sup>9</sup> they were provided extracts of the pages relevant to their own state and invited to comment on the factual accuracy and contextualization contained therein. This is a courtesy (as well as an auditing best practice) that is not extended in pretextual take-downs. Although any audit can be disruptive to daily operations, HFAs largely welcomed the investigation, dedicated extensive resources to providing timely and thorough response to the inquiry, and were proud of the governmental integrity that GAO exhibited during the process. Acrimony be damned, the gravity of this work may have proved too important to be derailed by soap opera.

That is not to say a critical evaluation of the GAO's methodology and conclusions is not also warranted. One of the most glaring faults is that the most salacious aspects of the reports draw data from only ten states.<sup>10</sup> Those represented include eight of the country's ten most expensive rental markets.<sup>11</sup> Included are New York City, Chicago, Seattle, San Francisco, Los Angeles, Philadelphia, and Miami. Sampling California<sup>12</sup> but excluding Montana, Iowa, and West Virginia, among many others, indisputably skews all cost data towards the highest end of the spectrum. Similarly, the

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9. The National Council of State Housing Finance Agencies was given a copy and provided a written response that was incorporated into the appendix of the third report.

10. Arizona, California, Florida, Georgia, Illinois, New York, Ohio, Pennsylvania, Texas, and Washington.

11. Jeremiah Jensen, *Here Are the Top 10 Most Expensive Rental Markets in the U.S.*, HOUSINGWIRE (MAY 1, 2018), <https://www.housingwire.com/articles/43253-here-are-the-top-10-most-expensiveal-markets-in-the-us>.

12. GAO-18-637, *IMPROVED DATA AND OVERSIGHT*, *supra* note 8, at 15 ("California accounted for about 24 percent of the new construction projects in our sample. . . . Additionally, New York City accounted for about 19 percent of the rehabilitation projects in our sample. . . .").

report focused exclusively on the nine percent Housing Tax Credit, again, misshaping the cost curve towards more expensive projects that require a deeper subsidy. And, finally, the report assessed costs from projects that were completed in years 2011–2015, meaning they were likely green-lit around 2008–2013. You do not need to be a housing expert to draw two important conclusions from that choice. First, those years were rough for the housing market and not the best sample period from which to extrapolate. Second, it fails to encapsulate major policy and financing advancements of the last few years, including more aggressive funding requirements and emerging building techniques like modular construction.

Ultimately, the GAO produced four reports detailing different aspects of the program, including its operational model, the role of government agencies, and the function of private market actors. The first one, in July 2015, chronicled HTC's oversight and reporting mechanisms with specific focus on the IRS and U.S. Department of Housing and Urban Development (HUD) responsibilities.<sup>13</sup> The second shifted to the role of the states in oversight and how the program's governing document, local Qualified Allocation Plans (QAP), adhered to statutory requirements.<sup>14</sup> Both reports recommended expanding federal surveillance and significantly growing the HUD footprint in data collection and evaluation. Critics roundly dismissed the recommendations, asserting that the report significantly discounted the aggressive compliance function of states and noted that the recommendations would quickly turn a somewhat byzantine two-party oversight system into a completely Kafkaesque three-party system.<sup>15</sup>

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13. GAO-15-330, *WEAKNESSES IN OVERSIGHT*, *supra* note 8.

14. GAO-16-360, *SOME AGENCY PRACTICES RAISE CONCERNS*, *supra* note 8.

15. Susan Reaman, KPMG International Cooperative, *Government Accounting Office Recommends Ways to Strengthen the Low-Income Housing Credit Program*, *WHAT'S NEWS IN TAX* (Sept. 18, 2017), <https://tax.kpmg.us/content/dam/tax/en/pdfs/2017/gao-low-income-housing-credit.pdf> ("Adopting this recommendation would have the effect of adding a third layer of regulatory review to the LIHTC program, significantly adding to the regulatory burden of multi-family housing developers."); see also Michael Novogradac, *GAO Report Criticizes Treasury/IRS Oversight of LIHTC, Recommends Joint IRS-HUD Administration*, *NOVOGRADAC* (July 24, 2015, 12:00am), <https://www.novoco.com/notes-from-novogradac/gao-report-criticizes-treasuryirs-oversight-lihtc-recommends-joint-irs-hud-administration> (last visited Jan. 21, 2019) ("But this recommendation begs the question of congressional intent. When Congress created the LIHTC as part of the Tax Reform Act of 1986, it was well aware of the existence of HUD, its prior experience of affordable housing program administration and the joint federal agency administration of the HTC. Despite this, Congress chose to devolve responsibility of non-tax and non-code enforcement LIHTC administration to state agencies, recognizing that each state has different needs and priorities for affordable housing and it didn't make much sense to have a one-size-fits-all approach to program administration.").

The third report was a primer on the role of syndicators in HTC transactions.<sup>16</sup> Syndicators are best known for being intermediaries in this process, connecting investors with developers and converting credits into equity. Most property owners do not have enough tax liability to use the credits themselves, either because they are smaller and do not have the balance sheet to justify a high tax assessment, or because they are nonprofits with no income tax obligations. Syndicators often help ensure that the proper legal structure is in place and that returns flow to the investors during the lengthy compliance period. And they provide services to the building's owners, the lower tier, like accounting help and lease-up compliance. Moreover, syndicators can be influential regional actors with a socially oriented mission, helping to steer broader economic development initiatives. The GAO's third report did not contain any explicit recommendations, but it did accentuate the nongovernmental nature of the investor-syndicator relationship, a theme that would resurface in the final report.

The climactic fourth report, released in September 2018, tackled development costs.<sup>17</sup> How much does it cost to build affordable housing? Is it too much? Who is guarding the henhouse? This topic was the dagger hanging over everyone's heads, the supposed *pièce de résistance* in the attack on affordable housing, the battle royal. Instead of a death match, the report was widely met with a collective "eh" and shrug. It was objective, informative, and not even a little bit scandalous. In fact, it only put into words what everyone already knew: housing costs vary significantly across types and markets; quick generalizations and easy comparisons simply are not credible. In fact, this principal is so well established that it is the formative idea upon which the entire HTC program's existence is predicated! Housing in New York City does not look anything like housing in Reynoldsburg, Ohio. Both the analysis of and response to the unique challenges of Americas' diversified housing markets must be customized and localized to be effective.

A number of salient findings in the GAO reports are worthy of further attention and examination. An unnuanced<sup>18</sup> reading could lead one to believe that rehabilitating massively large, extremely rural, senior housing projects is the most proper use of HTC funds. Such a conclusion misses the program's complexity, the interdependency of each of these attributes, and

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16. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-285R, LOW-INCOME HOUSING TAX CREDIT: THE ROLE OF SYNDICATORS (2017).

17. GAO-18-637, IMPROVED DATA AND OVERSIGHT, *supra* note 8, at 15 (2018).

18. *Id.* at 35 ("[P]rojects below the 25th percentile generally had a higher proportion of characteristics that were associated with decreases in per-unit cost. These projects were larger, had smaller units, were more often targeted toward seniors, and were located in rural areas. In comparison, projects above the 75th percentile generally had a higher proportion of characteristics associated with increases in per-unit cost (or less of a decrease). These projects were smaller, had larger units, were more often located in urban areas, and were built in more expensive real estate markets. . . .").

centrality of public policy in the program's success, as the following brief discussion demonstrates:

- **Regional variation is intense.** The report identified a nationwide median cost for each HTC unit at \$204,000. Other research challenges this finding, with a more thorough study finding actual median costs in all states, instead of just the twelve hand-picked GAO states, is only \$165,000.<sup>19</sup> This calculation is one of the biggest weaknesses in the report, suggesting a \$40,000 flaw. Even assuming the GAO's report has some validity, the text itself concedes that state-by-state medians ranged dramatically, from approximately \$126,000 in Texas to \$326,000 in California.<sup>20</sup> Four states have a median under \$200,000 and, conversely, two states have median per-door costs over \$300,000.<sup>21</sup>

This interstate oscillation likely reflects two separate cost aggravators: those external to HFAs and those controlled by them. Outward geographic pressures include material costs, access fees, shipping costs, labor costs, and others that are both incredibly localized but also heavily dictated by conditions outside the HFAs sphere. Some of these costs will be fixed; for example, it will always be more expensive to build in Hawaii where supply chains are limited than in the continental United States. Others are inconstant and unpredictable, like the material cost fluctuations after a natural disaster or supply constrictions resulting from terse trade negotiations. Internally, however, state policy decisions can also have significant consequences for project costs. Some of these are discussed at greater length further in this article, but they may include HFA's minimum durability requirements, location-based scoring priorities, competitive incentives for cost efficiency, and application fees.

- **Rehabs can be less expensive than new builds.** The median cost of rehabilitation, when controlling for other factors, was about \$39,000 less per unit than for new construction due to hard cost variables.<sup>22</sup> Unsurprisingly, it often costs less to repair a home than it does to build one from scratch. But a few drawbacks to the "no more new builds" refrain. First, existing housing stock grandfathers in a lot of ills that socially conscious community leaders are trying to retire. For example, older buildings are significantly less accessible to persons with disabilities, and retrofitting them to today's standards would likely wipe out any cost savings. They are also criminally inefficient when it comes to green technology, which irks climate change activists nearly as much as the already strained tenants who have to pay

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19. JEFFREY LUBELL & SARAH WOLFE, VARIATION IN DEVELOPMENT COSTS FOR LIHTC PROJECTS (2018).

20. GAO-18-637, IMPROVED DATA AND OVERSIGHT, *supra* note 8, at 20.

21. *Id.*

22. *Id.* at 26.



exorbitant utility costs stemming from drafty windows or increased medical costs due to poor air quality.

Moreover, the academic understanding of how our built environment impacts quality of life and community cohesion has grown by leaps and bounds since many of these structures were built. Jane Jacobs's seminal writings expanded our understanding of how architecture can further public safety and residents' sense of identity. Interior courtyards that isolate tenants from their neighbors and darkened passages that invite crime have seen their time pass; over-reliance on existing structures unduly perpetuates the influence of these outdated design concepts. Moreover, siting priorities shift with each generation, and new construction needs to follow these evolving demands. We must push beyond our current imprint to create housing opportunity in emerging and reviving neighborhoods where the existing stock alone is insufficient to meet our needs.

- **Larger can be less expensive than smaller.** Mega projects, over 100 units, cost approximately \$85,000 less per unit than projects under 37 units.<sup>23</sup> This is in part because a mega project allows certain fixed costs, like permitting and architectural fees, to be spread across more units while simultaneously enabling contractors to tap into bulk purchasing discounts. A reasonable observer may also wonder whether communities that lack the agency to prevent massive affordable housing projects from going up in their backyard are the kind of communities that also have high land acquisition costs (leading to the question of where these 100+ unit buildings were sited: Beverly Hills, or the eastside of Cleveland?).

Furthermore, while the mathematics behind this statistic may be correct, the authors fail to educate readers that often convincing public policy reasons exist to build smaller. And that the reason these smaller buildings cost more might not necessarily be because they are smaller, but because they have other features that are more costly. For example, permanent supportive housing is an intensive housing intervention for people in chronically homeless situations, often with co-occurring medical and substance abuse disorders. Their treatment needs require more expensive housing investments, like clinical space and accessibility enhancements. It also requires less geographic congregation and more dispersion throughout the community and closer proximity to medical facilities, often located in high-cost urban locales. Similarly, one of the most expensive housing types to build is single-family infill because site acquisition can be more challenging and there are no shared walls to gain construction efficiencies. However, this housing technique can support both family resilience by housing larger families and offering them a pathway towards

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23. *Id.*

homeownership. Single-family infill can also help heal communities that are plagued with blight and vacancy by returning broken-teeth lots to productive use. It is also worth noting that the racist “towers in the park” philosophy of affordable housing, which isolated low-income tenants in skyrisers away from core services largely, died with the failure of Pruitt-Igoe and other segregationist monstrosities.

- **Rural can be less expensive than urban.** Non-urban locations were about \$13,000 per unit less expensive than urban areas.<sup>24</sup> However, this savings was largely attributable to the costs associated with stand-alone parking structures that are only required in densely built environments, with suburban surface parking being considerably less expensive to create.

Affordable housing experts are once again quick to add the context lost in the report. While diversity of housing sites is important, and nonurban access is a critical need in some states, it can be very challenging to find a suburban or rural location that both (1) is walkable and suitable to the needs of a low-income family and (2) is amenable to affordable development. With regard to the first consideration, even the report itself acknowledges that transit-oriented design, defined as projects within 0.5 miles of a transit station, can add an extra \$17,000 per unit price tag.<sup>25</sup> But a savvy project designer must weigh that cost against the particular needs of low-income residents. Can seniors easily get to doctor’s appointments? Can families get to work if their car breaks down? Answering affirmatively to each of these questions is a requisite for fulfilling an affordable housing mandate that seeks to move people out of poverty, but it also add costs.

In fact, most developers will report that suburban hostility to affordability, or any development at all, makes those projects unfeasible without additional subsidy and government support. And rural development potential is strained by a lack of townships with a sufficient population to support an HTC building.

- **Senior projects can be less expensive than those for other tenant types.** Senior developments cost approximately \$7,000 per unit less than all other population types, but the report suggests this savings may derive from smaller square-footage needs than from other drivers.<sup>26</sup> Relatedly, and expectedly, the number of bedrooms was a statistically significant cost driver; projects with more one-bedroom units, which are mostly associated with senior projects, were cheaper than larger units with more bedrooms catering to families with children.<sup>27</sup> While the report implies this additional

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24. *Id.* at 30.

25. *Id.* at 31.

26. *Id.* at 28.

27. *Id.*

cost stems from increased *bedroom* footage, practitioners will more likely attribute cost differentials to the exponential expenses associated with multiple *bathrooms* (because the plumbing hardware and rough-in in a bath are more expensive than empty bedroom space), which are often mandated by the building code or other local practice. Senior projects also tend to draw less public obstruction, therefore eliciting fewer style upgrades and other expensive concessions to appease oppositional interests.

- **Nonprofit sponsored developments might increase costs.** The report concludes that developments fulfilling the legally required nonprofit set aside were \$15,000 more expensive than non-set-aside developments.<sup>28</sup> The report admits that noncoincidental factors may explain this cost, including the fact that mission-motivated owners are more likely to construct “permanent supportive housing” models that have a heavier investment need. Anecdotally, nonprofits are also more likely to create a housing product that is responsive to place-based constituent demands, that is more challenging to build and therefore scares off profit-driven organizations, or that utilizes more federally budgeted resources that increase the administrative and reporting burden.

While the report lacked important context, its largest omission was the inability to answer critics’ most pressing question: Is HTC more expensive to develop than market rate housing? In this inquiry, the report punted, claiming that it was unable to obtain sufficiently reliable market rate data to make an accurate comparison. Lucky for us, the National Council of State Housing Finance Agencies (NCSHA) commissioned an independent third-party research firm, Abt Associates, to find an answer.

The Abt report circumvents much of the GAO’s unreliable methodologies, using data from *all* states and also incorporating records from the 4% HTC program.<sup>29</sup> This dueling report supported some of the GAO’s broad concepts, like the wide variability across states and relevance of different bedroom sizes, but put a much finer point on the actual price of affordable housing and the dollar impact of different cost adjusters. Abt’s more robust dataset supported a median HTC per unit total development cost of \$164,757, nearly 20 percent less than the GAO’s estimate.<sup>30</sup> The HTC average for new construction only, excluding rehabilitation deals, was \$209,000 per unit.<sup>31</sup> NCSHA found this figure was largely comparable to market-rate multifamily construction, which it calculated was between \$196,000 and

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28. *Id.* at 29.

29. LUBELL & WOLFF, *supra* note 19, at 1.

30. *Id.* at 1.

31. *Id.* at 23.

\$204,000 per unit.<sup>32</sup> Even more interestingly, HTC cost growth appears to be slower than the market, growing only 8% at the same time Fannie Mae data showed a private market spike between 10 and 30%.<sup>33</sup>

That NCSHA found affordable HTC housing costs are about the same as market-rate housing costs is profoundly meaningful and a little bit shocking. HTC experts expected some increase over the market price because HTC has good reasons for being more expensive. On the one hand, it is built to a much higher quality standard. Tax credits come with a thirty-year compliance period and must be sufficiently durable to survive that long. Market rate products, on the other hand, are typically built with a shorter effective useful life, which means cheaper upfront material costs. And HTC developments need to meet the highest standards in physical accessibility, often meaning they need an elevator or other non-style upgrades that private owners skip. HTC projects are more likely to use historic structures, pay prevailing wages, and act as a seed to broader neighborhood growth, all of which increase costs. Moreover, all replacement and repair reserves need to be capitalized in the development budget because the suppressed rents are often insufficient to support the building's operating budget. For this same reason, since HTC developments do not turn a profit on the rental end, all the developer and owner's profits need to be capitalized up front, which is not true for the private market. In other words, HTC deals *should* be more expensive than their private neighbors. The fact that they are not is a testament to the program's fierce competition and the adroit oversight of the HFA gatekeepers.

The report exhaustively details a variety of interwoven checks and balances that states have instituted to curb cost increases and deter, prevent, and, where that is impossible, uncover fraud. The auditors acknowledge that the vast majority of states, 79%, have at least three lines of defense against misuse.<sup>34</sup> For example, consider Ohio's comprehensive system for regarding cost containment, many elements of which are widely adopted industry canons also contained in the NCSHA Recommended Practices in Housing Credit Administration.<sup>35</sup>

The following provisos are contained in the State's 2018–2019 Qualified Allocation Plan, the 2019 Multifamily Underwriting & Implementation Guidelines, and the 2019 Design & Architectural Standards:

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32. *Development Costs and Cost Drivers in the Housing Credit Program*, NAT'L COUNCIL OF STATE HOUS. FIN. AGENCIES (Sept. 7, 2018), <https://www.ncsha.org/resource/cost-study>.

33. *Id.*

34. *Id.* at 47.

35. *NCSHA Recommended Practices in Housing Credit Administration*, NAT'L COUNCIL OF STATE HOUS. FIN. AGENCIES (Dec. 29, 2017), <https://www.ncsha.org/resource/ncsha-recommended-practices-in-housing-credit-administration>.

1. Cost Limit: per square foot and per unit total cost caps based on historical trends;<sup>36</sup>
2. Cost Limit: cost necessity and reasonableness underwriting at three different points in time;<sup>37</sup>
3. Credit Allocation Limit: limits on the number of credits any individual development can receive;<sup>38</sup>
4. Credit Allocation Limit: limits on the number of deals any single developer or owner can receive;<sup>39</sup>
5. Credit Allocation Limit: credit limits that reward economies of scale;<sup>40</sup>
6. Fee Limits: a developer fee that is calculated by the size and complexity of the deal;<sup>41</sup>
7. Fee Limits: limits on contractor fees and related party fees;<sup>42</sup>
8. Cost Based Scoring: competitive points for having a low credit per unit calculation;<sup>43</sup>
9. Cost Based Scoring: tiebreakers that measures development cost, credit usage, and debt burden;<sup>44</sup>
10. Other: architectural plan review by a licensed architect;<sup>45</sup>
11. Other: regular on-site inspections by a trained architect and construction expert;<sup>46</sup>
12. Other: rigorous design standards to promote efficiency and eliminate excess;<sup>47</sup>
13. Other: No credit increases for change orders during construction;<sup>48</sup>

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36. Planning, Preservation & Development, 2019 Technical Revisions to Qualified Allocation Plan 24 (2018).

37. Planning, Preservation & Development, 2019 Multifamily Underwriting & Implementation Guidelines (2018).

38. 2019 Technical Revisions to Qualified Allocation Plan, *supra* note 36, at 37–42 .

39. *Id.* at 24.

40. *Id.* at 37–38.

41. *Id.* at 34.

42. Planning, Preservation & Development, 2019 Multifamily Underwriting & Implementation Guidelines 6–7 (2018).

43. 2019 Technical Revisions to Qualified Allocation Plan, *supra* note 36, at 48, 60, 64, 68.

44. *Id.* 98–99.

45. Planning, Preservation & Development, 2019 Design & Architectural Standards, 12 (2018).

46. *Id.*

47. *Id.*

48. Planning, Preservation & Development, *supra* note 42.

14. Other: third-party audited owner cost certifications;<sup>49</sup>
15. Other: third-party audited contractor cost certifications;<sup>50</sup>
16. Other: a fraud reporting website and a culture that promotes transparency;<sup>51</sup> and
17. Other: severe punishment for violations that ratchet up the stakes for noncompliance.<sup>52</sup>

The HFA safety net cannot be described as anything but impressive when considering that the GAO personally reviewed cost certifications for 1,849 developments and did not identify a single instance of waste or abuse.<sup>53</sup> However, despite acknowledging the extraordinary self-governance of the states, the report inexplicably recommends additional federal intrusion. Alan Greenspan once said, "Corruption, embezzlement, fraud, these are all characteristics which exist everywhere. It is regrettably the way human nature functions, whether we like it or not. What successful economies do is keep it to a minimum. No one has ever eliminated any of that stuff."<sup>54</sup> To extrapolate to the situation at hand: every dime we spend on unnecessary, duplicative, multilevel oversight is money we are diverting away from needy tenants. For this reason, it is particularly discouraging that the General Accounting Office (GAO) did not even attempt a cost-benefit analysis of the impact that their recommendations would have on the people this program was created to serve.

In a response letter, the IRS politely declined to step into the HFAs' business, and HUD never formally replied to the report. Perhaps agency leaders understood that more bureaucracy will not lessen programmatic costs and that the program's exceptional compliance track record and the commanding oversight instituted by HFAs did not warrant such extreme extra-legislative intervention. Or perhaps the agencies recognized that measuring local performance of local goals at a national level was antithetical to the decentralized governance scheme envisioned by Congress. Maybe they understood that decontextualizing local data and trying to force apples-to-oranges comparisons would undermine public confidence and create an attractive nuisance for talking-heads that wished the program harm. Or maybe HUD looked at their current Affirmatively

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49. 2019 Technical Revisions to Qualified Allocation Plan, *supra* note 36, at 73.

50. *Id.*

51. *Id.* at 30.

52. *Id.* at 31.

53. GAO-18-637, IMPROVED DATA AND OVERSIGHT, *supra* note 8, at 69. While the report acknowledges that documented reports of fraud are low, it attempts to engage in the *argumentum ad ignorantiam* fallacy to imply otherwise (claiming that "the true extent of fraud in the program is unknown.").

54. Alan Greenspan vs. Naomi Klein on the Iraq War, Bush's Tax Cuts, Economic Populism, Crony Capitalism and More, DEMOCRACY Now! (Sept. 24, 2007), [https://www.democracynow.org/2007/9/24/alan\\_greenspan\\_vs\\_naomi\\_klein\\_on](https://www.democracynow.org/2007/9/24/alan_greenspan_vs_naomi_klein_on).

Further Fair Housing reporting requirements and chose not to replicate a system marred by political infighting, technical chaos, and red tape. Regardless of the reason, industry advocates should be thankful that HUD is not going to become a chief player in the HTC program. As I sit writing this article in the midst of a government shutdown,<sup>55</sup> I can only shudder imagining what kind of consequences this turmoil would have on investor confidence in a program as delicately balanced as tax credits.

Another GAO recommendation was for HFAs to collect more information on syndicator costs, specifically upper-tier fees. The real objection here is not policy; it is propriety. Unlike all other costs tracked by HFAs, these costs are paid by the investor, not the property owner. They are not financed with tax credits, and they are not part of the development budget. In fact, it is unlikely that the tax-credit awardee even has knowledge of what those fees are or is in a position to demand that information, which syndicators are likely to guard as closely as trade secrets. Upper-tier fees can be analogized to the "pouring rights" fees that CocaCola pays to sports stadiums. Does this arrangement affect the gameday experience? Arguably, if you're a Pepsi fan. But does it increase the ticket price? No. In a total "woah, what just happened?" moment, the IRS's audit-response letter seemed to advise upper-tier fees were subject to mandatory disclosure, flipping long-standing guidance and interpretation on its head. However, a closer reading the language calms the waters a bit. Disclosure is still only required for funds that are "paid, incurred, or committed by the taxpayer [meaning the property owner] for the project." Upper-tier costs simply do not fit that definition, and lower tier costs are already reported.

Finally, the GAO recommended that agencies should expand and standardize their data-collection techniques to make future assessments easier. Few, if any, could disagree with this recommendation. Of course, more and better data are fantastic. As the NCSHA response letter expressed it, HFAs "stand willing to assist." But, as with other recommendations, the challenge is not ideological; it is practical. Data collection costs money and time, neither of which is in abundance at HFAs. Too many organizations are running on near-obsolete software systems that make data aggregation more aspirational than feasible. And, just as importantly, states should be under no obligation to collect, maintain, and clean data that is not relevant to their program. Would the GAO require that Montana have robust data systems to assess hurricane risk? Should Delaware have intricate procedures for developing near land owned by federally recognized Native American tribes, when it has none? Cost influences are just as localized as weather patterns and cultural histories. Taking this argument to its most logical extreme, one could assert that lacking nationwide data is a virtue, not a deficit, in this program. It prevents people from making false comparisons and manipulating data ambiguities. Instead, it forces interested parties to

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55. Curiously, I've now written two articles for the ABA's Forum on Affordable Housing. Both have been during government shutdowns. Perhaps I'm a jinx.



go state-by-state and engage in the arduous work of synchronizing data in a comprehensive and idiosyncrasy-conscious manner. In general, one-size-fits-all federal mandates, particularly unfunded mandates, are rarely the most appropriate solution.

So, with all the commotion and buildup, how was the report received? Did the pundits light their hair on fire? No. Actually, almost no one outside the housing echo chamber even noticed it. Even Senator Grassley let the report slide by without a written comment.<sup>56</sup>

The most thoughtful analysis came from Kriston Capps at CityLab, one of the only people at a national level who saw past the superficial glimmer and false showdown to really hone in on the hidden cost accelerators in affordable housing.<sup>57</sup> He does not mince his words: "How do you measure the toll of anti-growth sentiment on an affordable housing incentive program? Is NIMBYism a drag on affordable housing?" He points to a report from the National Association of Home Builders and National Multifamily Housing Council that estimates that government regulation composes as much as 32% of development costs.<sup>58</sup> M/I Homes CEO Bob Schottenstein addressed the same impasse in a recent radio interview,<sup>59</sup> saying the housing crisis "is not any one thing, but there is a main thing here. Regulation, which is code for zoning, which is code for density, which does not mean lack of quality, is the biggest impediment to meeting the housing needs. . . ." No jurisdiction is going to be able to build its way out of the housing crisis (which is possible, by the way!) unless we get serious about the roadblocks that we are creating in the way of progress. Ask any developer, and they are likely to agree that bad<sup>60</sup> land use restrictions are to blame, including unreasonable density rules, antiquated parking requirements, excessive set-back requirements, and McMansion-esque design requirements. Every time a local councilman makes it harder to build,

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56. The *New York Times* headlines for September 18, 2018, may help explain why Senator Grassley, Chairman of the Senate Judiciary Committee, could have been preoccupied: "Court Pick and Accuser Set for Public Hearings on Sex Assault Claim," "A Confirmation Once Seen as Inevitable Now in Limbo," "Kavanaugh's Nomination in Turmoil as Accuser Says he Assaulted Her Decades Ago," and "Echoes of Anita Hill, but in a Different Era for Women."

57. Kriston Capps, *Why Affordable Housing Isn't More Affordable*, CITYLAB (Sept. 21, 2018), <https://www.citylab.com/equity/2018/09/why-affordable-housing-isnt-more-affordable/569650>.

58. Paul Emrath & Caitlin Walter, *Regulation: Over 30 Percent of the Cost of a Multifamily Development*, NAT'L MULTIFAMILY HOUS. COUNCIL (June 2018), <https://www.nmhc.org/contentassets/60365effa073432a8a168619e0f30895/nmhc-nahb-cost-of-regulations.pdf>.

59. Kriston Capps, *Why Affordable Housing Isn't More Affordable*, CITYLAB (Dec. 12, 2018), <http://www.wcbe.org/post/report-highlights-housing-shortage-calls-regional-cooperation>.

60. Gillian B. White, *How Zoning Laws Exacerbate Inequality*, ATLANTIC (Nov. 23, 2015), <https://www.theatlantic.com/business/archive/2015/11/zoning-laws-and-the-rise-of-economic-inequality/417360>.



housing gets more expensive. Some of these requirements are necessary. Many are not. Some are flat out racist.<sup>61</sup> But the bigger problem is that, while HFAs have compliance locked down on the HTC front, the fox is watching the hens in local government.

Here is my New Year's resolution, and it should be yours, too. Go to a planning commission meeting this year. Or an area commission meeting. Or a zoning meeting. Look at the people who attend—statistically they are going to be older, whiter, more male, and more landed than their communities<sup>62</sup>—and ask whether they represent you. Whether they *should* represent you. The GAO report may feel divorced from your everyday experience, but it is not. It may feel like individual action is futile, but it is not. Colossal decisions are being made by two or three people in the back of municipal buildings every Tuesday night. Get in the game.

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61. URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS (June Manning Thomas & Marsha Ritzdorf eds., 1997).

62. Richard Florida, *NIMBYs Dominate Local Zoning Meetings*, CITYLAB (Sept. 6, 2018), <https://www.citylab.com/life/2018/09/nimbys-dominate-local-zoning-meetings/569440>.



# Uprooted: Local Efforts to Mitigate Displacement in Gentrifying Neighborhoods

*Heather Way, Elizabeth Mueller, and Ben Martin*

## Introduction

Gentrification is rapidly reshaping many American cities, as wealthy and highly educated residents move into historically marginalized communities and lower-income residents are pushed out.<sup>1</sup> In the 1990s, only nine percent of low-income neighborhoods were experiencing gentrification. By 2015, close to twenty percent were gentrifying.<sup>2</sup> In some cities, the changes have been especially stark, with gentrification taking over large swaths of the city. In Portland, Oregon, Washington, D.C., and Minneapolis, Minnesota, for example, more than half of each city's lower-income census tracts gentrified between 2000 and 2015.<sup>3</sup>

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Acknowledgments: This article arose out a larger project and report led by Heather Way, Elizabeth Mueller, and Jake Wegmann at The University of Texas at Austin that was commissioned by the Austin City Council to understand the stages of gentrification occurring in Austin neighborhoods and to identify displacement mitigation strategies that work best in particular gentrification stages. The full report, *Uprooted: Residential Displacement in Austin's Neighborhoods and What Can Be Done About It* (2018), is available at <https://sites.utexas.edu/gentrificationproject>. The Guadalupe neighborhood case study featured in this article and the larger report was developed with research and writing support from Nicholas Armstrong, a graduate student in the Community & Regional Planning Program at The University of Texas at Austin. The authors thank Mark Rogers, Executive Director of the Guadalupe Neighborhood Development Corporation, for his assistance with the case study, and Ashley Alcantra and Alexander Clark, law students with The University of Texas School of Law, for their assistance with this article.

1. Mike Maciag, *Gentrification in America Report*, GOVERNING MAG. (Feb. 2015), <http://www.governing.com/gov-data/census/gentrification-in-cities-governing-report.html>. See generally *The 'G' Word: A Special Report on Gentrification*, GOVERNING MAG. (Feb. 2015), <http://www.governing.com/topics/urban/gov-gentrification-series.html> (series exploring gentrification in U.S. cities, including maps and data on the most rapidly gentrifying cities in the U.S.).

2. Maciag, *supra* note 1.

3. *Id.*

As policymakers and housing and community development practitioners around the country struggle to retain lower-income residents in gentrifying neighborhoods, a number of case studies conducted over the years can help inform these efforts. These case studies typically focus on how specific strategies have been utilized in particular communities, identify implementation challenges, and present overarching lessons drawn from across the jurisdictions studied. Researchers at the Brookings Institution published gentrification case studies in 2001,<sup>4</sup> and this journal published additional case studies conducted by Urban Institute researchers in 2006.<sup>5</sup>

As part of a larger initiative and team studying gentrification for the City of Austin, we recently developed three case studies that build upon this earlier research.<sup>6</sup> We sought to identify how housing and community development practitioners in cities with decades of experience tackling gentrification have adapted their responses to evolving conditions, along with more recent efforts. We sought to identify new and innovative local responses, as well as refinements made to existing approaches.<sup>7</sup>

After providing a framework in Part I for understanding gentrification and displacement, in Part II we present highlights from our case studies of the Guadalupe neighborhood in Austin, Texas; Washington, D.C.'s Columbia Heights neighborhood; and the inner North/Northeast neighborhoods in Portland, Oregon. Finally, in Part III, we share cross-cutting lessons from these case studies to help housing and community development stakeholders act strategically in tackling the displacement pressures in their communities.

## Part I: Understanding Gentrification and Displacement

### *Gentrification*

The definition, causes, and impacts of gentrification are widely contested. The term "gentrification" was first used to describe the influx of a new

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4. Maureen Kennedy & Paul Leonard, *Dealing with Neighborhood Change: A Primer on Gentrification and Policy Changes*, BROOKINGS INST. (Apr. 2001), <https://www.brookings.edu/wp-content/uploads/2016/06/gentrification.pdf>.

5. Diane K. Levy et al., *In the Face of Gentrification: Case Studies of Local Efforts to Mitigate Displacement*, URB. INST.: METRO. HOUS. & COMMUNITIES POL'Y CTR. (2006), [staging.community-wealth.org/sites/clone.community-wealth.org/files/downloads/paper-levy-et-al.pdf](http://staging.community-wealth.org/sites/clone.community-wealth.org/files/downloads/paper-levy-et-al.pdf). The Urban Displacement Project has also developed case studies of communities experiencing displacement across Los Angeles and the Bay Area. URBAN DISPLACEMENT PROJECT, <http://www.urbandisplacement.org/case-studies/ucla> and <http://www.urbandisplacement.org/case-studies/ucb>.

6. Heather Way et al., *Uprooted: Residential Displacement in Austin's Gentrifying Neighborhoods and What We Can Do About It*, UNIV. OF TEX. AT AUSTIN, App. 4 (2018), <https://sites.utexas.edu/gentrificationproject>.

7. The *Uprooted* report for the City of Austin also sets forth a framework for evaluating and comparing the merits of different policies for tackling displacement in gentrifying neighborhoods. See *id.*, pt. 5.

“gentry” into low-income neighborhoods in London in the 1960s.<sup>8</sup> More recently, the 2001 Brookings report defined gentrification as “the process by which higher income households displace low income residents of a neighborhood, changing the essential character . . . of that neighborhood.”<sup>9</sup>

Our study identified gentrification as a process that occurs across three dimensions: (1) the physical transformation of neighborhoods; (2) the displacement of lower-income residents and other vulnerable populations by higher-income and higher-educated residents; and (3) changes to the neighborhood’s cultural character.<sup>10</sup>

The shifting preference of wealthier and highly educated residents towards central city living has been a core driver of gentrification occurring in the United States.<sup>11</sup> This broad-scale demographic shift, labeled the “great inversion,”<sup>12</sup> has been underway in many cities for decades.

The extent to which governments have influenced this demographic shift in cities and particular neighborhoods is debated. Among the factors considered to be important are city planning and economic development initiatives, tax incentives, and federal initiatives to redevelop public housing as mixed-income communities.<sup>13</sup> Also debated is whether new development that does not directly displace existing residents is part of the gentrification process or instead is a form of “re-urbanization” that should be viewed more positively.<sup>14</sup>

In the United States, gentrification has most often been applied to describe the influx of higher-income and higher-educated residents into historically marginalized communities—communities shaped by decades of discriminatory public policies and private real estate practices that undermined property values, facilitated substandard living conditions, and generated segregated housing patterns.<sup>15</sup> These neighborhoods’ lower property values, location in the urban core near good jobs and transit, and historical and cultural character are all factors that have made them more attractive to newcomers and susceptible to redevelopment.<sup>16</sup>

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8. RUTH L. GLASS, *LONDON: ASPECTS OF CHANGE* xviii–xix (1964).

9. Kennedy & Leonard, *supra* note 4, at 5.

10. Way et al., *supra* note 6, at 2.

11. Maciag, *supra* note 1.

12. ALAN EHRENHALT, *THE GREAT INVERSION AND THE FUTURE OF THE AMERICAN CITY* (2013).

13. Miriam Zuk et al., *Gentrification, Displacement, and the Role of Public Investment*, 33 J. PLAN. LITERATURE 1, 2 (2017).

14. Mark Davidson & Loretta Lees, *New Build Gentrification: Its Histories, Trajectories, and Critical Geographies*, 16 POPULATION, SPACE & PLACE 395, 399 (2010).

15. ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940–60* (1998); THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (1996); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

16. Kennedy & Leonard, *supra* note 4, at 7.

### Displacement

Discussions about gentrification also engender disputes about the benefits of gentrification and who receives them. While there is no consensus on whether gentrification is good or bad for a city, there is broad consensus that the displacement of vulnerable residents is an undesirable side effect.<sup>17</sup> As wealthy residents move into a neighborhood, housing values rise and the inventory of homes that are affordable without government restrictions is destabilized. Low-income residents are pushed to the outskirts or out of the city altogether.

Several forms of displacement have been identified by scholars. *Direct displacement* occurs when residents can no longer afford to remain in their homes due to rising housing costs.<sup>18</sup> Residents may be forced out by eminent domain, lease non-renewals, evictions, or physical conditions that render homes uninhabitable.<sup>19</sup> While displacement occurs routinely in low-income neighborhoods, when it occurs in the context of changes in the physical and social character of the neighborhood, it becomes a characteristic of gentrification.<sup>20</sup> *Indirect displacement* refers to changes in who is moving into the neighborhood as low-income residents move out. When units are vacated by low-income residents, other low-income residents cannot afford to move in because rents have increased.<sup>21</sup> This process is also called *exclusionary displacement*.<sup>22</sup> Such changes can also occur due to discrimination against low-income residents (for example, those using vouchers), building upgrades, or changes in land use or zoning that foster a change in the character of residential development.<sup>23</sup> The degree to which this form of residential succession occurs in gentrifying neighborhoods is subject to debate.<sup>24</sup> *Cultural displacement* occurs as the scale of residential change advances; shops and services shift to focus on new residents, and remaining residents may feel a sense of dislocation despite remaining in the neighborhood.<sup>25</sup>

### Right to Return and Forward-Looking Inclusion

When understood as a process rooted in the uneven treatment of particular neighborhoods and racial and ethnic groups, addressing gentrification-induced displacement requires attention to displaced, current, and future

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17. Miriam Zuk, et al., *supra* note 13, at 1.

18. Peter Marcuse, *Gentrification, Abandonment, and Displacement*, 28 WASH. U. J. URB. & CONTEMP. L. 195, 205 (1985).

19. *Id.*

20. Kennedy & Leonard, *supra* note 4, at 5–6.

21. Miriam Zuk et al., *supra* note 13, at 5.

22. Marcuse, *supra* note 18, at 206.

23. Miriam Zuk et al., *supra* note 13, at 5.

24. Lance Freeman, *Displacement or Succession? Residential Mobility in Gentrifying Neighborhoods*, 40 URB. AFF. REV. 463, 465 (2005).

25. Mark Davidson, *Displacement, Space and Dwelling: Placing Gentrification Debate*, 12 ETHICS, PLACE & ENV'T 219, 228 (2009).

residents. Some cities have created “right of return” or preference policies that focus on former residents or those at risk of being displaced.<sup>26</sup> At the same time, it is important to ensure that, in the future, other low-income people will also be able to access the opportunities in gentrifying neighborhoods and that the scale of change does not erase key aspects of neighborhoods that allow both current and future residents to feel at home.

## Part II: Neighborhood Case Studies

### Guadalupe Neighborhood, Austin, Texas: Early Intervention and Evolving Strategies to Create Permanently Affordable Housing for Vulnerable Residents with Historical Ties to the Neighborhood

#### *Introduction*

Austin’s Guadalupe neighborhood has worked to curtail the displacement of vulnerable residents since the late 1970s. The neighborhood’s struggle, in the face of rising land values and development pressures, is instructive for neighborhoods experiencing similar challenges. While land values in Guadalupe today are among the highest in Austin, the neighborhood’s community-based nonprofit development corporation (CDC)—Guadalupe Neighborhood Development Corporation (GNDC)—continues to pioneer the adoption of new tools and strategies to mitigate displacement of vulnerable residents, in a state that is hostile to many anti-displacement policies.

#### *Background and History*

The Guadalupe neighborhood is located just east of Austin’s Central Business District, across Interstate Highway 35. The neighborhood is small, comprising approximately 14 blocks. In the early twentieth century, the area was home to a multi-ethnic community of European and Mexican immigrants, and African Americans living in Austin’s earliest known freedmen settlement, Pleasant Hill. The now widely used name for the area, “Guadalupe neighborhood” started to be used in the late 1970s, after Our Lady of Guadalupe Catholic Church, which had relocated to the neighborhood from downtown in 1926.<sup>27</sup>

The City of Austin’s 1928 comprehensive plan created a “Negro district” that limited city services for African-Americans in Central East Austin to an area including the Guadalupe neighborhood.<sup>28</sup> Mortgage redlining and

26. See, e.g., Portland Housing Bureau, City of Portland Oregon, *North/Northeast Neighborhood Housing Strategy*, <https://www.portlandoregon.gov/phb/article/655457>; CITY OF SAN FRANCISCO PREFERENCE PROGRAMS, SAN FRANCISCO HOUSING DATA HUB, <https://housing.datasf.org/policies/preference-programs> (last visited Apr. 4, 2019).

27. Interviews with Mark Rogers, Exec. Director, Guadalupe Neighborhood Dev. Corp. (Jan. 31, 2018, and Apr. 25, 2018).

28. KOCH & FOWLER, A CITY PLAN FOR AUSTIN, TEXAS 57–58 (1928), [ftp://ftp.austintexas.gov/GIS-Data/planning/compplan/1927\\_Plan.pdf](ftp://ftp.austintexas.gov/GIS-Data/planning/compplan/1927_Plan.pdf).

racial deed restrictions further concentrated African-Americans as well as Mexican-Americans in the area.<sup>29</sup> In 1962, Interstate Highway 35 was built in Austin, cutting off the Guadalupe neighborhood from downtown and reinforcing the racial and ethnic divide that existed by then between East and West Austin.<sup>30</sup> Heading into 1970, Mexican-Americans comprised eighty percent of the neighborhood's residents.<sup>31</sup>

In the 1970s, neighborhood demographics shifted and conditions declined. Between 1970 and 1980, Guadalupe lost close to one third of its residents including two-thirds of its African-American population.<sup>32</sup> As families left, the area's residents became disproportionately elderly and poor. In 1980, eighty-seven percent of the homeowner households were low-income, and Guadalupe's census tract was the city's poorest.<sup>33</sup> By 1980, more than half of the neighborhood's 168 single-family homes were in substandard condition.<sup>34</sup> In the section closest to downtown, close to seventy percent of lots stood vacant.<sup>35</sup>

In 1979, the Daughters of the Republic of Texas, with support from a local congressman and Lady Bird Johnson, the former First Lady, proposed a plan to expand the French Legation museum in the Guadalupe neighborhood, using \$622,000 in federal Community Development Block Grant (CDBG) funds.<sup>36</sup> Eminent domain would be used to seize and demolish fourteen homes. In response, neighbors began meeting and formed the Guadalupe Area Neighborhood Association (GANA), which voted unanimously to oppose the French Legation expansion plan and launched a campaign against it, working closely with parish board members and church staff from Our Lady of Guadalupe.<sup>37</sup> In the end, the residents successfully blocked the plan, setting the stage for residents to define their own agenda for the area.

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29. ELIOT M. TRETTER, *AUSTIN RESTRICTED: PROGRESSIVISM, ZONING, PRIVATE RACIAL COVENANTS, AND THE MAKING OF A SEGREGATED CITY* (2012), available at <https://repositories.lib.utexas.edu/handle/2152/21232>.

30. Michael Barnes, *Recalling Austin's Ample East Avenue*, *AUSTIN AM.-STATESMAN* (Sept. 25, 2018), <https://www.statesman.com/news/20150829/recalling-austins-ample-east-avenue>.

31. *Guadalupe Community Development Program: Phase 1 Plan*, GUADALUPE NEIGHBORHOOD AREA ASS'N 12 (Apr. 1981) (on file with authors).

32. *Id.*

33. *Id.* at 13.

34. *Id.* at 26.

35. *Id.* at 28 (Map IX, Housing Tenure).

36. Darren McDivitt & Annie Stocklin, *GNDC: The Origin Story*, at 3 (on file with authors).

37. Rogers, *supra* note 27.



### Phase One: Neighborhood Protection and Improvement

#### a. *A Community-Driven Plan and Creation of a Community Development Corporation*

Since the French Legation fight, efforts to mitigate displacement in Guadalupe have continually been anchored in the community. After neighborhood leaders defeated the French Legation expansion, they lobbied the Austin City Council to redirect the CDBG funds originally designated for the French Legation expansion to support a community-centered plan for improving and preserving neighborhood housing. To develop the plan, Guadalupe leaders surveyed residents, held community meetings, and conducted door-to-door assessments of property conditions. GANA's steering committee met weekly for close to a year to develop the plan, with ongoing support by legal aid staff.<sup>38</sup>

This work culminated in the creation of a three-phase comprehensive redevelopment plan for the neighborhood in 1981: the Guadalupe Community Development Program (GCDP). The Austin City Council unanimously endorsed the plan and approved the redirection of the CDBG funding towards the plan's implementation. The primary focus of the plan was to "to improve the neighborhood quality while preventing the displacement of lower-income residents."<sup>39</sup> The project plan included a call for (1) downzoning to prevent commercialization of residential lots; (2) providing counseling and deferred loans for home repairs; (3) improving the quality of rental housing; (4) buying up vacant land to build affordable houses; and (5) improving streets, sidewalks, and alleyways.<sup>40</sup>

To implement the GCDP, neighborhood leaders formed a nonprofit community development corporation: the Guadalupe Neighborhood Development Corporation (GNDC). GNDC's board of directors was initially comprised of long-time neighborhood residents, but, as the organization expanded its service boundaries, the board added directors from other East Austin neighborhoods. The organization initially relied on volunteers and part-time staff to run its different development projects and programs but over time grew to include four full-time staff members.

#### b. *Early and Strategic Land Acquisition*

When the GCDP was created, large-scale land assembly by private investors had begun on lots closest to downtown. In response these redevelopment pressures, GNDC set out to acquire property in strategic locations throughout the neighborhood. This "four corners strategy," with the goal of owning each corner lot on each block, made GNDC a major property

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38. *Id.*

39. Bill Valdez, *Guadalupe Area Awaiting Word on Federal Funds*, AUSTIN AM.-STATESMAN (Sept. 10, 1981) (quoting from a memo from the Guadalupe Area Neighborhood Association to the Austin City Council dated Aug. 24, 1981).

40. GUADALUPE NEIGHBORHOOD AREA ASS'N, *supra* note 31, at 48–49.

owner in the area and gave the organization additional political clout in zoning battles.

By 1984, GNDC had acquired ten lots on which it built seven affordable homes for purchase and ten rental units. Most of the lots were acquired from public entities including the City of Austin. GNDC's rental properties were developed with little associated debt initially, thereby creating a steady source of revenue to help cover its operations.

The Ebenezer Third Baptist Church, a historic institution in the area, also played a key role in developing affordable rental housing in the neighborhood and created the East Austin Economic Development Corporation (EAEDC) to engage in economic and community development projects in the area. The EAEDC developed a cluster of six duplex buildings with twelve affordable rental homes for seniors and operates a child development center in the neighborhood.<sup>41</sup>

*c. Fixing Up Substandard Homes and Other Neighborhood Improvement Initiatives*

Within six months of initial funding for the GCDP, the neighborhood met its first-year goals for home repairs: Forty-two homeowners were enrolled in the City's home repair program, eight entered the Urban League's emergency repair program, and eighteen households were enrolled in the City's architectural barrier removal program. Guadalupe leaders also helped the City develop a home rehabilitation program for the neighborhood and received funding to rehabilitate ten substandard rental homes and sell them to existing tenants.<sup>42</sup>

A new neighborhood association, the Guadalupe Association for an Improved Neighborhood (GAIN), eventually supplanted the Guadalupe Area Neighborhood Association to lead other types of neighborhood improvements. A major focus of GAIN was combating crime, which included a neighborhood crime-watch program and installation of motion detector lights on houses. Two years after GAIN's founding, crime in the area had dropped by twenty-three percent.<sup>43</sup>

Both GNDC and GAIN played an active role in zoning cases and land use decisions impacting the neighborhood. In 1996, the Austin Chronicle noted that GAIN had been so successful at improving and preserving the neighborhood that other Central East Austin neighborhoods were turning to the organization for support.<sup>44</sup>

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41. EBENEZER VILLAGE, <http://www.ebc3austin.org/about-us/ebenezer-village> (last visited Apr. 4, 2019).

42. *Low Cost Housing Plan for Guadalupe*, GUADALUPE NEIGHBORHOOD DEV. CORP. (Nov. 1982) (on file with authors).

43. Alex de Marban, *Life on the 38th Parallel*, AUSTIN CHRON. (Jan. 12, 1996), <https://www.austinchronicle.com/news/1996-01-12/530366>.

44. *Id.*

## Phase Two: Densification and Shared Equity Homeownership Strategies

Since 2000, the Guadalupe neighborhood has undergone dramatic gentrification with an influx of higher-income residents and rising home values. Guadalupe's census tract went from five percent white with a median family income of \$39,000 to forty-three percent white with a median family income of \$67,000.<sup>45</sup> Changes in the housing market have been even more dramatic. Today, property lots that sold for \$5,000 in the 1980s sell for \$500,000 to \$650,000. A home that sold for \$349,000 in 2010 was listed for \$859,000 in 2015.<sup>46</sup>

GNDC can no longer afford to buy properties in Guadalupe. Nor can it afford to exercise its right to purchase when the families who previously purchased homes from GNDC decide to sell. Of the forty homeownership units that GNDC sold between 1983 and 2008, at least eight have been resold to market rate buyers. In response, GNDC has shifted its strategies in order to continue its mission of mitigating the displacement of vulnerable residents in Guadalupe.

### *a. Densifying Existing Properties*

With new land acquisition in Guadalupe off the table, GNDC has been adding affordable housing units on the land it already owns. In 2008, GNDC replaced two of its older duplexes with a twenty-two-unit affordable apartment complex called La Vista de Guadalupe, funded with federal Low Income Housing Tax Credits. GNDC is currently developing a twenty-four-unit apartment complex on the former site of a single-family home purchased from a long-time resident in the area.

A second densification strategy has been to develop accessory dwelling units (ADUs) behind GNDC's single-family rental houses, on the same lot. ADUs, or granny flats, are small homes that are either separated from or attached to the primary home. Apartments converted from garages are a common example of ADUs in older neighborhoods. GNDC's experience developing its first ADU brought to light local regulatory challenges to this strategy. Over time, the City of Austin has loosened restrictions on ADUs—in 2001, for neighborhoods with plans allowing them, and in 2015

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45. American Community Survey 2012–2016 (5-year estimates), SOCIAL EXPLORER, [https://www.socialexplorer.com/tables/ACS2016\\_5yr](https://www.socialexplorer.com/tables/ACS2016_5yr) (under “Census Tract” and “Travis County, Texas” select tract 9.01; then select “T14. Hispanic Or Latino By Race”) (last visited Dec. 21, 2018); American Community Surveys 2012–2016 (5-year estimates), SOCIAL EXPLORER, [https://www.socialexplorer.com/tables/ACS2016\\_5yr](https://www.socialexplorer.com/tables/ACS2016_5yr) (under “Census Tract” and “Travis County, Texas” select tract 9.01; then select “T61. Median Family Income (In 2016 Inflation Adjusted Dollars)”) (last visited Dec. 21, 2018); Census 2000, SOCIAL EXPLORER, <https://www.socialexplorer.com/tables/C2000> (under “Census Tract” and “Travis County, Texas” select tract 9.01; then select “T15. Hispanic Or Latino By Race”) (last visited Dec. 21, 2018).

46. Rogers, *supra* note 27.

by further reducing restrictions and enabling ADUs citywide.<sup>47</sup> Since 2001, GNDC has built seven ADUs in the Guadalupe neighborhood, with rents ranging from \$300 to \$900 a month.

*b. Community Land Trusts: Permanent Affordable  
Homeownership Opportunities*

In 2012, in response to rising homeownership costs and the loss of affordable homes previously sold by GNDC, the organization created the first community land trust (CLT) in Texas. In a CLT, a nonprofit organization maintains long-term ownership of the land to provide permanently affordable housing for the benefit of the community. The home is sold at an affordable price, typically financed with a mortgage from a bank. The land is leased to the homeowner, typically for ninety-nine years, at an affordable price (GNDC's monthly ground lease fee is \$25) through a detailed ground lease, covering the policies and rules governing the use and sale of the property. These rules vary widely across CLTs. When the family sells the home, the nonprofit CLT typically has a right of first refusal to purchase it.

The CLT home's resale amount is typically capped, allowing the family to recoup what it paid for the home (as long as the property appreciates), with a ceiling set on the amount of appreciation the family will receive upon sale. GNDC's shared equity formula caps appreciation for homeowners at two percent per year. This structure allows the family to build wealth, while also allowing GNDC to resell the home to another low-income family at an affordable price.

Initially, local banks refused to provide a mortgage for GNDC's CLT homebuyers. As a result, GNDC self-financed the mortgage on its first CLT home. Several years later, GNDC finally found a California-based mortgage lender willing to lend to CLT homebuyers. GNDC's first CLT home sold for \$150,000. The owner's monthly cost for the mortgage, taxes, insurance, and land trust fees was \$815. To date, GNDC has created eighteen CLT homes in East Austin. The model is now used by the City of Austin and local Habitat for Humanity chapter.

**Other Strategies and Tools**

*a. Preference Policy: Helping Families  
with Historic Ties to the Neighborhood*

GNDC gives preference in its rental and homeownership programs to qualified residents with long-term ties in the neighborhood. After meeting income and other program criteria, those at the highest level of priority are placed at the top of GNDC's waitlist (the waitlist for rental housing currently has over 700 households). For home sales, GNDC has six levels of priority for applicants, and, for rental housing, GNDC uses five priority levels. The highest priority for homeownership applicants is for those who

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47. AUSTIN, TEX., ORDINANCE 20151119-080 (2015), <http://www.austintexas.gov/edims/document.cfm?id=243658>.

currently reside in GNDC's rental homes. The next level of priority is for applicants (including applicants' parents and children) who have lived in GNDC's service area for twenty-five or more years, and then for applicants who have lived in the area for more than ten years.

*b. Property Tax Breaks*

GNDC has led efforts at the Texas Legislature and local appraisal district to reduce property taxes on CLT and other income-restricted homes to help lower-income residents afford their homes, especially in the face of rapidly rising property values (and thus property taxes) in East Austin. Austin residential owner-occupants have the eighth highest property tax burden in the country, and the highest tax burden in the country for non-coastal cities.<sup>48</sup>

In 2011, the Texas Legislature adopted a law that GNDC helped draft to reduce property taxes on CLT homes and land.<sup>49</sup> There are two primary categories of tax savings for CLT properties: first, a city or county (or both) can grant a 100% exemption from property taxes on land owned by qualified CLTs.<sup>50</sup> Second, the appraisal district must take into account the resale restrictions when appraising the CLT land and homes.<sup>51</sup> The two sections of the Tax Code incorporating these policies, along with a favorable, more specific appraisal methodology adopted by the local appraisal district, are saving low-income CLT homeowners thousands of dollars in property taxes each year. On a CLT property in Austin with a market value of \$300,000, the 2018 property tax savings are just under \$4,000 each year.

### Conclusion

The Guadalupe neighborhood's work to mitigate residential displacement over the past thirty-nine years is a model for other communities. Much of the neighborhood's success can be attributed to its ongoing strong ties to the community, early strategic land acquisition, and a strong CDC that is focused and flexible in its approaches to mitigating displacement. GNDC has pioneered new models for mitigating residential displacement, including the state's first CLT and the development of ADUs. Over time, the neighborhood has created ninety-one affordable units (including those currently under development) that are under long-term community control—over half the number of homes that existed in the neighborhood when displacement mitigation work first began in the 1980s.

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48. *50-State Property Tax Comparison Study*, LINCOLN INST. OF LAND USE POL'Y & MINN. CTR. FOR FIN. EXCELLENCE (Apr. 2015), [https://www.lincolnnst.edu/sites/default/files/pubfiles/50-state-property-tax-study-2015-full\\_0.pdf](https://www.lincolnnst.edu/sites/default/files/pubfiles/50-state-property-tax-study-2015-full_0.pdf) (Table 30: Top 50 Homestead Property Taxes for a Median-Value Home—Listed by Net Tax Payable 2014).

49. S.B. 402, 82d Leg., Reg. Sess. (Tex. 2001).

50. TEX. TAX CODE ANN. § 11.1827.

51. *Id.* § 23.21(c).

**Columbia Heights, Washington, D.C.:  
A Case Study of Affordable Rental Housing Preservation  
and Tenant Ownership in the Face of Large-Scale  
Displacement Pressures**

*Introduction*

Columbia Heights has been named one of the fastest gentrifying neighborhoods in the country, with median home values exceeding half a million dollars.<sup>52</sup> Rapidly accelerating housing prices that were spurred by public investment in the late 1990s have coincided with the ongoing loss of low-income residents of color from the neighborhood.<sup>53</sup> Despite the rapid pace of housing appreciation, a substantial level of affordable housing has been preserved in the neighborhood, thanks to a number of evolving progressive policies, resources, and investments.

*Background and History*

Columbia Heights is located two miles directly north of the National Mall in Washington, D.C. At the turn of the twentieth century, Columbia Heights was a white streetcar suburb, home to some of the District's wealthiest residents, but most white residents left the neighborhood after school desegregation and the midcentury dissolution of racialized neighborhood covenants.<sup>54</sup> By 1960, Columbia Heights had become a robust mixed-income and mixed-race community, with African Americans constituting seventy-six percent of the neighborhood's population.<sup>55</sup>

In 1968, the riots following the assassination of Martin Luther King, Jr. inflicted extensive damage on the neighborhood, with thousands of housing units and commercial establishments severely destroyed.<sup>56</sup> Middle-income families fled the neighborhood, and storefronts and

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52. J.B. Wogan, *Why D.C.'s Affordable Housing Protections Are Losing a War with Economics*, GOVERNING MAG. (Feb. 2015), <http://www.governing.com/topics/urban/gov-washington-affordable-housing-protections-gentrification-series.html>; American Community Survey 2012–2016 (5-year estimates), SOCIAL EXPLORER, [https://www.socialexplorer.com/tables/ACS2016\\_5yr](https://www.socialexplorer.com/tables/ACS2016_5yr) (under “Census Tract” and “District of Columbia” select tracts 28.01, 28.02, 29, 30, 31, 35, 36, 37; then select “T101. Median House Value for All Owner-Occupied Housing Units”) (last visited Dec. 21, 2018).

53. Wogan, *supra* note 52; Stephanie Brown, *Beyond Gentrification: Strategies for Redirecting the Outcomes of Community Transition*, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV. & NEIGHBORWORKS AM. 25 (July 2014), [http://www.jchs.harvard.edu/sites/default/files/w14-12\\_brown.pdf](http://www.jchs.harvard.edu/sites/default/files/w14-12_brown.pdf); Kathryn L. Howell, *Planning for Empowerment: Upending the Traditional Approach to Planning for Affordable Housing in the Face of Gentrification*, 17(2) PLAN. THEORY & PRAC., 210, 217 (2016).

54. Howell, *supra* note 53, at 216.

55. Census 1960, SOCIAL EXPLORER, <https://www.socialexplorer.com/tables/C1960TractDS> (under “Census Tract” and “District of Columbia” select tracts 28, 29, 30, 31, 35, 36, 37; then select “T13. Race (100% Count)”) (last visited Dec. 21, 2018).

56. Brown, *supra* note 53, at 25.

housing units in Columbia Heights remained boarded up and vacant for decades.<sup>57</sup> The area came to include a growing number of Latinos, as well as a small concentration of Asian Americans, mainly from Vietnam.<sup>58</sup>

Little economic investment occurred in Columbia Heights until after 1996, when a new subway was being constructed in the heart of the neighborhood and the city began to incentivize commercial development, as part of a citywide effort to counter D.C.'s declining population and tax base.<sup>59</sup> In furtherance of this explicit strategy to attract wealth to Columbia Heights, the city proceeded to invest \$138 million in new and remodeled schools, parks, and other civic amenities in Columbia Heights, while using financial incentives to attract private market developers to build denser housing, commercial space, and mixed-use development.<sup>60</sup> Residential displacement strategies were not incorporated into these initial redevelopment plans. Starting in 2000, the municipal government also ran an aggressive code enforcement initiative in Columbia Heights, which led to the closure of at least one affordable apartment building and threatened the closure of several others.<sup>61</sup>

The period from 1996 to 2010 was a significant turning point for Columbia Heights. Gentrification pressures had been mounting prior to 1996, but the government's revitalization efforts became a catalyst for the broad-scale makeover of the neighborhood by private developers and contributed to a surge in population and tax base.<sup>62</sup> White, wealthier residents moved into the neighborhood, and market-rate housing prices skyrocketed by 146 percent from 2000 to 2010, pushing out lower-income African-American residents and Latino residents who could no longer afford to live in the neighborhood.<sup>63</sup> During this time period, the number of white residents increased by 351 percent (from six to twenty-seven percent of the neighborhood's total population), while the number of families with children, African-Americans, and Hispanics plummeted, respectively, by twenty-eight percent, twenty-six percent, and ten percent.<sup>64</sup>

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57. Kathryn L. Howell, *Preservation from the bottom-Up: Affordable Housing, Redevelopment, and Negotiation in Washington, DC*, 31(3) Hous. STUDIES 305, 311 (2016).

58. Kennedy & Leonard, *supra* note 4, at 58.

59. Wogan, *supra* note 52; Brown, *supra* note 53, at 25–26.

60. Wogan, *supra* note 52.

61. The District of Columbia's code enforcement initiative, called the "Hot Properties Initiative," was the source of civil rights litigation in the early 2000s. See 2922 Sherman Ave. Tenants' Assoc. v. District of Columbia, 444 F.3d 673 (D.C. Cir. 2006).

62. Kennedy & Leonard, *supra* note 4 at 58; Brown, *supra* note 53, at 25–26.

63. Howell, *supra* note 53, at 217; see also Washington, D.C., *Gentrification Maps and Data*, GOVERNING MAG., <http://www.governing.com/gov-data/washington-dc-gentrification-maps-demographic-data.html> (last visited Dec. 21, 2018).

64. American Community Survey 2008–2012 (5-year estimates), SOCIAL EXPLORER, [https://www.socialexplorer.com/tables/ACS2012\\_5yr](https://www.socialexplorer.com/tables/ACS2012_5yr) (under "Census Tract" and "District of Columbia" select tracts 28.01, 28.02, 29, 30, 31, 35, 36, 37; then select "T18. Households by Presence of People Under 18 Years by Household Type," "T25. Educational



Since 2010, Columbia Heights has continued to see ongoing redevelopment and escalating housing values.<sup>65</sup> The neighborhood, however, remains racially and economically diverse, with forty-four percent of residents making less than \$30,000 per year.<sup>66</sup> Approximately 3,000 units in Columbia Heights—close to twenty-two percent of the housing in the neighborhood—are income-restricted today.<sup>67</sup>

### *Strategies and Policies*

Columbia Heights' inclusion of so many income-restricted affordable homes today is due in large part to the concentration of public housing and privately owned, government-subsidized properties in the neighborhood before gentrification took off.<sup>68</sup> In 2001, the neighborhood was home to one third of all subsidized housing in the city.<sup>69</sup> Another key factor has been the District's ongoing commitment to affordable housing preservation and protecting renters through a series of innovative, robust, and evolving city-level strategies and policies.

#### a. Tenant Opportunity to Purchase Act

The Tenant Opportunity to Purchase Act (TOPA)<sup>70</sup> gives tenants a priority opportunity to purchase their building before their landlord sells it to a third party. While the District of Columbia does not track the number of subsidized affordable units preserved through TOPA, an estimated 398

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Attainment for Population 25 Years and Over," and "T57. Median Household Income (In 2016 Inflation Adjusted Dollars)") (last visited Dec. 21, 2018); Census 2010, Social Explorer, <https://www.socialexplorer.com/tables/C2010> (under "Census Tract" and "District of Columbia" select tracts 28.01, 28.02, 29, 30, 31, 35, 36, 37; then select "T55. Hispanic Or Latino Origin By Race") (last visited Dec. 21, 2018); Census 2000, Social Explorer, <https://www.socialexplorer.com/tables/C2000> (under "Census Tract" and "District of Columbia" select tracts 28.01, 28.02, 29, 30, 31, 35, 36, 37; then select "T15. Hispanic Or Latino By Race," "T93. Median Household Income In 2016 Dollars," "T40. Educational Attainment For Population 25 Years And Over," "T180. Poverty Status In 1999 For Children Under 18") (last visited Dec. 21, 2018).

65. Wogan, *supra* note 52.

66. American Community Survey 2012–2016 (5-year estimates), SOCIAL EXPLORER, [https://www.socialexplorer.com/tables/ACS2016\\_5yr](https://www.socialexplorer.com/tables/ACS2016_5yr) (under "Census Tract" and "District of Columbia" select tracts 28.01, 28.02, 29, 30, 31, 35, 36, 37; then select "T56. Household Income (In 2016 Inflation Adjusted Dollars)" and "T57. Median Household Income (In 2016 Inflation Adjusted Dollars)"); Census 2010, SOCIAL EXPLORER, <https://www.socialexplorer.com/tables/C2010> (under "Census Tract" and "District of Columbia" select tracts 28.01, 28.02, 29, 30, 31, 35, 36, 37; then select "T57. Median Household Income (In 2016 Inflation Adjusted Dollars)").

67. Between 2,953 and 3,068 units in Columbia Heights are income-restricted. Prepared from data on the Housing Insights Tool, available at <http://housinginsights.org/tool/#>.

68. Kennedy & Leonard, *supra* note 4, at 57.

69. *Id.*

70. D.C. CODE § 42-3404.01–14 (1980).



affordable units in 15 buildings have been acquired through TOPA by former tenants in Columbia Heights and converted into limited equity cooperatives.<sup>71</sup> Between 2002 and 2009, Columbia Heights had the highest concentration of tenant purchases through TOPA in the city.<sup>72</sup>

Before selling a residential property, the landlord must present the tenants with an “Offer of Sale” providing the tenants with the opportunity purchase the property.<sup>73</sup> The landlord must also provide a copy of the offer to the municipal government under the District Opportunity to Purchase Act (DOPA), which extends a purchase right to the District if tenants decline to utilize their right to purchase.<sup>74</sup>

When tenants exercise their purchase rights in a building, they can form an association to purchase the building or transfer their rights to a third party, such as a nonprofit housing organization.<sup>75</sup> For low-income tenants, a tenant purchase is typically handled through the creation of a limited equity cooperative through which residents collectively own their building with resale restrictions.<sup>76</sup> Through the limited equity cooperative structure, the restrictions ensure that the units remain affordable for the long term for future low- and moderate-income residents.<sup>77</sup>

The financing and other infrastructure that has built up around TOPA, discussed further below, has been critical to the law’s success in enabling low-income tenants to purchase their rental homes. Traditional financing for purchases by tenant associations is very difficult to secure, so tenant purchases under TOPA typically rely on mission-driven lenders and public agencies, including the District’s Housing Production Trust Fund.<sup>78</sup>

TOPA has attracted criticism since its passage, and, throughout the Act’s past thirty-eight years, a number of loopholes have been identified.<sup>79</sup> The most recent controversy around TOPA recently led the D.C. Council to repeal TOPA for single-family houses.<sup>80</sup> Housing advocates have advocated

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71. Based on information compiled from *Where Are Coops in DC?*, COALITION FOR NONPROFIT HOUS. & ECON. DEV., available at <https://www.cnhed.org/policy-advocacy/policy-approach/coop/where-are-coops-in-dc>.

72. Wogan, *supra* note 52.

73. D.C. CODE § 42-3404.02 (1980).

74. *Id.* § 42-3404.31–37.

75. Howell, *supra* note 57, at 314.

76. Amanda Huron, *Creating a Commons in the Capital: The Emergence of Limited-Equity Housing Cooperatives in Washington, D.C.*, 26 WASH. HIST., No. 2, 57–60 (2014).

77. *Id.* at 57–58.

78. Howell, *supra* note 57, at 317.

79. *Id.* at 316.

80. Jodie Fleischer, *D.C. Council Votes to Exempt Single-Family Homes from TOPA Law*, NBC WASH. (Apr. 11, 2018), <https://www.nbcwashington.com/investigations/D.C.-Council-Votes-to-Exempt-Single-Family-Homes-From-TOPA-Law-479336123.html>.

for adjustments to the TOPA process to close these loopholes rather than fully repealing TOPA.<sup>81</sup>

b. The Housing Production Trust Fund

Most of the financial support for TOPA and housing preservation in Columbia Heights has come from the District's Housing Production Trust Fund—the largest municipal-level fund in the country.<sup>82</sup> Since 2014, annual allocations to the fund have exceeded \$100 million.<sup>83</sup> The Trust Fund utilizes fifteen percent of revenue from the District's deed and recordation taxes on every housing unit sold in the District.<sup>84</sup> The Trust Fund is used to support affordable housing rehabilitation, preservation, and new construction, as well as counseling and technical assistance to tenants interested in buying their units.<sup>85</sup>

Between 2001 and 2016, the Trust Fund awarded close to \$622 million in loans and grants for the preservation and creation of more than 10,000 affordable housing units across the District.<sup>86</sup> In this same time period, the district government spent more than \$48 million in Columbia Heights to create and preserve more than 300 affordable units in 12 multifamily buildings, including several buildings acquired by tenants.<sup>87</sup>

Activists in Columbia Heights have voiced concerns about the failure of the Trust Fund to serve those at the highest risk of displacement in the neighborhood.<sup>88</sup> While forty percent of the funds are required to serve households making less than thirty percent of the area median family income<sup>89</sup>—these targets often go unmet.<sup>90</sup>

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81. Telephone Interview with Kathryn Howell, Assistant Professor, Va. Commonwealth Univ. (Apr. 2, 2018).

82. *Housing Production Trust Fund*, D.C., DEP'T OF HOUS. & CMTY. DEV., <https://dhcd.dc.gov/page/housing-production-trust-fund> (last visited Dec. 21, 2018).

83. D.C., DEP'T OF HOUS. & CMTY. DEV., *supra* note 82.

84. *Id.*

85. *Id.*

86. *Stronger Management of the Housing Production Trust Fund Could Build More Affordable Housing*, OFF. OF THE D.C. AUDITOR (Mar. 20, 2018), [http://dcauditor.org/wp-content/uploads/2018/09/HPTF.Database.Report.3.20.18.FINAL\\_.pdf](http://dcauditor.org/wp-content/uploads/2018/09/HPTF.Database.Report.3.20.18.FINAL_.pdf) (intro section before the table of contents).

87. Based on analysis of data in OFF. OF THE D.C. AUDITOR, *Database of Housing Production Trust Fund Multi-Family and Single-Family Projects, FYs 2001–2016*.

88. Telephone Interviews with Dominic Moulden, Res. Organizer, OneDC (May 8, 2018, and May 10, 2018).

89. D.C. CODE § 42-2802(b-1)(2).

90. See, e.g., *FY 2014 Housing Production Trust Fund Annual Report and the Affordable Housing Report* (Table: Comparison of FY2-14 and FY2013 Units), D.C., DEP'T OF HOUS. & CMTY. DEV., at 2.

c. Grassroots Organizing, Technical Assistance, and Capacity Building Support

Primarily utilizing federal Community Development Block Grant dollars, the District of Columbia funds local organizations to provide a broad range of services to assist tenants with purchasing their buildings.<sup>91</sup> Such services include tenant organizing, education to tenants about ownership models, preparing legal organization documents, and technical assistance with sales negotiations and securing financing.<sup>92</sup> The funding is provided through the D.C. Department of Housing and Community Development via a competitive request for funding proposal process in which local organizations apply for funding.<sup>93</sup>

The District of Columbia also has a long history of providing capacity building and operational support for nonprofit organizations engaged in other types of housing preservation activities. As a result of this support, the District now has a large number of high capacity nonprofits that are actively engaged in affordable housing preservation. The D.C. Preservation Network lists 135 affiliated organizations, mostly made up of groups engaged in preservation work or in providing direct support to preservation activities.<sup>94</sup>

d. The D.C. Preservation Network: Information and Resource Coordination; Policy Advocacy

The D.C. Preservation Network (Network) is a group of community-based organizations and government agencies working collaboratively to preserve affordable housing in the District.<sup>95</sup> The Network has been most successful in coordinating the preservation of privately owned subsidized housing.<sup>96</sup>

The Network maintains and monitors a catalogue of at-risk subsidized housing in the District, drawing from lists, resources, and on-the-ground knowledge shared by participating members.<sup>97</sup> The focal point of the Network is a monthly meeting where participants both review housing that is in danger of losing affordability or in major disrepair and develop strategies for preserving the units. Diverse parties coordinate priorities, areas of expertise, and capacity in order to act quickly to preserve threatened

91. Telephone Interview with Eric M. Rome, Partner, Eisen and Rome (June 28, 2018).

92. *Id.*

93. Telephone Interview with Edward D. Davis, Program Manager, Neighborhood Based Activities, D.C. Dep't of Hous. & Cmty. Dev. (June 29, 2018).

94. COALITION OF NONPROFIT HOUS. & ECON. DEV., *Membership List*, <https://www.cnhd.org/membership/membership-list-1> (last visited Apr. 4, 2019).

95. Howell Telephone Interview, *supra* note 81.

96. *Id.*

97. Howell, *supra* note 53, at 219.

affordable units.<sup>98</sup> The Network also advocates for policy changes with the municipal government to promote affordable housing preservation.<sup>99</sup>

#### e. Additional Mitigation-Displacement Tools to Protect Tenants

The District of Columbia has enacted an array of additional policies and programs that have helped low-income renters stay in their homes and access affordable rental opportunities in Columbia Heights and the District's other gentrifying neighborhoods. These programs include a local rent supplement program, which receives \$46 million in local funding and provides monthly housing subsidies to more than 3,000 low-income renters in the city, targeting extremely low-income renters who make less than thirty percent of the area median income.<sup>100</sup> The District also offers a robust array of legal protections for renters, including organizing protections,<sup>101</sup> just cause eviction protections,<sup>102</sup> a tenant bill of rights,<sup>103</sup> and—in older buildings—rent control.<sup>104</sup> The District's Office of the Tenant Advocate (OTA) provides legal assistance to tenants and tenant associations and intervenes in judicial cases impacting renters' rights, such as lawsuits involving TOPA enforcement.<sup>105</sup>

The District's Affordable Housing Preservation Unit, created in 2017 and led by an Affordable Housing Preservation Officer, is one of the District's newest strategies to preserve affordable housing.<sup>106</sup> The Unit engages in ongoing outreach across the District to identify preservation opportunities, negotiates preservation deals with owners and other interested parties, and provides rapid financial and technical assistance where needed to facilitate preservation deals.

### Conclusion

Columbia Heights stands apart from many other gentrifying neighborhoods across the country in terms of the volume of housing that remains

98. Howell Telephone Interview, *supra* note 81.

99. See, e.g., *Maintaining Diversity and Affordability: A Strategy for Preserving Housing in the District of Columbia*, DC PRESERVATION NETWORK (Dec. 2014), <https://www.neighborhoodinfodc.org/dcpreservationcatalog/Preservation%20Strategy%20Dec2014.pdf>.

100. *The Local Rent Supplement Program*, D.C. FISCAL POL'Y INST. (Apr. 11, 2016), <https://www.dcfpi.org/wp-content/uploads/2016/04/16-04-LRSP-Brief.pdf>.

101. D.C. CODE § 42-3505.06 *et seq.*

102. *Id.* § 42-3505.01; *Guide to Eviction*, D.C. OFF. OF THE TENANT ADVOC., <https://ota.dc.gov/page/guide-eviction> (last visited Dec. 21, 2018).

103. D.C. CODE §§ 42-3531.07(8) & 42-3502.22(b)(1).

104. *Id.* § 42-3501.01 *et seq.*

105. *Fiscal Year 2015 Annual Report*, D.C. OFF. OF THE TENANT ADVOC. (2015), [https://ota.dc.gov/sites/default/files/dc/sites/ota/publication/attachments/Annual%20Report%202015\\_FOR\\_WEBSITE\\_NM.pdf](https://ota.dc.gov/sites/default/files/dc/sites/ota/publication/attachments/Annual%20Report%202015_FOR_WEBSITE_NM.pdf).

106. *Public-Private Affordable Housing Preservation Unit*, D.C., DEP'T OF HOUS. & CMTY. DEV., <https://dhcd.dc.gov/page/public-private-affordable-housing-preservation-unit> (last visited Dec. 21, 2018).

affordable and the large number of affordable units acquired and preserved by low-income tenants in the face of rapidly rising housing costs and other displacement pressures. A large base of preexisting subsidized units and robust local government support for housing preservation and tenants have played a critical role in mitigating displacement of vulnerable residents in Columbia Heights. The District's preservation programs and tenant protections are among the strongest in the country.

Despite these preservation successes, low-income residents in Columbia Heights continue to feel intense financial pressure, and the need for affordable units still far outstrips the supply.<sup>107</sup> If the District of Columbia had incorporated displacement mitigation strategies into its initial revitalization plans for Columbia Heights, many more affordable units would likely have been preserved and fewer vulnerable residents displaced. Once gentrification picked up steam in Columbia Heights, the preservation of affordable housing has become much more difficult.

The rapid transformation of Columbia Heights has created other issues, including tensions between long-time residents and newcomers.<sup>108</sup> Some persons of color with ties to the neighborhood report a loss of community and feeling like strangers in their own neighborhood.<sup>109</sup>

### **Inner North and Northeast Portland, Oregon: A Case Study of Community-Driven Strategies to Mitigate and Remediate the Displacement of African-American Residents**

#### *Introduction*

The inner neighborhoods of North and Northeast Portland (inner N/NE Portland) were once home to eighty percent of Portland's black community.<sup>110</sup> After decades of disinvestment, followed by urban renewal and large-scale public and private investment projects, the area has been rapidly gentrifying.<sup>111</sup> Since 2000, inner N/E Portland has lost over 7,200 black

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107. Wogan, *supra* note 52.

108. See, e.g., Rachel Sadon, *On a Columbia Heights Soccer Field, The Effects of Gentrification Play Out*, DCIST (July 2017), [http://dcist.com/2017/07/on\\_a\\_columbia\\_heights\\_soccer\\_field.php](http://dcist.com/2017/07/on_a_columbia_heights_soccer_field.php).

109. Howell Telephone Interview, *supra* note 81; KATHRYN L. HOWELL, TRANSFORMING NEIGHBORHOODS, CHANGING COMMUNITIES: COLLECTIVE AGENCY AND RIGHTS IN A NEW ERA OF URBAN REDEVELOPMENT IN WASHINGTON, D.C. 226 (Dec. 2013), <https://repositories.lib.utexas.edu/bitstream/handle/2152/23193/HOWELL-DISSERTATION-2013.pdf>.

110. Lauren Ackerman, *Albina, Portland (1870–)*, BLACK PAST, <http://www.blackpast.org/aaw/albina-portland-1870> (last visited Dec. 21, 2018).

111. Portland Hous. Bureau, *Displacement in North and Northeast Portland—An Historical Overview*, CITY OF PORTLAND, OR. 2–3, <https://www.portlandoregon.gov/phb/article/655460> (last visited Dec. 21, 2018).

residents—more than half the area's black population.<sup>112</sup> Recent strategies to reduce displacement in inner N/NE Portland aim to invest public funds with a new level of transparency and accountability to the area's long-time residents, including displaced residents.

### *Background*

Inner N/NE Portland is a collection of neighborhoods located north of downtown Portland, making up approximately seven square miles with approximately 54,000 residents.<sup>113</sup> In the 1910s, a ban on selling homes to African Americans in much of the city contributed to a concentration of African Americans centered around the Albina neighborhood of inner Northeast Portland, a process that was cemented by bank redlining in the 1930s through the 1950s.<sup>114</sup> By 1960, eighty percent of Portland's black population lived in or adjacent to Albina.<sup>115</sup>

Large urban renewal projects in the 1950s through the 1970s displaced thousands of African-American residents from their neighborhoods in inner N/NE Portland.<sup>116</sup> More than half of the residents of the Eliot neighborhood in Albina—3,000 people—were forced to relocate.<sup>117</sup> The 1980s and 1990s followed with the ongoing loss of African-Americans, neighborhood destabilization, and property deterioration.<sup>118</sup> By 1988, the King and Boise neighborhoods in Albina, which constituted one percent of the city's land, included one-third of the city's abandoned homes.<sup>119</sup>

To spur economic development and growth in the area, in 2000, the Portland City Council approved the designation of the Interstate Corridor Urban Renewal Area (ICURA), a twenty-year tax-increment financing (TIF)

112. American Community Survey 2012–2016 (5-year estimates), SOCIAL EXPLORER, [https://www.socialexplorer.com/tables/ACS2016\\_5yr](https://www.socialexplorer.com/tables/ACS2016_5yr) (under “Census Tract” and “Multnomah County, Oregon” select tracts 22.03, 23.03, 24.01, 24.02, 25.01, 31, 32, 33.01, 33.02, 34.01, 34.02, 36.01, 36.02, 37.02; then select “T14. Hispanic or Latino by Race”) (last visited Dec. 21, 2018); Census 2000–2010 Comparability Data, SOCIAL EXPLORER, <https://www.socialexplorer.com/tables/COT2000> (under “Census Tract” and “Multnomah County, Oregon” select tracts 22.03, 23.03, 24.01, 24.02, 25.01, 31, 32, 33.01, 33.02, 34.01, 34.02, 36.01, 36.02, 37.02; then select “T54. Hispanic or Latino Origin by Race”; view “Black or African American Alone”) (last visited Dec. 21, 2018).

113. American Community Survey 2012–2016 (5-year estimates), SOCIAL EXPLORER, [https://www.socialexplorer.com/tables/ACS2016\\_5yr](https://www.socialexplorer.com/tables/ACS2016_5yr) (under “Census Tract” and “Multnomah County, Oregon” select tracts 22.03, 23.03, 24.01, 24.02, 25.01, 31, 32, 33.01, 33.02, 34.01, 34.02, 36.01, 36.02, 37.02; then select “T1. Total Population” and “T3. Land Area (Sq. Miles)”) (last visited Dec. 21, 2018).

114. Portland Hous. Bureau, *supra* note 111, at 1.

115. Ackerman, *supra* note 110.

116. Portland Hous. Bureau, *supra* note 111, at 2.

117. Ackerman, *supra* note 110.

118. Portland Hous. Bureau, *supra* note 111, at 2.

119. Edward J. SanFilippo, *King, Portland, Oregon: A Neighborhood in Transition*, KING NEIGHBORHOOD ASS'N 4 (Dec. 7, 2011), <http://kingneighborhood.org/wp-content/uploads/2014/07/King-Neighborhood-Edward-J.-SanFilippo.pdf>.

district.<sup>120</sup> Following the creation of the ICURA, wealthier, white residents poured into inner N/NE Portland, and median home values skyrocketed in several areas of the ICURA.<sup>121</sup> Meanwhile, the area continued to see a mass exodus of African-Americans.<sup>122</sup> From 2000 to 2016, the areas lost more than half of its African-American population.<sup>123</sup>

By the early 2010s, African-American leaders in Portland had grown disgruntled with the ICURA projects for spurring the ongoing displacement of African-American residents.<sup>124</sup> Displacement concerns came to a head in November 2013, when the City announced the discounted sale of a property in the area for a commercial development anchored by a Trader Joe's grocery store.<sup>125</sup> The deal was vigorously opposed by African-American leaders, who demanded not only that the project be halted (they were successful), but also that the City make a serious affirmative effort to address displacement in the area.<sup>126</sup>

In response, Portland's Mayor announced in 2014 that the City would redirect \$20 million in TIF funding from the ICURA to address residential displacement in inner N/NE Portland, with funding decisions made pursuant to a community-driven process and housing strategy.<sup>127</sup> Over the next three years, the amount of tax increment funding dedicated towards affordable housing and mitigating displacement in the area grew to \$100 million, to be spent over a six-year period.<sup>128</sup>

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120. *Interstate Corridor*, PROSPER PORTLAND, <https://prosperportland.us/portfolio-items/interstate-corridor> (last visited Dec. 21, 2018).

121. For example, home values in the King neighborhood tripled from 2000 to 2016. American Community Survey 2012–2016 (5-year estimates), SOCIAL EXPLORER, [https://www.socialexplorer.com/tables/ACS2016\\_5yr](https://www.socialexplorer.com/tables/ACS2016_5yr) (under “Census Tract” and “Multnomah County, Oregon” select tracts 33.01 and 33.02; then select “T101. Median House Value for All Owner-Occupied Housing Units”); Census 2000, SOCIAL EXPLORER, <https://www.socialexplorer.com/tables/C2000> (under “Census Tract” and “Multnomah County, Oregon” select tracts 33.01 and 33.02”; then select “T163. Median House Value For All Owner-Occupied Housing Units”).

122. Nikole Hannah-Jones, *In Portland's Heart, 2010 Census Shows Diversity Dwindling*, OREGONIAN (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).

123. American Community Survey 2012–2016 (5-year estimates) and Census 2000–2010 Comparability Data, SOCIAL EXPLORER, *supra* note 112.

124. Dennis C. Theriault, *A Leap of Faith*, PORTLAND MERCURY (Mar. 4, 2015), <https://www.portlandmercury.com/portland/a-leap-of-faith/Content?oid=15109659>.

125. *Id.*

126. Associated Press, *Trader Joe's Drops Black-Neighborhood Store Plan*, YAHOO NEWS (Feb. 3, 2014), <https://www.yahoo.com/news/trader-joe-39-drops-black-neighborhood-store-plan-224732374.html>; Portland African American Leadership Forum, *PAALF Letter Regarding Trader Joe's* (Dec. 18, 2013), <https://www.documentcloud.org/documents/929379-paalf-letter-regarding-trader-joes.html>.

127. Theriault, *supra* note 124.

128. Portland Hous. Bureau, *N/NE Neighborhood Housing Strategy*, CITY OF PORTLAND, OR., <https://www.portlandoregon.gov/phb/72705> (last visited Dec. 21, 2018); Portland



*The North/Northeast Neighborhood Housing Strategy:  
A Community-Driven Plan*

From the beginning, the guiding principles behind the housing strategy for the area—what became the North/Northeast Neighborhood Housing Strategy (Strategy)—were to (1) prioritize community involvement in developing and implementing the strategy; and (2) provide low-income residents with the ability to remain and return to their community.<sup>129</sup> The development of the Housing Strategy began in 2014 with a series of meetings with community leaders, including members of the Portland African American Leadership Forum and faith leaders, to consider the best ways to engage the community in developing the housing strategy.<sup>130</sup> This group eventually formed into an advisory committee to help steer the outreach process and strategy development.

After a series of community forums in 2014, backed by robust community outreach (more than 450 community members ended up participating), the Portland City Council adopted the Housing Strategy in early 2015.<sup>131</sup> To address “the legacy of displacement” in inner N/NE Portland, the five-year plan includes a menu of goals, priorities, and programs, split into four categories with specific goals and dollar allocations.<sup>132</sup>

The creation of new affordable homeownership opportunities for low-income households is a key goal of the Strategy.<sup>133</sup> The primary tool for pursuing this goal is a down-payment-assistance loan program, where families making up to eighty percent of the area median income can apply for a down payment assistance loan of up to \$100,000.<sup>134</sup> The loan is an interest-free second mortgage funded by the Portland Housing Bureau (PHB), with repayment deferred until the sale of the home.<sup>135</sup> The City also

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Hous. Bureau, *Requested Budget Year 2017-18*, CITY OF PORTLAND, OR. 88 (Jan. 30, 2017), <https://www.portlandoregon.gov/phb/article/652810>.

129. Telephone Interview with Dr. Steven Holt, Committee Member, N/NE Housing Strategy Oversight Committee (Feb. 22, 2018).

130. *Id.*

131. Portland Hous. Bureau, *North/Northeast Neighborhood Housing Strategy Community Forum Summary*, CITY OF PORTLAND, OR. 2, <https://www.portlandoregon.gov/phb/article/652858> (last visited Dec. 21, 2018); Theriault, *supra* note 124; Portland Hous. Bureau, *North/Northeast Neighborhood Housing Strategy Executive Summary*, CITY OF PORTLAND, OR., <https://www.portlandoregon.gov/phb/article/655457> (last visited Dec. 21, 2018).

132. Portland Hous. Bureau, *N/NE Neighborhood Housing Strategy*, *supra* note 128.

133. Portland Hous. Bureau, *North/Northeast Neighborhood Housing Strategy Executive Summary*, *supra* note 131, at 3.

134. Portland Hous. Bureau, *Eligibility & Terms*, CITY OF PORTLAND, OR., <https://www.portlandoregon.gov/phb/article/653339> (last visited Dec. 21, 2018); Danny Peterson, *A Pathway to Return*, PORTLAND OBSERVER, Mar. 7, 2018.

135. *Id.*



funds nonprofits to create new affordable homes for sale such as through subsidies for land acquisition.<sup>136</sup>

So far, the City of Portland has struggled to meet the homeownership goals laid out in the Strategy. As of January 2018, only four families had become homeowners through the program.<sup>137</sup> The small number of families served is due in large part to the high cost of single-family homes in the area and the inability of low-income families in the area to qualify for mortgages to cover the purchase price, even after receiving the down-payment-assistance loan.<sup>138</sup>

The Housing Strategy also focuses on the development and preservation of affordable rental housing.<sup>139</sup> As of mid-2018, at least 350 affordable apartment units in seven developments had been built or were under development in the ICURA.<sup>140</sup>

*The Preference Policy: Providing Displaced Residents with an Opportunity to Return*

A core feature of the Housing Strategy is the N/NE Preference Policy.<sup>141</sup> The policy, which is available for both homeownership and rental units, is used to determine the order of applicants on waiting lists for affordable housing developments that have been funded with ICURA TIF funds or whose developers agree to participate. Priority is given first to families who owned property that was taken by the City through eminent domain for urban renewal projects, then to those with generational ties to the area.<sup>142</sup> Qualifying for a preference does not guarantee eligibility for the affordable housing—given that applicants must still meet the specific criteria of the program in question—but the preference policy endeavors to redress decades of harmful city policies that marginalized and displaced

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136. Portland Hous. Bureau, *North/Northeast Neighborhood Housing Strategy Executive Summary*, *supra* note 131, at 3.

137. Portland Hous. Bureau, *North/Northeast Neighborhood Housing Strategy Oversight Committee Annual Report 2017*, CITY OF PORTLAND, OR. 18, <https://www.portlandoregon.gov/phb/article/681514> (last visited Dec. 21, 2018).

138. *Id.* at 10.

139. Portland Hous. Bureau, *North/Northeast Neighborhood Housing Strategy Executive Summary*, *supra* note 131, at 3.

140. The data come from numerous online sources to confirm which developments were still in active development or had been completed, including Portland Hous. Bureau, *N/NE Neighborhood Housing Strategy—Annual Reports*, City of Portland, Or., <https://www.portlandoregon.gov/phb/74515> (last visited Dec. 21, 2018).

141. *N/NE Preference Policy Obligations*, CITY OF PORTLAND, OR., <https://www.portlandoregon.gov/phb/article/691183> (last visited Dec. 21, 2018).

142. Portland Hous. Bureau, *Supplemental Information: N/NE Affordable Housing Preference Policy*, CITY OF PORTLAND, OR., <https://www.portlandoregon.gov/phb/article/653971> (last visited Dec. 21, 2018).

many longtime residents by giving those residents a priority for accessing new affordable housing opportunities in the area.<sup>143</sup>

Whenever an affordable housing development comes on line, PHB advertises the openings and households apply to receive preference for placement. As of January 2018, sixty-five families have been housed in subsidized units in N/NE Portland using the preference policy.<sup>144</sup>

Several issues with the Preference Policy have arisen since its adoption, including confusion around how the policy works.<sup>145</sup> Many current and former residents received high points for preference, only to find out later that they did not meet the income requirements for the program they applied for, or they faced difficulty in qualifying for mortgages to purchase the homeownership units.<sup>146</sup> Going forward, the PHB has committed to actively providing clear and accurate information about the process to applicants.<sup>147</sup>

*The Community Oversight Committee: Providing Ongoing  
Transparency and Accountability*

The N/NE Portland Community Oversight Committee (Oversight Committee) has provided critical transparency and oversight over the City's implementation of the N/NE Neighborhood Housing Strategy, ensuring that the implementation of the Community Development Initiative (CDI) action plan is in line with the values and goals of the community articulated in the plan.<sup>148</sup> The committee is made up of community leaders and subject matter experts (affordable housing, law, financing, civil rights, etc.), and at least one committee member must be a beneficiary of an affordable housing program.<sup>149</sup>

The Oversight Committee does not have binding decision-making power, but rather provides recommendations to the Housing Commissioner, Mayor, and City Council on Housing Strategy projects.<sup>150</sup> The Oversight Committee generally meets every other month and also issues an annual report closely monitoring the City's progress towards meeting the

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143. *Id.*

144. Portland Hous. Bureau, *North/Northeast Neighborhood Housing Strategy Oversight Committee Annual Report 2017*, *supra* note 137, at 9.

145. Holt, *supra* note 129.

146. *Id.*

147. Memorandum from Shannon Callahan, Interim Dir., Portland Hous. Bureau, to the N/NE Neighborhood Housing Strategy Oversight Committee (May 3, 2018), <https://www.portlandoregon.gov/phb/article/683202> (regarding the 2017 N/NE Neighborhood Housing Strategy Oversight Committee Annual Report).

148. Portland Hous. Bureau, *North/Northeast Neighborhood Housing Strategy Executive Summary*, *supra* note 131, at 1.

149. Portland Hous. Bureau, *Portland Housing Bureau North and Northeast Portland Housing Strategy Community Oversight Committee Charter*, CITY OF PORTLAND, OR. (Mar. 17, 2015), <https://www.portlandoregon.gov/phb/article/659902>.

150. *Id.*

goals in the N/NE Neighborhood Housing Strategy.<sup>151</sup> Developers seeking city permission for new development projects must first present to the committee on how the project will serve the goals of the Strategy.<sup>152</sup>

#### *The Community Development Initiative*

In 2016, Prosper Portland, the city's economic and urban development agency, created the CDI to guide the expenditure of the remaining uncommitted ICURA TIF funds through 2021.<sup>153</sup> The CDI development process followed the Neighborhood Housing Strategy precedent, engaging approximately 200 community members to develop an action plan on how to spend the funds.<sup>154</sup> The CDI action plan was developed with the specific goal of growing economic prosperity for African-American residents and other residents of color that had not fully participated in or benefited from past ICURA projects.<sup>155</sup> The CDI has an oversight committee modeled on the N/NE Community Oversight Committee.<sup>156</sup>

#### *Mitigating Tenant Displacement Through a Tenant-Protection Ordinance*

In 2016, the City adopted a new citywide tenant-protection ordinance, which is not specific to N/NE Portland but does help address concerns raised there and elsewhere about displacement pressures on Portland renters due to increasing rents.<sup>157</sup> The ordinance requires landlords to pay from \$2,900 to \$4,500 (depending on the number of bedrooms) in relocation assistance to tenants when their rents are increased by more than ten percent over a twelve-month period.<sup>158</sup> Landlords must also provide tenants with at least ninety days' notice of rent increases.<sup>159</sup> A tenant has six months from the effective date of the rent increase to provide the landlord with

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151. Holt, *supra* note 129. See generally Portland Hous. Bureau, *Meeting Materials and Video*, CITY OF PORTLAND, OR., <https://www.portlandoregon.gov/phb/74485> (last visited Dec. 21, 2018) (containing meeting materials for the N/NE Community Oversight Committee); Portland Hous. Bureau, *N/NE Neighborhood Housing Strategy—Annual Reports*, *supra* note 140.

152. Holt, *supra* note 129.

153. *North/Northeast Community Development Initiative Action Plan*, PROSPER PORTLAND 3 (Jan. 2017), <https://prosperportland.us/wp-content/uploads/2016/08/NNECDI-Action-Plan-web.pdf>.

154. *Id.*

155. *Id.* at 1, 4.

156. *Id.* at 20.

157. PORTLAND, OR., CODE § 30.01.085.C; Jessica Floum, *Portland City Council Extends Renter Protection and 'Housing Emergency' Policies*, OREGONLIVE (Oct. 4, 2017), [http://www.oregonlive.com/politics/index.ssf/2017/10/portland\\_city\\_council\\_extendpo.html](http://www.oregonlive.com/politics/index.ssf/2017/10/portland_city_council_extendpo.html); Jessica Floum, *Portland Landlords Must Pay Relocation Costs to Evict Tenants Without Cause*, OREGONLIVE (Oct. 3, 2017), [http://www.oregonlive.com/politics/index.ssf/2017/02/portland\\_landlords\\_must\\_pay\\_re.html](http://www.oregonlive.com/politics/index.ssf/2017/02/portland_landlords_must_pay_re.html).

158. PORTLAND, OR., CODE § 30.01.085.B, C.

159. *Id.* § 30.01.085.C.

a notice to terminate the rental agreement. If the tenant decides instead to continue residing in the unit, the tenant must pay back the relocation assistance.<sup>160</sup>

The following landlord actions also trigger the financial assistance and ninety-day notice requirements:

- Service of a no-cause eviction notice (a landlord can evict a tenant only for reasons listed in the ordinance);
- Substantial changes in lease terms; and
- Refusal to renew the lease.<sup>161</sup>

Certain types of housing units and landlords are exempt from the ordinance, including dwelling units occupied by the landlord and units that are the landlord's principal residence rented on a temporary basis.<sup>162</sup> Soon after the ordinance was adopted, a group of landlords challenged the law in state court, arguing that the law violated the state's ban on rent control. The court upheld the ordinance, and the ruling is now on appeal.<sup>163</sup>

### Conclusion

Portland's new and innovative efforts to mitigate displacement in inner N/NE Portland and provide long-time residents with the opportunity to stay and return—including through a preference policy, city-wide tenant relocation protections, and \$100 million in investment in the N/NE Neighborhood Housing Strategy—will be interesting to follow and evaluate over the coming years. While these efforts are still relatively new, the ongoing work in the area offers many lessons for other communities seeking to mitigate the displacement of vulnerable residents. Portland's strategies and programs stand out for their community-centered focus, large levels of financial backing from the city, and the emphasis on providing ongoing transparency and accountability to the community.

Portland's dedication to providing displaced residents with the opportunity to return to their communities via the Preference Policy is especially innovative and has the potential to serve as a national model, at least for families seeking affordable rental housing. For neighborhoods that have experienced large levels of property appreciation, the goal of providing displaced residents with access to affordable homeownership has proven to be much more difficult to fulfill.

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160. *Id.*

161. Portland Hous. Bureau, *Mandatory Renter Relocation Assistance*, CITY OF PORTLAND, OR., <https://www.portlandoregon.gov/phb/74544> (last visited Dec. 21, 2018).

162. *Id.*

163. Andy Giegerich, *Landlords Appeal Portland Eviction Relocation Assistance Ruling*, PORTLAND BUS. J. (Aug. 11, 2017), <https://www.bizjournals.com/portland/news/2017/08/11/landlords-appeal-portland-eviction-relocation.html>.

### Part III: Eight Cross-Cutting Lessons Learned for Reducing Displacement in Gentrifying Neighborhoods

From these three case studies, we have drawn a number of cross-cutting lessons for housing and community development practitioners working to reduce the displacement of vulnerable residents from gentrifying communities.

*Lesson One: Include Strategies for Addressing Displacement in Public Revitalization Projects and Major Infrastructure Investments.*

In some neighborhoods, the shift from the need for revitalization to the need for anti-displacement measures can occur quickly. When a city institutes revitalization programs or otherwise makes significant investments in a community, such as new transit infrastructure, it should anticipate displacement and incorporate affordable preservation and other displacement mitigation strategies into those plans up front, rather than reacting to this need later on.

In both Columbia Heights in the District of Columbia and inner North/Northeast Portland, for example, if displacement mitigation strategies had been integrated into initial revitalization strategies, many more affordable units could have been preserved and fewer vulnerable residents impacted. If a city has not addressed displacement up front, it should engage in active monitoring of how its revitalization projects and major infrastructure investments are impacting vulnerable residents and be prepared to act quickly to adapt or revamp its strategies.

*Lesson Two: Incorporate Community Voices Throughout the Development and Implementation of Displacement Mitigation Plans and Strategies.*

Active community engagement helps ensure that plans and strategies address community needs and brings critical transparency and accountability to the process. The inclusion in development plans of specific goals and timelines also improves accountability. Effective engagement requires strong city efforts to reduce barriers to participation and connect with directly impacted residents, including those who already have been displaced.

Efforts to mitigate displacement in the Guadalupe neighborhood in Austin have been continually anchored in the community, beginning with a community-generated plan and actionable strategies for addressing displacement and preserving the neighborhood.<sup>164</sup> The N/NE Portland Neighborhood Housing Strategy was likewise developed with robust community input and provides specific targets, strategies, and goals to address displacement in a defined geographical area.<sup>165</sup> The annual evaluations and regular reviews conducted by the N/NE Portland Oversight

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164. See discussion on page 45.

165. See discussion on pages 60–61.

Committee<sup>166</sup> have been critical to identifying deficiencies and changes needed to the programs used under the Housing Strategy.

*Lesson Three: Develop the Capacity of Tenants and Other Vulnerable Groups to Be Active Participants in Reducing Displacement in Gentrifying Communities.*

Building the capacity of tenants and other vulnerable groups is critical to the implementation of many important displacement mitigation strategies, including resident purchases of apartment complexes. Building vulnerable residents' capacity is also important in building political leverage needed to defeat policies that facilitate displacement.

Financial support for capacity building should include funding community organizing and technical assistance. Enhanced legal protections for vulnerable tenants—such as strong protections from retaliation, a right to purchase, and a right to organize—are also important tools for enabling tenants to be active participants in mitigating displacement.

The District of Columbia's strong tenant protections, with enforcement support by the Office of Tenant Advocacy, along with city funding for tenant organizing groups and technical assistance providers, have all been critical to the District's successful preservation of apartments under the District of Columbia's Tenant Opportunity to Purchase Act.<sup>167</sup> Likewise, much of the Guadalupe neighborhood's success in mitigating displacement has arisen out of the early support that residents received to mobilize against an eminent domain project and then create a displacement mitigation plan and community development corporation.<sup>168</sup> These supports laid the foundation for decades of successful work to mitigate displacement of vulnerable residents in the neighborhood.

*Lesson Four: Dedicate Large Levels of Public Funding for Displacement Mitigation.*

The implementation of displacement mitigation strategies at a scale large enough to have a systemic impact requires large financial commitments equivalent to or greater than city investments in transportation and other important civic endeavors. The best financial commitments are long-term and do not come from a city's general fund, thus avoiding annual budget battles. Programs that serve the most vulnerable residents of a community require the greatest levels of investment. Producing and preserving affordable housing at scale, like widening freeways or building regional parks, is an undertaking with costs that are often startling to laypeople.

In Columbia Heights, \$48 million in investments from the D.C. Housing Production Trust Fund since 2001 has supported the creation and

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166. See discussion on pages 62–63.

167. See discussion on pages 52–55.

168. See discussion on pages 44–45.

preservation of 321 units, a subsidy of close to \$150,000 per unit.<sup>169</sup> The District has committed over \$100 million annually to D.C.'s Housing Production Trust Fund (HPTF)—the largest such commitment by a city in the United States.<sup>170</sup> The City of Portland is funding implementation of the N/NE Portland Neighborhood Housing Strategy with a commitment of \$100 million in tax increment financing over a six-year period, an average of \$17 million per year.<sup>171</sup>

*Lesson Five: Intervene Early to Remove as Much Land  
from Market Pressures as Possible.*

As gentrification picks up steam in a neighborhood, it becomes much more difficult to feasibly acquire properties for the preservation and construction of affordable housing. For neighborhoods susceptible to gentrification or in the very early stages of gentrifying, it can be hard to envision the rapid rise in property values that will come in later stages of gentrification. But buying land and housing in this early period creates more capacity to mitigate displacement when change does come. For example, Guadalupe neighborhood's affordable housing inventory is almost all located on land that was acquired before gentrification picked up steam in the neighborhood.<sup>172</sup> And a large portion of the affordable housing in Columbia Heights is rent-restricted rental housing that was built prior to the neighborhood's gentrification.<sup>173</sup>

When land is acquired to mitigate displacement, it should be taken permanently out of the speculative real estate market wherever possible. Mechanisms such as community land trusts, long-term affordability restrictions, and nonprofit and public ownership of land protect precious public investments in affordable housing and ensure opportunities for future generations of low-income residents to live in a gentrifying neighborhood. While stewardship of affordable housing investments is best achieved through community and public ownership of affordable housing developments and the land underneath the homes, long-term deed restrictions also help insure affordability for generations. Another benefit of community ownership of land—such as GNDC's "four corners strategy" of acquiring as many lots as possible on each corner of each neighborhood block<sup>174</sup>—is providing residents with stronger control over future redevelopment.

The Guadalupe Neighborhood Development Corporation's early affordable homes were sold with rights of first refusal but without caps on the resale price. After gentrification intensified, GNDC could not afford to exercise its right of refusal on these homes, and several were resold at

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169. See discussion on page 54.

170. See discussion on page 54.

171. See discussion on page 59.

172. See discussion on pages 45–46.

173. See discussion on pages 52, 57.

174. See discussion on pages 45–46.



market prices far exceeding what a low-income family could afford. Today, GNDC's leaders regret that they did not utilize stronger affordability protections in those earlier home sales, and the organization now exclusively uses the community land trust model for its homeownership units.<sup>175</sup>

*Lesson Six: Develop a Network of High Capacity Organizations to Identify and Act on Affordable Housing Preservation Opportunities.*

Essential to preserving existing affordable housing is having a coordinated network of preservation groups and other stakeholders who meet regularly to closely monitor at-risk affordable rental properties and collaborate on proactive preservation interventions. Effective monitoring includes creating and actively updating a database of at-risk properties that incorporates detailed information about properties' expiring subsidies, habitability, and other indicators of vulnerability. The D.C. Preservation Network (DCPN)—one of the best national models for affordable housing preservation—has become a critical forum for D.C. preservation groups to share information and resources, track at-risk buildings, and coordinate preservation efforts.<sup>176</sup>

*Lesson Seven: Be Ready to Adapt Strategies to Changing Neighborhood Conditions.*

To make progress, city leaders and housing and community development practitioners need to be ready to mix and match a variety of strategies—and adapt those strategies—based on the conditions in a specific neighborhood. What works best in an early-stage gentrifying neighborhood may not work best in a late stage gentrifying neighborhood. For example, in the Guadalupe neighborhood, land acquisition was a successful strategy in the late 1990s when the neighborhood was in the early stages of gentrifying and lots cost less than \$50,000, but is not feasible today when lots sell for more than \$500,000. To be successful in mitigating displacement, Guadalupe's leaders have had to adopt new strategies, such as densifying the amount of affordable housing on its existing lots.

*Lesson Eight: Develop Realistic Expectations of What Constitutes Success.*

The difficult fact is that, unlike in other areas of city planning and management, such as transportation or open space, "model cities" that stand out as clear inspirations to follow in reducing residential displacement in the face of market pressures are difficult to find. This is because the broader forces fueling both inversion at the regional scale (i.e., the increase in demand among the well-off for housing in city centers<sup>177</sup>) and gentrification in

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175. See discussion on pages 47–48.

176. See discussion on pages 55–61.

177. See discussion on page 41.



particular neighborhoods are largely out of the control of local elected officials. Even with large-scale concentrated investments in a neighborhood to mitigate residential displacement, it is next to impossible to entirely eliminate displacement in the face of these market pressures.

Success, if it is achieved, will take years of public and private sector focus on comprehensive displacement mitigation strategies—and will likely take the form of reducing and mitigating, rather than altogether halting, residential displacement. Local leaders and practitioners have to set realistic expectations for what can be achieved, the resources that need to be invested to substantially reduce displacement, and how long it will take for real results to manifest themselves.

### **Conclusion**

The three case studies featured in this article highlight several of the strategies and issues that housing and community development practitioners should consider when addressing the displacement of low-income residents in gentrifying neighborhoods. As these case studies underscore, even with large levels of city investment, displacement is going to continue occurring in cities with robust job and housing markets. But, with the right strategies and resources, it is possible to make a difference in maintaining some degree of affordability and preserving communities.



# Building by Right: Social Equity Implications of Transitioning to Form-Based Code

*Daniela A. Tagtachian, Natalie N. Barefoot,  
and Adrienne L. Harreveld*

Part I: Introduction

Part II: Form Based Codes and New Urbanism

Part III: Case Studies

A. City of Miami, Florida: Miami21

B. Downtown Nashville, Tennessee: Urban Overlay

C. Unincorporated Miami-Dade County, Florida: Urban Center  
Districts

D. Gulfport, Mississippi: Optional Overlay

Part IV: Legal Responses

Part V: Conclusion

## I. Introduction

Zoning, whether with intent or by effect, has played a role in promoting municipal inequity<sup>1</sup> and perpetuating segregation.<sup>2</sup> The recent trend

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1. See, e.g., Elliott Anne Rigsby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, THE CENTURY FOUNDATION (June 23, 2016), <https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty>.

2. Sacoby Wilson, Malo Hutson & Mahasin Mujahid, *How Planning and Zoning Contribute to Inequitable Development, Neighborhood Health, and Environmental Justice*, 1 ENVTL. JUST. 211, 212 (2008), [www.ced.berkeley.edu/downloads/pubs/faculty/hutson\\_2008\\_environ-health.pdf](http://www.ced.berkeley.edu/downloads/pubs/faculty/hutson_2008_environ-health.pdf). That municipalities are allowed to design their own zoning ordinances facilitates municipalities implementing planning and zoning standards and regulations, that address the desires of privileged populations and neglect the needs of disadvantaged populations. *Id.* Further, “[D]iscriminatory planning and exclusionary

of municipalities to transition their zoning frameworks from traditional codes to form-based codes<sup>3</sup> has occurred with a sight to address urban concerns such as access to public transit and limiting urban sprawl, but has not focused on alleviating municipal equity concerns or even ensuring the implementation of the codes do not exacerbate existing inequities. Form-based codes<sup>4</sup> currently affect almost fourteen percent of the U.S. population<sup>5</sup> and provide an opportunity to create communities truly reflective of the democratic principles of equality, inclusion, and justice.<sup>6</sup> However this aspiration can only be achieved if policies and practices that disproportionately harm or increase the likelihood of harm to vulnerable communities are contemplated and addressed. This article identifies through case studies the extent of community involvement in the decision-making process surrounding form-based codes and their potential discriminatory impact. Additionally, this article provides mechanisms to address these social equity issues that can be tailored to each community's unique experiences and needs. This article is not a critique of the merits of form-based codes as a regulatory tool for land development, but rather its purpose is to shed light on two aspects of implementation common to form-based codes across the country, the limited extent to which low-income minority communities are able to meaningfully participate in the decision-making

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zoning contribute to unequal development within metropolitan areas. . . . This results in segregated communities along the lines of race and class and the creation of an urban underclass that is denied access to mainstream opportunities." *Id.* (internal citations omitted).

3. The vast majority (eighty-eight percent) of all form-based codes in the United States have been adopted after 2003, with the highest frequency of adoptions occurring between 2008 and 2010. See Hazel Borys & Emily Talen, *February 2017 Case Studies*, PLACEMAKERS, [http://www.placemakers.com/wp-content/uploads/2012/08/CodesStudy\\_Feb-2017.htm](http://www.placemakers.com/wp-content/uploads/2012/08/CodesStudy_Feb-2017.htm) (last visited Mar. 30, 2019).

4. Form-based codes are a type of zoning regulation that use aesthetic form rather than land uses as the organizing criteria for land development and, as such, encourage mixed-use development. In an interview with Public Square, Victor Dover, urban designer and the principal of Dover, Kohl & Partners Town Planning, explained: "A form-based code is organized around the type of place you're trying to create rather than land usage. Conventional zoning will have sections and subsections devoted to land uses, like residential, industrial or commercial, but form-based codes recognize that healthy cities are, first of all, mixed-use places and they depend on things that have more to do with physical design than land use, like the building-to-street relationship." Robert Steuteville, *Great Idea: Form-Based Codes*, PUBLIC SQUARE (May 10, 2017), <https://www.cnu.org/publicsquare/2017/05/10/great-idea-form-based-codes>.

5. *February 2017 Case Studies*, *supra* note 3 ("The population percentage is calculated at the time of adoption and therefore does not include any densification over time.").

6. "The political, legal, and moral equality of every citizen is a fundamental value of democracy. These aspects of equality are summarized in the idea that there can be no second-class citizens in democracy." CENTER FOR CIVIC EDUCATION, *ELEMENTS OF DEMOCRACY: THE FUNDAMENTAL PRINCIPLES, CONCEPTS, SOCIAL FOUNDATIONS, AND PROCESSES OF DEMOCRACY* 18 (2007).

process and the increased likelihood of displacement of these same communities, and to propose mechanisms that will strengthen form-based codes by addressing or decreasing the likelihood of these inequitable effects.

Form-based codes are touted as one of the only viable ways to combat the nationwide affordable housing<sup>7</sup> and environmental crises<sup>8</sup> perpetuated by urban sprawl.<sup>9</sup> Form-based codes are a type of zoning regulation that streamline the approval process for mixed-use development in cities; encourage higher density<sup>10</sup> and walkability;<sup>11</sup> and use aesthetic form

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7. Danielle Arigoni et al., *Affordable Housing and Smart Growth: Making the Connection*, Smart Growth Network Subgroup on Affordable Housing 18–21 (2001), available at [https://www.uc.edu/cdc/urban\\_database/housing/affordable\\_housing\\_and\\_smart\\_growth-making\\_the\\_connection.pdf](https://www.uc.edu/cdc/urban_database/housing/affordable_housing_and_smart_growth-making_the_connection.pdf) (last visited Mar. 30, 2019). For general information on the current affordable housing crisis, see J. Ronald Terwilliger, *Solving the Affordable Housing Crisis: The Key to Unleashing America's Potential*, 26 J. Affordable Hous. & Cmty. Dev. L. 255 (2017) (In 2016, “nearly twenty-one million families paid rents considered unaffordable under federal standards. . . . Approximately eleven million of these households were ‘severely’ cost-burdened, spending in excess of fifty percent of their incomes on housing alone” (emphasis added)); see also Harvard Joint Center for Housing Studies, *America’s Rental Housing 2017*, at 26 (Dec. 2017), available at <https://www.jchs.harvard.edu/research-areas/reports/americas-rental-housing-2017> (last visited Mar. 30, 2019).

8. U.S. EPA, ABOUT SMART GROWTH, <https://www.epa.gov/smartgrowth/about-smart-growth#benefits> (last visited Mar. 30, 2019) (“Development guided by smart growth principles can minimize air and water pollution, reduce greenhouse gas emissions, encourage cleanup and reuse of contaminated properties, and preserve natural lands. . . . Smart growth practices can lessen the environmental impacts of development with techniques that include encouraging compact development, reducing impervious surfaces, safeguarding environmentally sensitive areas, mixing land uses (e.g., homes, offices, and shops), promoting public transit, and improving pedestrian and bicycle amenities.”).

9. Anne Maurer, *Smart Growth Principles and the Fair Housing Act: An Examination of the Loudoun County Revised General Plan*, 13 J. AFFORDABLE HOUS. & CMty. DEV. L. 239, 241 (2004) (“The danger that it [urban sprawl] poses to the environment is particularly daunting, for [v]irtually every environmental problem—from air and water pollution to the destruction of wetlands and wildlife habitat, from global climate change to overflowing landfills—has been linked to the land consumption and pollution that result from current land use and transportation patterns.” (citing Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 267–68 (2000))).

10. *The Charter of the New Urbanism*, CONGRESS FOR THE NEW URBANISM, <https://www.cnu.org/who-we-are/charter-new-urbanism> (last visited Mar. 30, 2019) (“Appropriate building densities and land uses should be within walking distance of transit stops, permitting public transit to become a viable alternative to the automobile.”).

11. *Id.* (“The physical organization of the region should be supported by a framework of transportation alternatives. Transit, pedestrian, and bicycle systems should maximize access and mobility throughout the region while reducing dependence upon the automobile.”).

rather than land use as the organizing criteria.<sup>12</sup> These codes are quite different from traditional or Euclidian zoning, the mainstay of zoning laws that for generations have divided land into zones with a specific regulatory character focused on the primary use (i.e., residential, commercial, industrial, agricultural),<sup>13</sup> and contributed to the creation of the urban sprawl that form-based codes seek to alleviate.<sup>14</sup> The shift from Euclidian to form-based code often requires a complete overhaul of municipalities' zoning regulations. Importantly, this overhaul can often occur in a single legislative action.<sup>15</sup>

Once a form-based code gets adopted, typically large areas are up-zoned—rezoned to increase intensity and/or density—in order to modify the urban design and to allow for mixed-use developments. Rezoning is a necessary component to transitioning to form-based code because it is the only way to implement the new urban planning and design vision in a traditionally zoned municipality. As traditional zoning separates land uses, this rezoning frequently consists of up-zoning to increase density and development often around mass-transit options. The areas that are up-zoned by form-based codes are often located where low-income minority communities that have been historically disenfranchised and discriminated against reside.<sup>16</sup>

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12. "Form-based codes, pioneered in the 1980s, still address land use—keeping incompatible uses apart—but focus more attention on those physical aspects of private buildings that impact the quality of the public realm. . . . They also replace our current dangerous street standards with designs that encourage walking and biking." Jeff Peck, *A Step-by-Step Guide for Fixing Badly Planned Cities*, CITY LAB (Oct. 9, 2018), <https://www.citylab.com/design/2018/10/5-rules-designing-better-more-walkable-cities/569914> (last visited Mar. 30, 2019).

13. JULIAN CONRAD JUERGENSEMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 4.2, at 80 (1998) (cited in *Black's Law Dictionary* under "Euclidean zoning").

14. Jason T. Burdette, Form-Based Codes: A Cure for the Cancer Called Euclidean Zoning? (2004) (unpublished Major Paper in support of Master of Urban and Regional Planning, Virginia Polytechnic Institute and State University, available at <https://pdfs.semanticscholar.org/d9a1/5fd1e4e64173b337a6cf4afacc9aaa2b51fd.pdf>).

15. See, for example, the creation of the Goulds Urban Center District, which significantly modified the zoning of a historically Black community in unincorporated Miami-Dade County through a single legislative act, discussed *infra* Sections III.C, V.

16. See, for example, Columbia Pike, a historically Black and Brown neighborhood in Arlington, Virginia, to the south of Arlington Boulevard (U.S. Route 50) which adopted a form-based code for commercial centers in 2003. According to Arlington County, "Arlington was one of the first jurisdictions in the nation to apply Form Based Codes to revitalize an existing, older community" and the form-based code is being used "to encourage mixed-use development and to foster a walkable, lively 'Main Street' atmosphere." Arlington County Gov't, PROJECTS & PLANNING: COLUMBIA PIKE FORM BASED CODE—COMMERCIAL CENTERS, <https://projects.arlingtonva.us/neighborhoods/commercial-form-based-code> (last visited Mar. 16, 2019). In an interview with Public Square, Victor Dover, urban designer and the principal of Dover, Kohl & Partners Town

Cities typically invest substantial time and resources to engage stakeholders (including developers and community members) *at the onset* of the process of transitioning to form-based codes. However, once executed, there exists limited opportunity for the meaningful participation of vulnerable communities and fewer avenues to ensure these communities are not disparately impacted. These issues can be addressed by providing for meaningful participation in project development and approvals after up-zoning has occurred and by implementing anti-displacement strategies to protect historically disenfranchised communities. Without additional

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Planning responded to the question “Are you finding that elected officials, developers, planning staff, and citizens are becoming more accepting of the idea of code reform in the direction that New Urbanists are talking about?” by stating:

I have seen examples where they find their way through that thicket and one worthy example is Columbia Pike in Arlington, Virginia. It’s a corridor, already difficult to deal with as Geoff [Dyer, director of design and interim CEO at the City of Lafayette Downtown Development Authority] has mentioned, and a form-based code was adopted for the place. *Unlike the northern side of Arlington, it had seen very little reinvestment for 25 or 30 years. The only new things built during that period were fast food restaurants and car dealerships, mainly because of the so-called “The Arlington Way” in which developers willingly subjected themselves to years of endless hearings, negotiations and proffers of various kinds of community benefits before they could get permission to build anything. They replaced that arduous process with the form-based code and development began immediately.* Developers had a pent up desire to make Columbia Pike more than it was but they weren’t able to get at it because the zoning and *tradition of decision-making stood in the way.* Once that changed with a form-based code, they reinvested hundreds of millions of dollars in the corridor.

Steuteville, *supra* note 4 (emphasis added). Surprisingly, there is no mention of the racial history of the north-south divide and its relationship to the lack of prior investment in the area. As a Jim Crow neighborhood, Columbia Pike was comprised of the county’s Black residents throughout the early twentieth century, and then after Jim Crow laws were abolished and the Fair Housing Act was adopted, “waves of Latino, Asian, and Middle Eastern immigrants” moved into the area due to the availability of affordable housing. G. Stephen Thurston, *Are There Two Arlingtons? Understanding the History Behind Arlington’s North-South Divide and How It’s Shaping Present-Day Perceptions and Realities*, ARLINGTON MAG. (Apr. 27, 2015), <https://www.arlingtonmagazine.com/are-there-two-arlingtons>. Meanwhile, north of Arlington Boulevard remained almost exclusively White and comprised of professionals and “old money.” *Id.* In 2013, Bailey Garfield, a local business owner, expressed his “worr[y] about his future in what is one of the last affordable parts of Arlington.” Patricia Sullivan, *Entrepreneurs and Residents Along Columbia Pike Wait to See What Redevelopment Brings*, WASH. POST (July 23, 2013), [https://www.washingtonpost.com/local/businesses-watch-and-wait-for-columbia-pikes-future/2013/07/27/2dc9ee4c-cc8b-11e2-8845-d970ccb04497\\_story.html?utm\\_term=.d8fd38d5d444](https://www.washingtonpost.com/local/businesses-watch-and-wait-for-columbia-pikes-future/2013/07/27/2dc9ee4c-cc8b-11e2-8845-d970ccb04497_story.html?utm_term=.d8fd38d5d444). He commented that the new luxury apartment buildings on Columbia Pike “have brought people with more disposable income” and his “biggest worry is escalating property values.” *Id.* Moreover, although further developments, including a streetcar and Metro stop, are expected, “the piecemeal development [as of 2013] has unleashed a wave of gentrification that worries longtime residents.” *Id.*

protections to the affected communities, the mass up-zoning and consequent development may occur without significant or meaningful public participation opportunities because form-based codes allow developments to be built as a matter of right,<sup>17</sup> and thereby remove the little leverage that is afforded to communities through notice and public hearing requirements if the up-zoning were requested in traditional zoning. This process is concerning because, across the country, a consistent consequence of the implementation of form-based codes is the increased likelihood of displacement of minority communities coupled with fewer opportunities in the administrative process to voice their concerns.

This article addresses the impacts of form-based codes on communities' abilities to participate meaningfully in the development activities in the places where they live. Following the Introduction in Part I, Part II provides background on form-based codes and the differences between form-based and Euclidian (traditional) zoning. Part III analyzes four areas in the South that have adopted different types of form-based code: the City of Miami (SmartCode), Nashville (Urban Overlay Districts), Unincorporated Miami-Dade County (Urban Center Districts) and Gulfport Mississippi (Optional Overlay). These four municipalities represent a sample of the various methods for implementing form-based code throughout the nation. This section examines the impacts of the implementation of form-based codes on the rates of development in these areas, the resulting demographic shifts, community involvement, and community responses to the implementation of form-based codes. Part IV discusses using the Fair Housing Act as a potential legal challenge to the effects of form-based codes and potential policy solutions to increase the likelihood of meaningful community participation and to decrease the likelihood of displacement.

## II. Form Based Code and New Urbanism

Zoning became prevalent in the United States after the Standard State Zoning Enabling Act (developed in 1921).<sup>18</sup> This act was passed, in part, as a reaction to the air pollution caused by the industrial revolution and the unsuitable and dangerous living conditions that it created for residential neighborhoods adjacent to factories.<sup>19</sup> Zoning was legitimized shortly

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17. For example, see Miami21 definitions section: "By Right: A use allowed pursuant to zoning review and approval of a Building Permit or issuance of a Certificate of Use under Article 7, Section 7.1.2.1. Permitted Uses." In practice, this term means that if a developer is seeking to build in compliance with the code, the development will get approved administratively. See MIAMI, FLA., MIAMI 21 FINAL CODE art. 1, § 1.2 (Jan. 31, 2018), available at [http://www.miami21.org/PDFs/Amended\\_Codes/Miami\\_21\\_Volume\\_1.pdf](http://www.miami21.org/PDFs/Amended_Codes/Miami_21_Volume_1.pdf).

18. *Standard State Zoning Enabling Act and Standard City Planning Enabling Act*, AM. PLANNING ASSOC., <https://www.planning.org/growingsmart/enablingacts.htm> (last visited Mar. 30, 2019).

19. In the 1926 case of *Village of Euclid, Ohio v. Amber Realty Co.*, the Supreme Court described the conditions as follows:



thereafter in 1926, in the U.S. Supreme Court's ruling in *Village of Euclid, Ohio v. Amber Realty Co.*<sup>20</sup> Throughout the twentieth century, traditional (or Euclidean) zoning became widely popularized. Twenty years after *Euclid*, eighty-five percent of communities throughout the country had adopted traditional zoning regulations.<sup>21</sup> The ubiquity of Euclidean zoning along with other federal, state, and local policies increased rates of urban sprawl.<sup>22</sup>

Separating land by use meant that workplaces, recreational spaces (i.e., bars, restaurants, etc.), and residences were not located in the same zones. Because of the dearth of public transportation options available in most cities, the separation of uses created a dependence on automobiles to travel between these spaces. Such automobile dependence required an

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Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed . . . which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. . . .

[T]he exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are . . . aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops, and factories.

272 U.S. at 386–87, 391. “Operating from the premise that everything has its place, [Euclidean] zoning is the comprehensive division of a city into different use zones.” JUERGENSMEYER & ROBERTS, *supra* note 13, § 4.2, at 80 (cited in *Black’s Law Dictionary* under “Euclidean zoning”).

20. *Village of Euclid, Ohio*, 272 U.S. at 396. There, Ambler Realty alleged that the village of Euclid’s zoning regulations were an unconstitutional use of police power, but the Court found that this use of the state’s police power was necessary as cities tried to meet the challenges of a growing and increasingly industrialized society. *Id.*

21. See, e.g., Burdette, *supra* note 14.

22. David Rusk studied 213 urbanized areas and found that, between 1960 and 1990, populations increased from 95 million to 140 million (47%), while urbanized land increased from 25,000 square miles to 51,000 square miles (107%). *Debate on Theories of David Rusk*, 2 *The Regionalist* (Fall 1997). By the end of that time period, density per square mile decreased by 28%. *Id.* Data collected by the U.S. Department of Housing and Urban Development for its State of the Cities 2000 report (1994–1997 time period) show a continuation of this trend that urban areas are expanding at about twice the rate that the population is growing. U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, *THE STATE OF THE CITIES 2000*, at 63 (2000), <https://archives.hud.gov/reports/socrpt.pdf>; see also SIERRA CLUB, *STOP SPRAWL: NEW RESEARCH ON POPULATION, SUBURBAN SPRAWL AND SMART GROWTH*, <https://vault.sierraclub.org/sprawl/population/whitepaper.asp> (last visited Mar. 30, 2019) (“It is important to remember that if there are multiple causes of sprawl, then their impact is multiplied together, so that if population increases by 50%, and density decreases by 50%, land consumed will increase not by 100%, but by 300%. So poor land use makes the impact of population growth worse, and vice-versa.”).

investment in roads and highways, rather than public transportation. This choice led to negative environmental consequences and segregated residential spaces. Urban sprawl grew rapidly throughout the country with development consuming an average of two acres of American farmland per minute between 1922 and 1997<sup>23</sup> and increasing the number of miles driven per capita by seventy-two percent between 1969 and 1990.<sup>24</sup>

As a way to address some of the negative consequences of urban sprawl, the New Urbanists formed as a movement of planners, architects, activists, developers, and environmental activists seeking to address “disinvestment in central cities, the spread of placeless sprawl, increasing separation by race and income, environmental deterioration, loss of agricultural lands and wilderness, and the erosion of society’s built heritage as one interrelated community-building challenge.”<sup>25</sup> A key tool New Urbanists developed to address these challenges was form-based codes.<sup>26</sup> Rather than zoning areas by use, form-based codes organize areas into “transect zones,” in which each zone is distinguished by the allowable amount of intensity and density as part of a transition from rural to urban.<sup>27</sup> In addition to local zoning reforms, New Urbanists seek buy-in from the federal government in promoting sustainable, mixed-use, affordable housing.<sup>28</sup>

In 2003, the global planning and development firm, Duany Plater-Zyberk & Company (one of the founders of New Urbanism), developed SmartCode,<sup>29</sup> a model based on the six “prototypical American rural-to-urban . . . Transect Zones, or T-zones, for application on zoning maps.”<sup>30</sup> SmartCode outlines six ideal transect zones,<sup>31</sup> including the natural zone, rural zone, suburban zone, general urban zone, urban center zone, and

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23. Elizabeth Becker, *2 Acres of Farmland Lost Per Minute, Study Says*, N.Y. TIMES (Oct. 4, 2002), <https://www.nytimes.com/2002/10/04/us/2-farm-acres-lost-per-minute-study-says.html>.

24. Maurer, *supra* note 9, at 241 n.31 (2004) (citing David J. Cieslewicz, *The Environmental Impacts of Sprawl*, in URBAN SPRAWL: CAUSES, CONSEQUENCES & POLICY RESPONSES 26 (Gregory D. Squires ed., 2002)).

25. *The Charter of the New Urbanism*, *supra* note 10.

26. Peck, *supra* note 12.

27. *Tools*, CONGRESS FOR THE NEW URBANISM, <https://www.cnu.org/resources/tools> (last visited Mar. 30, 2019).

28. *The Charter of the New Urbanism*, *supra* note 10.

29. See *The Transect*, CENTER FOR APPLIED TRANSECT STUDIES, <https://transect.org/transect.html> (last visited Mar. 28, 2019).

30. See *id.*

31. “The T-zones are intended to be balanced within a neighborhood structure based on pedestrian sheds (walksheds), so that even T-3 residents may walk to different habitats, such as a main street, civic space, or agrarian land.” *Id.*

urban core.<sup>32</sup> Each zone increases in intensity and density.<sup>33</sup> An increase in intensity and/or density is otherwise known as up-zoning. Many cities adopt these recommended transect zones when transitioning to form-based code.<sup>34</sup>

Since its origins in the 1980s, a total of 387 form-based codes have been adopted throughout the United States, and over 300 more are in progress. As of February 2017, there were a total of 45,162,192 people and 107,966,143 acres of land affected, where the SmartCode had been adopted (14,068,221 people/93,059,407 acres), the SmartCode was in process (4,125,038 people/3,522,248 acres), the Transect Form-Based Codes had been adopted (9,385,163 people/7,016,683 acres), other types of Form-Based Codes had been adopted (17,320,510 people/4,300,639 acres), or discussions on SmartCodes or Form-Based Codes had occurred (1,071,260 people/71,051 acres).<sup>35</sup> Many of these revisions reflect the design principles outlined in SmartCode.<sup>36</sup> The codes are typically adopted as a city ordinance, usually after stakeholders<sup>37</sup> have given input in a public forum, such as a charrette.<sup>38</sup>

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32. Thomas Comitta Associates, Inc., *The Smart Growth Transect for Community and Economic Development*, SMART GROWTH PARTNERSHIP OF WESTMORELAND COUNTY (Sept. 9, 2010), [http://www.smartgrowthpa.org/files/comitta\\_sgpcw\\_11%20x%2017%20page.pdf](http://www.smartgrowthpa.org/files/comitta_sgpcw_11%20x%2017%20page.pdf).

33. "Intensity" represents the amount of gross built area in a given land area, and "density" refers to the number of units in a given land area. Ann Forsyth, *Measuring Density: Working Definitions for Residential Density and Building Intensity* (Design Brief No. 8), DESIGN CENTER FOR AMERICAN URBAN LANDSCAPE (Nov. 2003), <http://annforsyth.net/wp-content/uploads/2018/05/db9.pdf>.

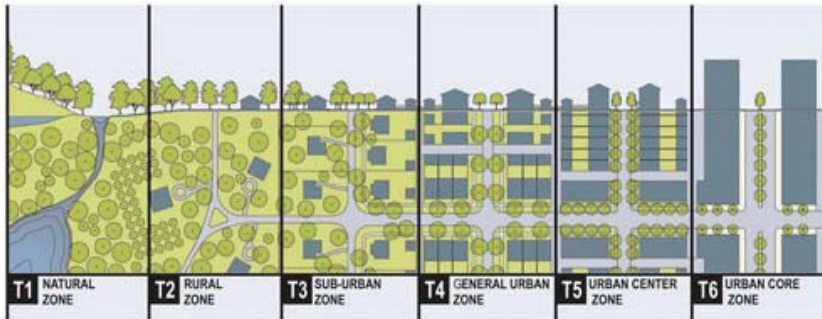
34. See *The Transect*, *supra* note 29; see also SMARTCODE VERSION 9.2, available at <https://transect.org/codes.html> (last visited Mar. 28, 2019).

35. *February 2017 Case Studies*, *supra* note 3 ("The population percentage is calculated at the time of adoption and therefore does not include any densification over time.").

36. See *id.*

37. Stakeholders usually include developers, community members, community leaders, and government officials.

38. Mary Madden & Joel Russell, *How Form-Based Codes Are Written*, PLANNERSWEB (Dec. 5, 2014), <http://plannersweb.com/2014/12/fbc4> ("Developing [the] community vision must be done early in the process, with the active involvement of those affected. One of the best models for how to do this is the community 'charrette,' which is a multi-day open public process with multiple feedback loops for the public to interact with a variety of professionals with complementary expertise in planning, urban design, architecture, transportation, law, public safety, real estate economics, and public administration. The range of professionals involved is typically determined based on the specific context and issues likely to be addressed during the community planning process. . . . A charrette process typically culminates in a place-specific 'vision plan,' which is a heavily illustrated physical plan showing the results of the discussions held at the charrette, embodying the best thinking of the involved professionals and public working together. It is much more than a policy document, showing very specifically how the public realm should be shaped, as well as the nature, location, and character of public spaces and the relationships between buildings and the streets they frame.").



SmartCode Transect Zones

Once form-based codes are adopted, cities have administrative authority to approve or reject building proposals based on whether they fit into the described specifications of that transect zone.<sup>39</sup> In other words, if a proposed building fits into the prescribed aesthetic standards for an area, the proposal will be approved administratively by staff within the city or county's zoning department.<sup>40</sup> Because form-based codes incorporate fewer land-use regulations and embed mass up-zoning into the code, they offer an opportunity for a wide variety of significant land use developments to be approved through the administrative process alone.<sup>41</sup> In contrast, traditional zoning regulates intensity, density, *and* use. And developments that fall outside of these zoning and planning code specifications require a discretionary approval by elected or appointed officials that includes

39. Jim Little, *Pensacola Form-Based Code Proposal in Limbo After Failing to Pass CRA*, PENSACOLA NEWS J. (Oct. 12, 2018), <https://www.pnj.com/story/news/2018/10/12/pensacola-form-based-code-proposal-limbo-after-failing-pass-cra/1602388002> ("Form Based Code is a regulation, not just a guideline, adopted into city law. This type of development code provides predictable results by using physical form, rather than separation of land uses, as the principle for the code. So the developer can build a structure that meets the code, but the public no longer has much of a say in it or a way to tweak it before it's built."); Jacob Ogles, *Groups Begin Scrutinizing Sarasota Code*, SRQ DAILY (Oct. 8, 2018), <https://www.srqmagazine.com/srq-daily/2018-10-08/9293> ("Kate Lowman, a founding member of STOP!, said her great concern right now revolves around process. The Downtown plan implemented an administrative review process for certain projects meeting code requirements to be approved without public hearings. . . . I have reviewed some aspects of the development approval process, and I can see that we will be losing even more public hearings," she says. . . . Unfortunately it looks like this will take us in the wrong direction.").

40. See, e.g., MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.88 (Jan. 22, 2019). Administrative approval means applications for new developments are reviewed by county officials who are tasked with reviewing applications to check for compliance with the County Code. *Id.*; see also Miami, Fla., Miami21 Final Code, *supra* note 17, art. 7, § 7.1.2.1.

41. Ogles, *supra* note 39.

public notice and hearing. Consequently, community members in areas that have adopted form-based codes have expressed concerns with their potential displacement due to up-zoning and the lack of involvement in the decision-making process because of the wide-sweeping administrative authority given to cities to make decisions on how neighborhoods should look and feel without meaningful community input.<sup>42</sup>

It is important to note that up-zoning is a tool and, as such, can result in displacement or in furtherance of affordable housing.<sup>43</sup> While the increase in density can be used to create more affordable housing units, density alone is not enough.<sup>44</sup> Policies also must be implemented to promote affordable housing development.<sup>45</sup> In fact, up-zoning by itself has

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42. Some concerned citizens have referred to the process as “aesthetic authoritarianism by a few unelected elitists.” Charles Gallanter, *Form-Based Code: Aesthetic Authoritarianism*, NEWS & CITIZEN (Aug. 9, 2018), [https://www.stowetoday.com/news\\_and\\_citizen/opinion/letters\\_to\\_the\\_editor/form-based-code-aesthetic-authoritarianism/article\\_f8165b92-9bf5-11e8-8124-8bfa846fd10e.html](https://www.stowetoday.com/news_and_citizen/opinion/letters_to_the_editor/form-based-code-aesthetic-authoritarianism/article_f8165b92-9bf5-11e8-8124-8bfa846fd10e.html) (last visited Mar. 13, 2019). Others are thankful when the code is not adopted because community concerns were not incorporated in the process:

“I’m so relieved,” said Nancy Cypser, trustee of the Woodland Civic Association in East Farmingdale, in response to a decision not to implement form-based code. Cypser said Monday that the consulting firm hired to use the past reports and come up with the “form-based code”—a type of zoning focused on aesthetics and an overall vision of a community—had not incorporated the negative feedback on building height and density from community meetings held in early 2017.

Denise Bonilla, *Babylon Town Abandons Plan to Rezone 109 Acres in East Farmingdale*, NEWSDAY (Oct. 9, 2018), <https://www.newsday.com/long-island/suffolk/east-farmingdale-rezoning-1.21725474>.

43. Randy Shaw, NYC’s ‘Progressive’ Mayor Bill de Blasio Promotes Gentrification, Displacement, BEYOND CHRON. (Sept. 7, 2017), <http://beyondchron.org/nycs-progressive-de-blasio-promotes-gentrification-displacement>.

44. “Increased density is touted as one solution to create more affordable units; yet, while the apartment building boom of recent years has added thousands of new units [in Minneapolis], most are pricey market-rate rentals. Minneapolis has lost approximately 15,000 affordable units since 2000, according to city planners [with the irony being that] [m]ost of those units still exist, but are no longer considered affordable.” Burl Gilyard, *Do the Economics of Density Really Create Affordable Housing?*, TWIN CITIES BUS. (Sept. 28, 2018), <http://tcbmag.com/news/articles/2018/october/do-the-economics-of-density-really-create-affordable-housing> (last visited Mar. 30, 2019).

45. See Aline Reynolds, *So You Want to Change Zoning to Allow for More Housing?*, NEXT CITY (Sept. 27, 2018), <https://nextcity.org/daily/entry/so-you-want-to-change-zoning-to-allow-for-more-housing> (last visited Mar. 30, 2019). Nora Liu, the northwest regional manager for the Government Alliance on Race and Equity, states: “If an area is rezoned, it needs to be done with parallel strategies to strengthen communities, so that people in the communities can thrive in place.” *Id.*; see also *Have We Zoned Great, Walkable Places out of Existence?*, FORM-BASED CODES INSTITUTE BLOG (Nov. 9, 2018), <https://formbasedcodes.org/blog/zoned-great-walkable-places-existence> (last visited Mar. 30, 2019) (“Form-based codes often result in an increase in property values, because the kinds of places

caused mass displacement,<sup>46</sup> and form-based codes have resulted in “displacement [of the poor] to outer fringe[s],” “increased gentrification,” and greater “social/economic segregation.”<sup>47</sup> This occurs because, in addition to the loss of community, when people are forced to move because they are priced-out, they are likely to move to areas that are more segregated, and, as such, they are likely to also receive less or worse municipal services and be further away from job markets and public transport.

Much of the scholarship regarding form-based codes explores its merits as an alternative to Euclidean zoning.<sup>48</sup> However, little has been written on their functional impact to communities and on citizens’ abilities to participate meaningfully in how their city is developed. The following case studies will examine that impact and the associated demographic trends.

### III. Case Studies

By transitioning to form-based code, a municipality in a single legislative action can recharacterize the use of each parcel of land located within the area that adopted the new code and, in some areas, up-zone the density and intensity permitted. The following four case studies examine areas throughout the South that have implemented form-based codes in different ways. Miami21 closely follows the principles outlined in SmartCode.<sup>49</sup> Nashville has adopted its own form-based code for its downtown and created an Urban Design Overlay that can be applied to preexisting zoning districts.<sup>50</sup> Unincorporated Miami-Dade County has created its own form-based code that applies to specific neighborhoods rather than zoning districts.<sup>51</sup> Gulfport follows SmartCode,<sup>52</sup> with the city making the code mandatory for certain areas of the city and available as an optional

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they create are both in demand and scarce. It is up to policymakers to decide how to mitigate these market forces so existing businesses and residents can remain in place as communities grow.”).

46. Renae Widdison, Jen Becker & Elena Conte, *Flawed Findings: How NYC’s Approach to Measuring Displacement Risk Fails Communities*, PRATT CENTER FOR COMMUNITY DEVELOPMENT (2018), [https://prattcenter.net/sites/default/files/flawed\\_findings\\_full\\_report\\_final.pdf](https://prattcenter.net/sites/default/files/flawed_findings_full_report_final.pdf) (last visited Mar. 13, 2019). This report concluded that New York approves major developments and up-zoning without considering the social consequences, including the displacement of residents. *Id.*

47. Kim Rolla & William M. Harris, Sr., *Zoning and Land Use: Charlottesville Community Discussion Related to Planning Futures and Citizen Impacts*, LEGAL AID JUSTICE CENTER (2017), <http://www.justice4all.org/wp-content/uploads/2017/02/Gentrification-Zoning-and-FBC.pdf> (last visited Mar. 13, 2019) (discussing the disadvantages of form-based codes on the poor).

48. Hank Savitch, *Dreams and Realities: Coping with Urban Sprawl*, 19 VA. ENVTL. L.J. 333 (2000); Burdette, *supra* note 14; Maurer, *supra* note 9.

49. See February 2017 Case Studies, *supra* note 3.

50. *Id.*

51. See discussion *infra* Section III.C.

52. See February 2017 Case Studies, *supra* note 3.



overlay in other parts. These case studies do not represent the complete set of the ways form-based code can be adopted, but they illustrate some of the variations and the associated effects on participatory mechanisms and displacement.

#### A. Miami, Florida: Miami21

##### i. The Code and Its Adoption

Miami21 is currently heralded as the magnum opus of form-based codes.<sup>53</sup> Using the principles outlined in SmartCode, the sprawling City of Miami implemented form-based code in 2009 throughout the entire city.<sup>54</sup> Prior to the adoption of Miami21, zoning in Miami was considered to be a “hodge-podge” of incompatible buildings and uses,<sup>55</sup> and Miami21 was viewed as much needed reform that would make Miami’s aesthetic more consistent and predictable.<sup>56</sup>

Beginning in 2005, the city held “60 formal public hearings on the new code, in addition to another 500 meetings with residents and other stakeholders—ranging from events with hundreds of attendees in large downtown convention halls to intimate sit-downs in residents’ living rooms.”<sup>57</sup> In these conversations, developers and city officials often cited the opportunities that Miami21 would provide for affordable housing developments.<sup>58</sup> Ultimately, Miami21 was approved in 2009 at the end of Mayor Manny Diaz’s term.<sup>59</sup>

Although Miami21 was approved in 2009, the economic crash resulted in a dramatic halt of property development, diverting attention away from zoning laws.<sup>60</sup> It was not until about 2013 that developers had sufficient

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53. *Miami21*, FORM-BASED CODES INSTITUTE, <http://formbasedcodes.org/codes/miami-21> (last visited Jan. 23, 2019); Press Release: City of Miami Receives National Award for Pioneering Zoning Reform, City of Miami Planning & Zoning Department (Jan. 11, 2011), [http://www.miami21.org/Media\\_01112011.asp](http://www.miami21.org/Media_01112011.asp).

54. MIAMI, FLA., *MIAMI 21 FINAL CODE*, *supra* note 17.

55. *Miami’s Zoning History*, City of Miami Planning & Zoning Dep’t, *Miami21: Your City, Your Plan*, [http://www.miami21.org/Miami\\_Zoning\\_History.asp](http://www.miami21.org/Miami_Zoning_History.asp) (last visited Feb. 1, 2019).

56. *Miami 21*, DPZ & Co., <https://www.dpz.com/Projects/0425> (last visited Mar. 30, 2019).

57. *Miami21 Public Meetings*, City of Miami Planning & Zoning Dep’t, *Miami21: Your City, Your Plan*, [http://www.miami21.org/Public\\_Meetings\\_ZoningCode.asp](http://www.miami21.org/Public_Meetings_ZoningCode.asp) (last visited Feb. 1, 2019). Notably, many of these meetings were in Spanish. *Id.*

58. *Planning Report: Plan Would Reward Developers That Build Affordable Housing in Miami*, City of Miami Planning & Zoning Dep’t, *Miami21 : Your City, Your Plan* (Aug. 7, 2007), [http://www.miami21.org/Media\\_070817.asp](http://www.miami21.org/Media_070817.asp) (last visited Mar. 14, 2019).

59. Zach Patton, *The Miami Method for Zoning: Consistency over Chaos*, *Governing* (May 2016), <http://www.governing.com/topics/urban/gov-miami-zoning-laws.html>.

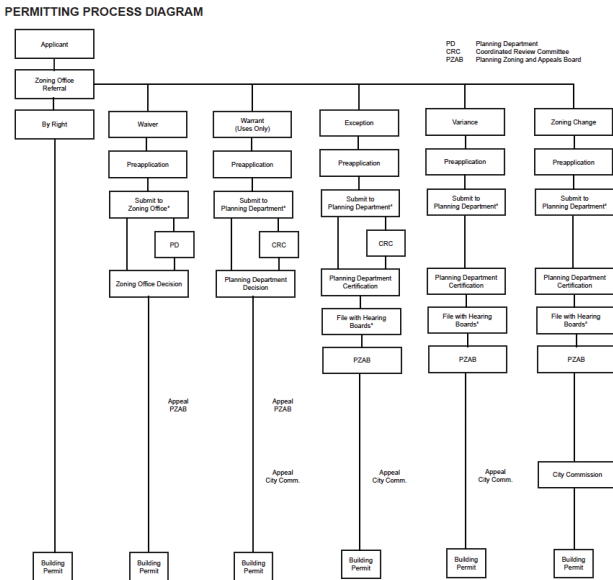
60. *Id.* After Miami21 was approved on October 22, 2009, “came the Great Recession. Ironically, it may have been the best thing that could have happened to Miami 21. Development in South Florida ground to a halt, and city leaders were overwhelmed by

capital to take advantage of the Miami21’s increased density and intensity.<sup>61</sup> The four-year delay meant that, effectively, stakeholders who were consulted in 2009 (or even as early as 2005) about Miami21 were actually planning for something that would not come to fruition until years later. Not only were people not meaningfully involved in the process, but, in 2013, Miami was a different city than what it was in 2009. Additionally, no evidence suggests that the community was informed and/or understood that after Miami21 was implemented, the public participation process would be substantially diminished. The ramifications of incorporating up-zoning into the new code when transitioning to form-based code are apparent from the permitting process in Miami21, as shown below, which provides an applicant that is building “By Right” a streamlined path to obtain a building permit.<sup>62</sup>

MIAMI 21  
AS ADOPTED - JANUARY 2018

ARTICLE 7. PROCEDURES AND NONCONFORMITIES  
DIAGRAM 14 PERMITTING PROCESS

63



other concerns. Suddenly, debate over a zoning code was no longer a front-burner issue.” *Id.* Assistant Planning Director Gonzalez in the city planning office was in agreement: “It was good timing, actually, because then when the economy did come back, we were ready to receive the development. And ever since the beginning of 2013, it’s been, like, boom!” *Id.*

61. *Id.*

62. MIAMI, FLA., MIAMI 21 FINAL CODE, *supra* note 17, art. 7, Diagram 14 (Jan. 31, 2018), available at [http://www.miami21.org/PDFs/Amended\\_Codes/Miami\\_21\\_Volume\\_I.pdf](http://www.miami21.org/PDFs/Amended_Codes/Miami_21_Volume_I.pdf).

63. *Id.*



Miami21 is also unique because it leaves a special carve-out for something known as Special Area Plans, which do not conform with form-based codes or any code at all.<sup>64</sup> The official purpose of a Special Area Plan (SAP) is to “encourage the assembly and master planning of parcels” that are greater than nine acres and to promote “greater integration of public improvements and infrastructure” and to “provide high quality design elements” by incentivizing developers to utilize more than nine acres of land with very little to no zoning regulations.<sup>65</sup> In a *quid pro quo*, the government forgoes its normal zoning laws in exchange for a developer’s investment in the development of land within the city limits. While SAPs are not form-based codes, they are relevant because, similar to the process that follows once up-zoning gets adopted as part of a transition to form-based code, when an SAP is approved through a legislative process at the city level, no more opportunity exists for public input on developments or zoning changes within the SAP. The city has made that trade-off on behalf of residents with the hopes that development will be beneficial to the community that is directly affected,<sup>66</sup> but residents have expressed concerns over the lack of community input in the process.<sup>67</sup> SAPs have led to large scale luxury developments in affluent areas, like Brickell City Centre.<sup>68</sup> However, it has also led developers to seek out SAPs in minority neighborhoods abutting the Downtown Miami area to take advantage of the lack of regulatory control, such as the proposed Magic City SAP and the proposed Eastside Ridge SAP in Little Haiti.<sup>69</sup> The mass up-zoning that typically accompanies an SAP being granted has the potential to displace long term low-income residents.<sup>70</sup>

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64. *Id.* art. 3, § 3.9.1.

65. *Id.*

66. Although critics of SAPs have raised concerns regarding the lack of community involvement in the SAP process, City of Miami Planning & Zoning Director Francisco Garcia “insist[ed] that community input is a central tenant of SAPs.” David Smiley & Andres Viglucci, *Redesigning Miami, 9 Acres at a Time*, MIAMI HERALD (Jan. 13, 2017), <https://www.miamiherald.com/news/local/community/miami-dade/article126501109.html>. Additionally, in response to concerns regarding how SAPs affect local communities, Miami 21 designers “note[d] that developers, even without SAPs, could always pursue up-zoning without providing anything in return to the community.” *Id.*

67. For example, in response to the SAPs being proposed in Little Haiti, Marleine Bastien, a local Haitian-American activist said: “The more we learn about these mammoth projects, the more concerned we are . . . What we resent is for us to be brought in at the 11th hour when everything is cooked and ready to eat, and we get the crumbs.” *Id.*

68. *About Us*, BRICKELL CITY CENTER, <https://www.brickellcitycentre.com/about-us/overview> (last visited Feb. 1, 2019).

69. Brian Bandell, *Developer Seeks Approval for 5.4m Sq. Foot Project in Miami’s Little Haiti*, SOUTH FLA. BUS. J. (June 19, 2018), <https://www.bizjournals.com/southflorida/news/2018/06/19/developer-seeks-approval-for-5-4m-square-foot.html>.

70. In response to the proposed Eastridge SAP in Little Haiti, Elie Philippe, a local resident stated “I’m afraid we’re going to lose all the Haitians in Little Haiti. Like, Little

Given the increase in rates of developments being built as a matter of right (in compliance with Miami21), the carve-outs where no notice or hearing is required, and the sharp reduction in the amount of public hearings held since form-based code was implemented (discussed *infra*), Miami21 seems to have curtailed traditional avenues for public participation in the zoning process.

## ii. Effects and Implementation

Rather than alleviate a chronic housing shortage for vulnerable communities with affordable housing developments, the up-zoning has brought an influx of high-rise luxury buildings,<sup>71</sup> which many fear will displace long-term residents, primarily low-income communities of color. Development is commonplace in the City of Miami. City of Miami Planning and Zoning Director Francisco Garcia, one of the authors of Miami21, explained, "In Miami, I don't think there is any area that is not undergoing some degree of change or redevelopment, or thinking about redevelopment. . . . This is our world today here in Miami."<sup>72</sup> From 2000 to 2016, downtown Miami saw a 150% population increase<sup>73</sup> and, from 2010 to 2018, downtown Miami saw a 38.1% population increase.<sup>74</sup> Since development in the area started with luxury condominiums, many of the new units in downtown Miami have effectively priced out a large segment of the population.<sup>75</sup> As of March 2018, there were more than 500 luxury condominiums, with an asking price of over \$1 million USD, formally listed for sale in the greater downtown Miami area.<sup>76</sup> Recently, there has been more studio apartment development,<sup>77</sup> meaning fewer families are able to access units in the area. In fact, Miami-Dade County's housing market is one of the country's least

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Haiti is going to become a place where they have Haitian things, but no Haitian people." Laura Rodriguez & Brandon Lopez, *Mega Developer Wants to Build in Little Haiti*, NBC MIAMI (June 20, 2019), <https://www.nbcmiami.com/news/local/Mega-Developer-Wants-to-Build-in-Little-Haiti-486087901.html>.

71. Natalie Delgadillo, *Downtown as a Template for Miami's Future*, CITY LAB (Oct. 23, 2016), <https://www.citylab.com/transportation/2016/10/downtown-miami-future-walkability-development>.

72. Smiley & Viglucci, *supra* note 66.

73. Delgadillo, *supra* note 71.

74. 2018 Greater Downtown Miami Demographics Report, MIAMI DOWNTOWN DEVELOPMENT AUTHORITY at 2, [http://www.miamidda.com/wp-content/uploads/MDDA\\_DemoPopReport\\_05072018.pdf](http://www.miamidda.com/wp-content/uploads/MDDA_DemoPopReport_05072018.pdf).

75. Delgadillo, *supra* note 71.

76. *Nearly 78 Months of Luxury Condo Supply Listed for Sale in Greater Downtown Miami*, CRANESPOTTERS.COM (Mar. 6, 2018), <https://cranespotters.com/PreconstructionNews/Details/40309?pagename=Nearly%2078%20Months%20Of%20Luxury%20Condo%20Supply%20Listed%20For%20Sale%20In%20Greater%20Downtown%20Miami>.

77. Rene Rodriguez, *How Small Can You Go? These New Miami Apartments Want You to Downsize and Live Large*, MIAMI HERALD (Apr. 23, 2013), <https://www.miamiherald.com/news/business/real-estate-news/article208563364.html>.

affordable, and recent studies have shown that the City of Miami is one of the hardest cities for renting, and it takes “much-higher-than-average incomes to afford a place in the downtown corridor.”<sup>78</sup>

### c. Public Participation and Community Response

In addition to the increased likelihood of displacement of communities of color, concerns exist related to what mechanisms are in place for citizens to voice their complaints under Miami21. For example, since Coconut Grove was annexed to the City of Miami in 1925, it is subject to the changes that were made when the City of Miami adopted Miami21.<sup>79</sup> The proposal for a large development in the West Grove community of Coconut Grove, one of the oldest neighborhoods in the City of Miami, exemplifies Miami21’s effect on notice to the community and potential for community input. This former Jim Crow neighborhood is comprised mainly of African-American and Afro-Bahamian communities.<sup>80</sup> In November 2018, the West Grove community read in a local newspaper article that a Chicago developer had signed a \$25 million contract to purchase some fifteen lots along Grand Avenue, the main street in the heart of the historic, low-income Black neighborhood.<sup>81</sup> The plan, as presented, was to build “a hotel, offices, a micro-unit apartment house, a mix of affordable and ‘deluxe’ rental apartments and shops,” and a roof of one of the buildings “would be designed to accommodate drones capable of ferrying people.”<sup>82</sup> The buildings were to be five stories tall, the maximum height permitted by Miami21 for the area.<sup>83</sup> According to information shared at a community meeting in the West Grove, the closing for the acquisition of land was set to occur in mid-February 2019,<sup>84</sup> but did not take place as planned.

The West Grove community found out about this potential three-city-block development that would displace at least seventy families through

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78. Nancy Dahlberg, *Millennials Migrate to Downtown Miami in Droves and Business Follow*, MIAMI HERALD (Sept. 27, 2016), <https://www.miamiherald.com/news/business/article104311866.html>.

79. Grant Livingston, *The Annexation of the City of Coconut Grove*, 60 TEQUESTA: J. HIST. ASS’N S. FLA. 32 (2000).

80. Roshan Nebhrajani, *The Early Bahamian History of Coconut Grove*, NEW TROPIC (May 9, 2016). The West Grove, marked as “D9” with a circle, on a 1937 redlining map of Greater Miami by the Home Owners’ Loan Corporation is designated as “hazardous.” *Mapping Inequality Redlining in New Deal America*, UNIV. OF RICHMOND DIGITAL SCHOLARSHIP LAB, <https://dsl.richmond.edu/panorama/redlining/#loc=12/25.8080/-80.2085&opacity=0.8&city=miami-fl> (last visited Mar. 30, 2019).

81. Andres Viglucci, *Will This Plan Save the West Grove? A Developer Has Big Plans for Grand Avenue*, MIAMI HERALD (Nov. 26, 2018), <https://www.miamiherald.com/news/local/community/miami-dade/coconut-grove/article222032010.html>.

82. *Id.*

83. *Id.*

84. Commissioner Ken Russell, Coconut Grove Ministerial Alliance Monthly Community Meeting, Community Remarks (Dec. 1, 2018) (notes on file with authors).

the article in *The Miami Herald*.<sup>85</sup> As soon as they saw the news, they began calling City Commissioner Ken Russell to find out why they had not been notified of the impending development. They also wanted to confirm that the community would get an opportunity to negotiate a community benefits agreement guaranteeing affordable housing units and establishing a local hiring preference for the anticipated retail stores.<sup>86</sup>

At a community meeting on December 1, 2018, Commissioner Ken Russell explained that, although the sale had not gone through yet, if the developers proceeded to buy the properties and build in compliance with Miami21, they would be building “as a matter of right,” and, as such, the City of Miami did “not have a seat at the table” regarding the development, and thus could not negotiate for a community benefits agreement.<sup>87</sup> As of mid-March 2019, the community has not received additional information about any future development plans.<sup>88</sup> Accordingly, it is possible the sale was not successful and the prior owners remain in possession of these properties.

When up-zoning gets imbedded into the zoning code, as was the case with the properties on Grand Avenue, the community loses the leverage that they would have had if the developer needed to get a discretionary land use permit in order to build. Without this leverage, it is very difficult for the community to negotiate with the developers for community benefits because the developer does not need the community’s support to build in accordance with the code.

### *B. Downtown Nashville, Tennessee: Urban Overlay*

#### *i. The Code and Its Adoption*

Nashville did not adopt SmartCode for the entire city. Instead, in 2015, Nashville adopted its form-based code as an “urban overlay” to the existing zoning code in Downtown Nashville only.<sup>89</sup> However, this urban overlay uses the transect model and applies six different transect zones to the Downtown Nashville area.<sup>90</sup>

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85. *Id.*

86. *Id.* For general information on community benefits agreements, see *Community Benefits 101*, PARTNERSHIP FOR WORKING FAMILIES, <http://www.forworkingfamilies.org/page/community-benefits-101> (last visited Mar. 30, 2019).

87. See Commissioner Russell, *supra* note 84.

88. St. Paul Community Development Corporation Housing Committee meeting (Mar. 11, 2019) (notes on file with authors).

89. *What Is an Urban Design Overlay?* METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Planning-Department/Rezoning-Subdivision/Urban-Design-Overlay.aspx> (last visited Mar. 28, 2019).

90. *Nashville Next: A General Plan for Nashville and Davidson County, Volume III: Community Plans*, METRO. PLANNING COMM’N OF NASHVILLE & DAVIDSON COUNTY, TENN. (amended Aug. 24, 2017), [https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/CommPlans2017/next-vol3-Downtown\\_Amended2017.pdf](https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/CommPlans2017/next-vol3-Downtown_Amended2017.pdf).

The Metropolitan Planning Commission of Nashville and Davidson County adopted NashvilleNext after “holding over 420 public meetings . . . engaging over 18,500 participants in providing public input to the general plan.”<sup>91</sup> NashvilleNext outlined the city’s plan for growth over the next twenty-five years, expanding on some of the form-based codes the city had adopted as early as 2005.

The city considered NashvilleNext as a way to articulate a vision for Nashville’s growth that can be adopted into the code, one neighborhood at a time.<sup>92</sup> Thus, NashvilleNext is viewed as a series of recommendations for Nashville’s growth that developers and government officials can choose to opt into, but that is not legally enforceable.

Nashville’s approach to zoning combines “Specific Plan Districts” or “SP,” zoning, which “refers to a new type of form-based zoning district, not an overlay, which is not subject to the traditional zoning districts’ development standards.”<sup>93</sup> Along with the Specific Plan Districts, Nashville utilizes overlays, including the Urban Design Overlay, the Institutional Overlay, and the Contextual Overlay District.<sup>94</sup> The Urban Design Overlay (UDO) “defines a specific area and sets design standards for its development” and is form-based, rather than traditional zoning.<sup>95</sup>

Effectively this scheme means that only certain districts of Nashville are actually form-based.<sup>96</sup> For an area or neighborhood to adopt a UDO (i.e., a form-based code), “a council member can request that Metro Planning create a UDO,” or a developer can make an application.<sup>97</sup> Nashville prioritizes UDO requests that are linked to a Detailed Neighborhood Design Plan (“DNDP, because the UDO will translate the community’s vision of the future articulated in the DNDP “from planning policy into zoning code with regulatory power.”<sup>98</sup>

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91. *Id.* at 3.

92. *Id.*

93. *Zoning & Subdivision*, Planning Dep’t, METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Planning-Department/Rezoning-Subdivision.aspx> (last visited Mar. 28, 2019).

94. *Id.* While an Urban Design Overlay is more reflective of zoning that would be seen in a T5 or T6 zone under SmartCode, a Contextual Overlay District applies design standards to “reinforce established . . . character of residential development in a particular area” *Contextual Overlays*, METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Planning-Department/Rezoning-Subdivision/Contextual-Overlays.aspx> (last visited Mar. 28, 2019); Institutional overlays apply to colleges and universities in the Nashville Area, *Institutional Overlays*, METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., *supra*.

95. *Id.*

96. *Nashville Next: A General Plan*, *supra* note 90.

97. *What Is an Urban Design Overlay?*, *supra* note 89.

98. *Id.*

Since a UDO request is a zone change, it must follow the zone change procedure which includes:

- Submission to Metro Planning for review,
- Review and recommendation by Metro Planning staff,
- Public hearing at Metro Planning Commission,
- Metro Planning Commission recommendation to Metro Council,
- Three readings (including public hearing on second reading) at Metro Council, and
- Metro Council approval of the UDO.<sup>99</sup>

However, it is not a requirement that developers applying for a UDO follow any of the recommendations outlined in the DNDP.<sup>100</sup> Requesting a variance within a UDO requires the same procedure.<sup>101</sup> This means that even though community stakeholders articulated a plan for their neighborhood, a developer can request a zoning change that does not actually reflect a DNDP.<sup>102</sup> Although the process is the same under form-based code, because the area has been up-zoned and multiple uses are permitted, developers do not have to request as many variances, presumably because the desired building already fits within the specifications of the code.

This process represents an opportunity for the community to be involved in the design process in a non-enforceable way.<sup>103</sup> The DNDPs as well as Community Plans which involved community input, outline a vision for a neighborhood that reflects the particular character, landmarks, and needs

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99. *Id.*

100. *Id.* "Metro Planning prioritizes UDOs that are linked to DNDPs, because the DNDP process involves the community in envisioning its future." However, the link is not required. *Id.*; see also *The Rezoning Process in Nashville/Davidson County*, METRO. GOV'T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/zoning/ZoningProcessChart.pdf> (last visited Mar. 28, 2019).

101. *Id.*

102. *Id.*; Nashville also has "Community Plans" that are memorialized in Nashville Next and are opportunities for community members and stakeholders to gather to outline their plans and visions for their neighborhood or community, these plans can be codified by going through the zoning change process, including requesting a UDO, see *Community Plans*, METRO. GOV'T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Planning-Department/Community-Planning-Design/Community-Plans.aspx> (last visited Mar. 28, 2019).

103. *What Is an Urban Design Overlay?*, *supra* note 89; see also *Community Plans*, *supra* note 102, for alternative ways for community members to get involved in the neighborhood planning process. However, it is important to note that neither Community Plans nor DNDPs are directly tied to developing the zoning code. Zoning changes still require the standard legislative process to be adopted. DNDPs and Community Plans are unenforceable on their own.

of a neighborhood, but does not actually create enforceable code. As Nashville's Metro Planning outlines on its website that it "prioritizes" UDOs "linked to DNDPs" (i.e., codes that reflect the design principles and zoning suggestions drawn up in the DNDP), it does not require, but bends toward design concepts that incorporate community input.<sup>104</sup>

## ii. Effects and Implementation

Downtown Nashville, which has been the epicenter of form-based code and development in Nashville, has not always been a residential area characterized by economic growth.<sup>105</sup> Traditionally, mostly Blacks lived in Downtown Nashville. And during the Jim Crow period, all of the downtown area was redlined, meaning federal mortgage lenders would not provide home loans in the area.<sup>106</sup>

Much of the downtown area's development now has been comprised of luxury condos, hotels, and office space.<sup>107</sup> The most notable construction has been the sixteen-acre Nashville Yard development, which will serve as a future home to Amazon.<sup>108</sup> Of the over 3,000 rental units and condos that have been built in Downtown Nashville, only fifty-four (less than two percent) are deemed affordable for "median income" families.<sup>109</sup> There are about 100 times as many hotel rooms that have been built as compared to affordable rental units.<sup>110</sup> According to Rick Bernhardt, the former director of the Metropolitan Planning Commission of Nashville and Davidson County, areas of Nashville under form-based zoning increased 113% in taxable property value from 2005 to 2013, compared with just 33% countywide.<sup>111</sup>

Two-thirds of the people living in Downtown Nashville are white-collar workers, representing a significant shift from the demographics of

104. *Id.*

105. Garrett Harper, *Economic Development*, NASHVILLE AREA CHAMBER OF COMMERCE (Mar. 2013), <https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/NashvilleNext/ECD%20background%20reportforonline%20posting.pdf>.

106. Robert K. Nelson, LaDale Winling, Richard Marciano, Nathan Connolly, et al., *Mapping Inequality*, AMERICAN PANORAMA, Robert K. Nelson & Edward L. Ayers ed.), <https://dsl.richmond.edu/panorama/redlining/#loc=4/36.71/-96.93&opacity=0.8> (last visited Mar. 28, 2019).

107. Development Tracker, NASHVILLE PLANNING DEPARTMENT, <https://maps.nashville.gov/DevelopmentTracker> (last visited Mar. 28, 2019).

108. Sandy Mazza, *3 Things to Know About Amazon's Future Home: Nashville Yards*, TENNESSEAN (Nov. 14, 2018), <https://www.tennessean.com/story/money/2018/11/14/nashville-yards-amazon-downtown-development/1990369002> (last visited Mar. 13, 2019).

109. Development Tracker, *supra* note 107.

110. *Id.*

111. Sean Tubes, *Planner Describes How "Form-Based" Zoning Changed Nashville*, CHARLOTTESVILLE TOMORROW (Sept. 21, 2016), <https://www.cvilletomorrow.org/articles/nashville-planner-on-form-based-zoning>.



Downtown Nashville in the 1990s and early 2000s.<sup>112</sup> The pockets of Downtown Nashville where luxury residences have been developed are now White, but the area as a whole remains mostly Black, with White residents living in the suburbs. Notably, despite twenty-one buildings developed in 2018 in Downtown Nashville that had an investment amount of over \$2.5 million USD<sup>113</sup> (including an office building, eleven hotels, three apartment complexes with over one hundred units, building expansions, a storage facility, and a museum), there were *zero* public hearings related to new developments in Downtown Nashville in all of 2018.<sup>114</sup>

### C. Unincorporated Miami-Dade County, Florida: Urban Center Districts

#### i. The Code and Its Adoption

Urban Center and Urban Area Districts (UCDs)<sup>115</sup> are uniquely zoned areas throughout unincorporated Miami-Dade County situated near transit corridors.<sup>116</sup> UCDs are form-based codes that follow the transect model outlined in SmartCode, with some variations to conform to the natural landscape and existing infrastructure.<sup>117</sup> UCDs were chosen as part of a directive of the county's Comprehensive Development Master Plan<sup>118</sup> (CDMP) to pro-

112. See Harper, *supra* note 105; *Downtown Nashville Demographics*, POINT2HOMES, <https://www.point2homes.com/us/Neighborhood/TN/Downtown-Nashville-demographics.html> (last visited Mar. 30, 2019).

113. Development Tour, DOWNTOWN NASHVILLE PARTNERSHIP, <https://www.nashvilledowntown.com/business/development-map> (last visited Jan. 30, 2019).

114. *Id.*

115. There are currently thirteen UCDs: Downtown Kendall (adopted 1999), Naranja Community Urban Center District (adopted 2006), Cutler Ridge Metropolitan Urban Center District (adopted 2006), Goulds Community Urban Center District (adopted 2006), Ojus Urban Area District (adopted 2006), Perrine Community Urban Center District (adopted 2006), Princeton Community Urban Center District (adopted 2006), Leisure City Community Urban Center District (adopted 2007), Model City Urban Center District (adopted 2010), North Central Urban Area District (adopted 2011), Bird Road Corridor Urban Area District (adopted 2013), Palmer Lake Metropolitan Urban Center District (adopted 2013), and Country Club Urban Center District (adopted 2014). MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES ch. 33, arts. XXXIII(I)–(V) (Jan. 22, 2019); see also *Zoning Districts*, Regulatory & Economic Resources, MIAMIDADE.GOV, <http://www.miamidade.gov/zoning/districts.asp> (last visited Mar. 30, 2019).

116. Urban Centers, *Land Use Element of Comprehensive Development Master Plan*, MIAMI-DADE COUNTY, I-46 (2008), available at <http://www.miamidade.gov/planning/cdmp/plan/cdmp-land-use-element.pdf>.

117. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES ch. 33, art. XXXIII(K) (Jan. 22, 2019); see also Standard Urban Center District Regulations, Miami-Dade, FLA. CODE, ch. 33, art. XXXIII(K) (revised Mar. 2019), <https://www.miamidade.gov/zoning/library/reports/standard-urban.pdf>.

118. DEP'T OF REGULATORY & ECON. RES., at I-45 to I-48, <https://www.miamidade.gov/planning/library/reports/planning-documents/cdmp/land-use.pdf> (last visited Mar. 30, 2019).



mote urban centers in places where mass transit, roadways, and highways are highly accessible.<sup>119</sup> They are “designated by the county’s Comprehensive Plan to develop over time into multi-use districts characterized by high quality urban design.”<sup>120</sup>

With the County’s adoption of Article XXXIII(K) of Chapter 33 of the Miami-Dade Code in July 2005, the County transitioned from zoning UCDs with traditional (Euclidean) zoning maps to zoning these areas using form-based code.<sup>121</sup> The master plans for the various UCDs use form-based codes and are regulated by the subchapters of Article 33 of the Miami-Dade County Code.<sup>122</sup> As part of the change to form-based code, the areas of unincorporated Miami-Dade County that are now designated as UCDs were rezoned from individual parcels of land zoned by specific, demarcated uses, such as RU-1—Single-Family Residential District, to larger, contiguous areas of land with broad use categories, such as Core.<sup>123</sup>

Inside UCDs, areas are labeled as “Core,” “Center,” or “Edge” sub-districts.<sup>124</sup> These sub-districts regulate the allowable intensity and density.<sup>125</sup> Mixed-use developments are encouraged in the core and center sub-districts, while edge sub-districts have largely been reserved for residential development.<sup>126</sup>

Section 33-284.88 of the Miami-Dade Code states that all developments in UCDs, besides single-family homes and duplexes, “shall be processed and approved administratively.”<sup>127</sup> After an applicant submits a proposal, it will be reviewed by the Department of Regulatory and Economic

119. *Id.*; MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.81 (Jan. 22, 2019).

120. Standard Urban Center District Regulations, *supra* note 117 (“About This Document” reference).

121. *Id.* The City of Miami also transitioned to form-based code in 2009 with the adoption of Miami21. *Project Vision*, MIAMI 21, <http://www.miami21.org>, (last visited Mar. 30, 2019); *see also supra* Section III.B.a. UCDs and the City of Miami are currently the only areas of Miami-Dade County that utilize form-based code.

122. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES ch. 33, art. XXXIII(I)–(V).

123. *See, e.g.*, Hearing No. 14-7-CC-1 (13-92) regarding Zoning Application Case No. Z2013000092/N (*Bird Road Corridor Urban Area District*), BD. COUNTY COMMISSIONERS, [http://pzimage.miamidade.gov/images/new\\_documents/Z2013000092/N.pdf](http://pzimage.miamidade.gov/images/new_documents/Z2013000092/N.pdf) (last visited Mar. 30, 2019) (representing the prior zoning categories of the area); *see also* Bird Road Corridor Urban Area District, Miami Dade, FLA. CODE, ch. 33, art. XXXIII(U), <https://www.miamidade.gov/planning/library/ordinances/bird-corridor-district-regulations.pdf> (last visited Mar. 30, 2019) (describing the new zoning guidelines).

124. *See* MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.81 (describing the standard purpose and applicability of Urban Center District Regulations).

125. *See* discussion *supra* note 33 (defining “intensity” and “density”).

126. Standard Urban Center District Regulations, *supra* note 117, at 1.

127. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.88. Administrative approval means applications for new developments are reviewed by county officials who are tasked with reviewing applications to check for compliance with the County Code. *Id.* Because of their low-density and low overall impact, single-family homes and duplexes

Resources, which will issue a decision in twenty-one days.<sup>128</sup> Other departments such as the Department of Public Works and Waste Management, Miami-Dade Fire Rescue Department, and the Miami-Dade County School Board to assess potential impacts on infrastructure and services, in which case mitigation measures may be requested.<sup>129</sup> Besides these administrative review procedures, developments that are consistent with the UCD zoning plan are not required to provide notice to residents or be subject to any public hearing.<sup>130</sup> However, any developments that are inconsistent with the area's transect description are subject to the same procedures, including notice and hearing, that a request for a map variance would require in an area outside a UCD that does not follow form-based code.<sup>131</sup>

## ii. Effects and Implementation

Similar to the other municipalities that have transitioned to form-based zoning, re-characterizing areas in unincorporated Miami-Dade County as urban mixed-used spaces with higher density, intensity, and floor-heights has the potential to displace the long-time residents of these areas.<sup>132</sup> Areas that are zoned as high-density and mixed-use with proximity to mass transit are very attractive to developers, especially as the population of Miami-Dade County continues to grow.

Only one UCD, Model City, includes a mandatory inclusionary zoning provision.<sup>133</sup> This requires all developments with more than four residential units to provide a minimum of either 12.5 percent workforce housing or ten percent as affordable housing.<sup>134</sup> In UCDs without mandatory inclusionary zoning provisions, and/or other similar legislative protections, zoning changes make it possible for developers to build large-scale residential complexes without any affordable units.

Moreover, there is also the potential for significant displacement even where mandatory inclusionary zoning provisions exist, because of the

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that are in compliance with the Code do not have to see administrative approval before construction. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* Applications and the departments' responses are available at Miami Dade Zoning, MIAMI-DADE COUNTY, [https://energov.miamidade.gov/EnerGov\\_Prod/SelfService#/search](https://energov.miamidade.gov/EnerGov_Prod/SelfService#/search) (last visited Mar. 30, 2019).

131. See generally MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES, ch. 33.

132. For more information on displacement of historically Black communities in other parts of the County, see David Smiley, *Evictions, Profit, and Slum: The Slow Fade of Grand Avenue*, MIAMI HERALD (Dec. 2, 2016), <http://www.miamiherald.com/news/local/community/miami-dade/article118514978.html>; Andres Viglucci, *There's a Bit of Wynwood Developers Haven't Touched: Will They Gentrify That Too?*, MIAMI HERALD (Nov. 17, 2017), <http://www.miamiherald.com/news/local/community/miami-dade/midtown/article185212378.html>.

133. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.99.42(c)(1).

134. *Id.*

inadequacy of these provisions. For example, the Model City UCD requirement of 12.5 percent workforce or ten percent affordable housing,<sup>135</sup> does not guarantee enough affordable housing units for all low-income residents currently living in the Model City UCD where there is a poverty rate of 42.9 percent.<sup>136</sup> Additionally, an affordable housing unit is defined as a household “whose income range is up to 80 percent of the most recent median family income for the County,”<sup>137</sup> a figure which is out of reach for the “estimated 75.6 percent of households [in Liberty City that] have annual incomes of less than \$40,000, and [even more out of reach for the] 46.2 percent of households [that] earn less than \$20,000 annually, far below the County’s median household income of \$43,099.”<sup>138</sup>

### iii. Public Participation and Community Response

Although not mandated by statute, residents in UCDs were asked to participate in a process called “charrettes,” which ultimately led to the design of UCDs.<sup>139</sup> Charrettes were a series of stakeholder meetings where residents and other stakeholders,<sup>140</sup> including developers, could outline

135. *Id.*

136. *Id.*; Edward Murray, *Liberty City: Economic Analysis and Opportunities Report*, South Florida Housing Consortium 27 (Feb. 2, 2017), available at [https://civic.miami.edu/\\_assets/pdf/housing-initiatives/housing-reports/Liberty-City-Economic-Analysis-and-Opportunities-Report-2017-2-2-Final.pdf](https://civic.miami.edu/_assets/pdf/housing-initiatives/housing-reports/Liberty-City-Economic-Analysis-and-Opportunities-Report-2017-2-2-Final.pdf). Model City is another name for Liberty City.

137. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.99.42 (“‘Affordable housing unit’ means a dwelling unit, the sale, rental, or pricing of which is restricted to households whose income range is up to 80 percent of the most recent median family income for the County reported by the U.S. HUD and maintained by the Department of Planning and Zoning.”).

138. See Murray, *supra* note 136, at 27 (“Significantly, the poverty rate in Liberty City is 42.9 percent, which is more than double the overall poverty rate (20.5 percent) for Miami-Dade County.”).

139. Miami-Dade County Dep’t of Planning & Zoning, *Charrette Area Plans Urban Centers*, S. FLA. REG’L PLANNING COUNCIL, <http://www.sfrpc.com/ftp/pub/watershed/12Jan06%20Exhibit%20C.pdf> (last visited Mar. 30, 2019).

140. Charrettes invite stakeholders, such as developers, and community members, to participate in the planning process. To see who participated in some charrettes and what was discussed, see *Model City/Brownsville Charrette Area Plan Report Executive Summary*, Miami-Dade County Dep’t of Planning & Zoning, Community Planning Section (Sept. 2003), <https://www.miamidade.gov/zoning/library/reports/model-city-executive-summary.pdf> (last visited Mar. 30, 2019); *Goulds Community Urban Center, Citizens’ Master Plan Final Report*, Miami-Dade County Dep’t of Planning & Zoning (July 23, 2003), <http://miamidadetpo.org/library/studies/goulds-community-urban-center-citizens-master-plan-final-report-2003-07.pdf>; *Goulds Charrette Area Plan Report Executive Summary*, Miami Dade County Dep’t of Planning & Zoning, Community Planning Section (2003), <https://www.miamidade.gov/zoning/library/reports/goulds-executive-summary.pdf>; *Perrine Charrette Area Plan Report Executive Summary*, Miami-Dade County Dep’t of Planning & Zoning, Community Planning Section (Jan. 2003),

initiatives and the types of development that they wanted in the community.<sup>141</sup> However, the Code does not require these initiatives to be followed, and the County does not have a system in place to enforce the designs and recommendations that the stakeholders produced at these meetings for the UCDs; they rather are used to “develop the community’s vision for its growth and future development.”<sup>142</sup> Each enforceable ordinance adopted the zoning and land-use descriptions created through the charrettes, but, with the exception of Model City that included a mandatory inclusionary zoning provision, the social benefits discussed at the charrettes were not included.<sup>143</sup> Notably, the Model City/Brownsville Charrette was led by the Model City Office of Community and Economic Development (OCED) Community Advisory Committee, which adopted the following process:

The study itself has been funded with HUD CDBG funds and was intended to develop a coordinated Area Plan for Model City/Brownsville’s revitalization. OCED will then be able to concentrate improvement efforts in those areas by *providing the community development programs that will benefit the residents*. . . .

. . . .

. . . Once a Charrette Area Plan is accepted by the local community, it is presented to the Community Council, Planning Advisory Board and finally to the Board of County Commissioners for acceptance of the report and to direct County staff to prepare the necessary code amendments to implement the

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<https://www.miamidade.gov/zoning/library/reports/perrine-executive-summary.pdf> (last visited Mar. 30, 2019); *North Central Charrette Area Plan Report Executive Summary*, Miami-Dade County Dep’t of Planning & Zoning, Community Planning Section (Sept. 2003), <https://www.miamidade.gov/zoning/library/reports/north-central-executive-summary.pdf>.

141. Charrette Master Plans are detailed documents for each UCD that include renderings and development proposals. See, e.g., *supra* note 140.

142. *Small Area Studies*, Miami-Dade Dep’t of Regulatory & Econ. Resources, <https://www.miamidade.gov/zoning/small-area-studies.asp> (last visited Mar. 30, 2019).

143. See, e.g., *North Central Charrette Area Plan Report Executive Summary*, *supra* note 140. North Central’s charrette discussed the inclusion of affordable housing; however, Model City is the only UCD with a mandatory inclusionary zoning provision. Even in Model City, where the County staff prepared the necessary Code amendments for the creation of UCDs, the UCD Code, on the whole, did not address the implementation of citizen requests from the charrette such as “improv[ing] the public infrastructure: landscaping, parks, schools, sidewalks, street lights, water and sewer service.” *Model City/Brownsville Charrette Area Plan Report Executive Summary*, *supra* note 140. To view examples of charrette reports and corresponding regulations, see *Small Area Plans & Ordinances*, Miami-Dade Dep’t of Regulatory & Econ. Resources, <https://www.miamidade.gov/zoning/small-area-plans.asp> (last visited Mar. 30, 2019).

recommendations that require legislative action as well as finalize the Area Planning Process.<sup>144</sup>

A comparison between the level of community participation in Model City (which required the charrette area plan to be accepted by the community) to the more traditional charrette process, such as the North Central Charrette, is a good example of the varying degrees of community involvement in charrettes. Over the course of a week in North Central, public meetings were held in which:

the design team set up its studio in a wood shop at Turner Tech and was open to the public all week. A presentation of work in progress was held on Friday, May 10th. *Residents*, property and business owners as well as North Dade Chamber of Commerce, County staff and elected officials *were present*.  
...

... A series of presentations by County Staff were held and during that time further *citizen and professional input was taken into account*.<sup>145</sup>

The invitation to be present to comment on a presentation is not a substitute for the meaningful involvement of community members in the decision-making process of what is going to happen in or to their community.

The lack of meaningful community involvement is even more concerning considering the demographics and historical racial makeup of the various UCDs. Below is a map of the areas zoned as “Negro Housing Areas” in Miami-Dade County in 1951<sup>146</sup> and a map of the UCDs throughout Miami-Dade,<sup>147</sup> which closely mirrors the “Negro Housing Areas” of the 1950s. Note that both maps identify the following neighborhoods: Ojus, Model City (Liberty City), Perrine, Goulds, Princeton, Naranja, and Leisure City (Modello).

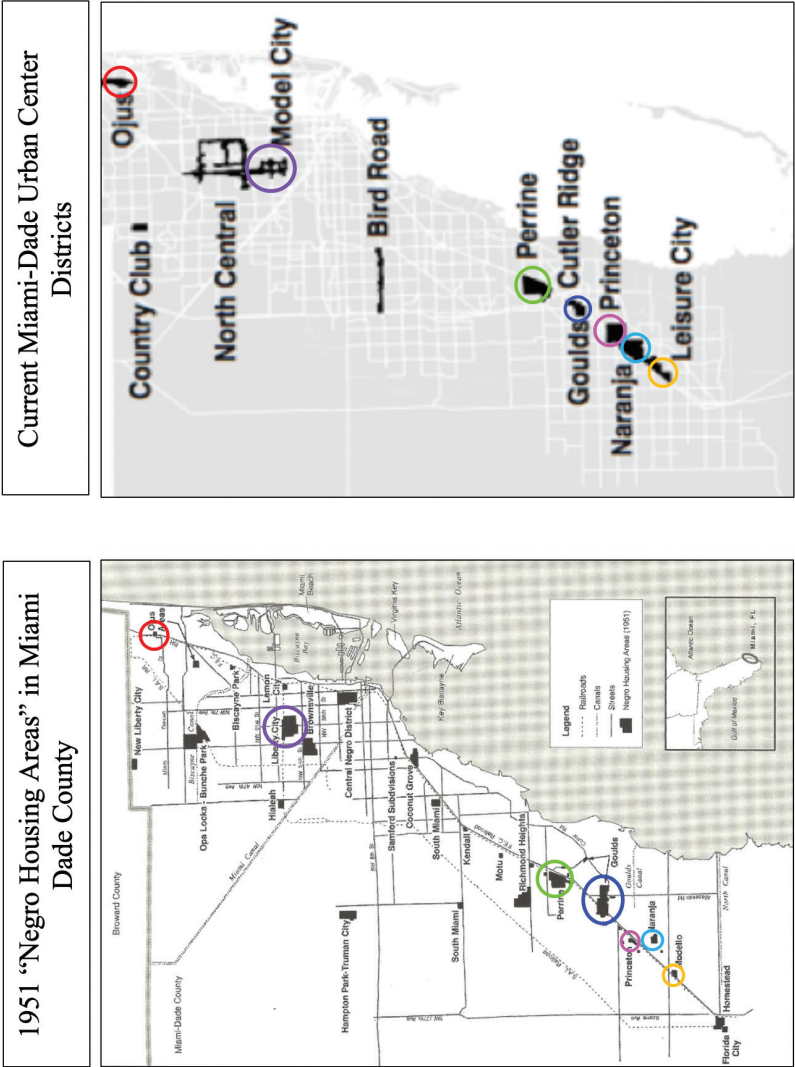
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144. *Model City/Brownsville Charrette Area Plan Report Executive Summary*, *supra* note 140 (emphasis added).

145. *North Central Charrette Area Plan Report Executive Summary*, *supra* note 140 (emphasis added).

146. N.D.B. CONNOLLY, *A WORLD MORE CONCRETE: REAL ESTATE AND THE REMAKING OF JIM CROW SOUTH FLORIDA* 187 (2016) (map by Gordie Thompson).

147. Standard Urban Center District Regulations, *supra* note 117.



The demographics of UCDs, especially those with Jim Crow legacies, are typically poorer and contain a higher percentage of people of color.

### UCD Demographics<sup>148</sup>

UCD	Per Capita Income	Median Household Income	% Black	% Hispanic*	% White	% Below Poverty Line
Ojus	\$32,169	\$43,420	7%	46%	43%	15.1%
Model City (Liberty City)	\$11,076 <sup>149</sup>	\$26,600	84%	14%	1%	45.1%
Perrine	\$10,380	\$26,977	84%	14%	3%	40.7%
Goulds	\$11,477	\$29,333	49%	43%	5%	40.7%
Princeton	\$17,797	\$49,725	20%	64%	14%	24.8%
Naranja	\$11,612	\$29,149	35%	53%	7%	37.9%
Leisure City (Modello)	\$12,891	\$34,428	19%	73%	6%	35%

\*Hispanic includes respondents of any race. Other categories are non-Hispanic.

148. All numbers are estimates. *Leisure City, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1239950-leisure-city-fl> (last visited Feb. 1, 2019); *Naranja, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1247700-naranja-fl> (last visited Feb. 1, 2019); *Princeton, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1258975-princeton-fl> (last visited Feb. 1, 2019); *Goulds, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1226950-goulds-fl> (last visited Feb. 1, 2019); *West Perrine, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1276700-west-perrine-fl> (last visited Feb. 1, 2019) (indicating that the Perrine UCD is located in the West Perrine area); *Ojus, FL*, CENSUS REPORTER, <https://censusreporter.org/profiles/16000US1251125-ojus-fl> (last visited Feb. 1, 2019); *Household Income in Liberty City, Miami, FL*, STATISTICAL ATLAS, <https://statisticalatlas.com/neighborhood/Florida/Miami/Liberty-City/Household-Income> (last visited Feb. 1, 2019).

149. Per capita income was calculated using the individual census tracts for the bounded area of Liberty City. *Liberty City Neighborhood in Miami, Florida (FL)*, 33127, 33142, 33147, 33150 *Detailed Profile*, City-Data.com, <http://www.city-data.com/neighborhood/Liberty-City-Miami-FL.html> (last visited Feb. 1, 2019).



### Miami-Dade County Demographics<sup>150</sup>

County	Per Capita Income	Median Household Income	% Black	% Hispanic*	% White	% Below Poverty Line
Miami-Dade County	\$24,515	\$44,224	18.5%	67.7%	13.8%	18.2%

\*Hispanic includes respondents of any race. Other categories are non-Hispanic.

Community concern regarding the UCD development process is captured by an incident in Ojus, one of the northernmost UCDs. In 2014, a 400-unit luxury condo apartment complex was approved administratively, and, because it complied with the zoning parameters in the Ojus Core sub-district, residents were not notified of the building's proposal, approval, and construction.<sup>151</sup> No public hearing took place for residents to express their concerns about the building.<sup>152</sup>

Among other concerns, residents were worried, for example, about changes in traffic patterns because of the size of the construction project and the access points to enter the street from the building's parking garage.<sup>153</sup> In response, Eric Silva, the County's Senior Zoning Chief, said the current Zoning Code does not say where the developer can or cannot put the access points, and moreover, Silva added that "residents were under the impression that the County could not give a developer site plan approval without consulting with them first."<sup>154</sup> Silva explained that "the Ojus Urban Area Zoning District . . . only required an administrative review" of plans submitted by developers.<sup>155</sup> He further stressed that "[i]t doesn't need to go to a board for approval. There were no variances; they met the code, so we approved it."<sup>156</sup> In other words, the whole development project from start to finish was only subject to administrative review, which did not require community participation.

150. All numbers are estimates. *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/miamidadecountyflorida/POP060210> (last visited Feb. 1, 2019).

151. Jeffrey Pierre, *Ojus Residents Voice Concerns About a Proposed 400-Unit Luxury Complex*, MIAMI HERALD (Nov. 10, 2014), <http://www.miamiherald.com/news/local/community/miami-dade/aventura/article3727534.html> (last visited Mar. 30, 2019).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*



### D. Gulfport, Mississippi: Optional Overlay

#### i. The Code and Its Adoption

Gulfport, Mississippi, has instituted what is known as an optional overlay of form-based code.<sup>157</sup> In the wake of Hurricane Katrina (“Katrina”), Gulfport was left with massive amounts of destruction.<sup>158</sup> This destruction also provided the city an opportunity to reconceptualize how it could grow and build in the wake of the disaster.<sup>159</sup> As part of its Comprehensive Plan and in conformity with state law,<sup>160</sup> in February 2007, Gulfport adopted a city-wide SmartCode.<sup>161</sup> Unlike Miami and Nashville, the Gulfport “Code is an option for development of Communities and Neighborhoods in the City of Gulfport, Mississippi, and may, by proper planning process, be made mandatory in certain districts of the City.”<sup>162</sup> Similar to Miami21, for areas in Gulfport zoned with the optional SmartCode overlay, “[a] proposal for a building or community plan that complies with this Code[,] may thereby be processed administratively, without public hearing.”<sup>163</sup>

The optional overlay model in Gulfport follows the specifications of transects outlined in SmartCode.<sup>164</sup> For example, the T6 zone (i.e., the urban core) is zoned for Downtown Gulfport. Prior to passing the ordinance, Gulfport described its vision for this zone as follows:

[The] Code [for the Urban Core] is intended to encourage the area to also become richly mixed use, with specialty retail, offices, and residential in mixed use buildings, and a wide variety of quality restaurants. Buildings

157. *February 2017 Case Studies*, *supra* note 3. An optional overlay is different from the overlays seen in Nashville. In Nashville, the city can mandate a new zoning code in a particular area. In Gulfport, developers can choose to opt-in to the form-based overlay zoning code, or they can choose to be governed by the underlying traditional zoning code.

158. *Redevelopment Master Plan Charrette Book*, Gulfport, Mississippi, MISS. RENEWAL FORUM (Oct. 31, 2005), [http://www.mississippirenewal.com/documents/Rep\\_Gulfport.pdf](http://www.mississippirenewal.com/documents/Rep_Gulfport.pdf).

159. *Id.*

160. MISS. CODE ANN. §§ 17-1-1 to 17-1-27 (West 2019); CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D, art. 1, § 1.1 (adopted Feb. 3, 2007); *see also Codes*, Mississippi Renewal Forum, [http://www.mississippirenewal.com/documents/Rep\\_Codes.pdf](http://www.mississippirenewal.com/documents/Rep_Codes.pdf) (last visited Mar. 29, 2019).

161. CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D—SmartCode (adopted Feb. 3, 2007); *Transect-Based Regulating Plans*, CENTER FOR APPLIED TRANSECT STUDIES, [https://transect.org/regulating\\_img.html](https://transect.org/regulating_img.html) (last visited Mar. 29, 2019); *see also Codes That Support Smart Growth Development*, U.S. EPA, <https://www.epa.gov/smartgrowth/codes-support-smart-growth-development> (last visited Mar. 29, 2019).

162. CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D, art. 1, § 1.3.3 (adopted Feb. 3, 2007).

163. *Id.* App. D, art. 7.

164. *Id.* App. D, art. 6.

are generally of large-scale, with mixed-use condominium buildings from 8 to 18 stories, and set close to street frontages.<sup>165</sup>

In this area, developers can receive density bonuses if they provide a certain number of affordable units.<sup>166</sup>

#### ii. Effects and Implementation

Gulfport neighborhoods Soria City, North Gulfport, and Turkey Creek which have majority Black populations represent a disproportionate concentration of Black residents in the Gulfport-Biloxi area where Blacks comprise less than 30% of the population.<sup>167</sup> These geographic concentrations were rooted in history, since the East-West railroad created a racial divide and Turkey Creek was a swamp land acquisition that was once promised to freed slaves.<sup>168</sup>

These neighborhoods, which still represent the highest concentration of Blacks in the area, have historically been subject to the tumultuous economic history of Gulfport and bore the brunt of the environmental impacts of Katrina. Black residents historically congregated around the boat-building, fishing, and seafood industries, and have remained there despite the crash of these industries in the late 1970s and a failure to recover.<sup>169</sup> In addition to economic disaster, the most heavily concentrated Black census tracts in Gulfport faced the highest surge elevations of 16 to 22 feet due to Katrina.<sup>170</sup>

After Katrina devastated these neighborhoods, the city was presented with a choice in how these neighborhoods could be redeveloped. Rather than recognizing the devastating impacts of both the economy and Katrina on these areas, the City of Gulfport characterized the area as a “blank slate” ripe for high-end, luxury development,<sup>171</sup> and it became an epicenter of up-zoning. To invite developers to Gulfport, the City of Gulfport published the following description in 2010 on its website:

Like the artist with the blank canvas or an explorer who steps foot in a brand new land—as residents of Gulfport, Mississippi, we eagerly await the authors who will write the future chapters of our beloved hometown. . . . From the fury of Mother Nature comes the opportunity to re-define our city as a progressive new enterprise of hope and prosperity. When you bring

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165. *Codes*, MISS. RENEWAL FORUM, at 15, [http://www.mississippirenewal.com/documents/Rep\\_Codes.pdf](http://www.mississippirenewal.com/documents/Rep_Codes.pdf) (last visited Mar. 29, 2019).

166. CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D, §§ 1.6–1.7, 5.9 (adopted Feb. 3, 2007).

167. Kate Driscoll Derickson, *The Racial Politics of Neoliberal Regulation in Post-Katrina Mississippi*, 104 ANNALS ASS'N AM. GEOGRAPHERS 889, 892 (2014).

168. *Id.*

169. *Id.* at 891.

170. *Id.* at 893.

171. *Id.* at 889–93.

your vision to the shores of Gulfport, you will take your place among the other captains and watch your own ship come in.<sup>172</sup>

Geographer Kate Driscoll Derickson argues:

In the same way that the racialized concept of blight justified and created opportunities for new forms of urban development under the guise of urban renewal in the postwar era (internal citation omitted), the highly racialized and impoverished nature of these neighborhoods worked to justify and enable the narrative that the storm had rendered them blank slates and, in so doing, created new opportunities for intensifying and further accomplishing the vision of the city promoted by regional boosters.<sup>173</sup>

The development in Gulfport has been focused on inventing a flourishing tourism industry rather than ensuring municipal equity and creating housing or opportunities for poor,<sup>174</sup> long-term residents.<sup>175</sup> This focus has paved the way for the development of an aquarium, casino, and hotels, geared toward the tourism industry.<sup>176</sup> Characterizing a disenfranchised, historically Black area of Gulfport as a “blank slate” signals just how tangential the city sees the residents’ role in the public input and participation process.

### iii. Public Participation and Community Response

Andrés Duany, who was also largely responsible for Miami21 and other form-based codes throughout the country, organized in 2005 what was known as a redevelopment charrette.<sup>177</sup> Rather than engaging community members, the week-long charrette brought together “over 200 hundred

172. Kate Derickson, *After Hurricane Katrina, Devastated Black Neighborhoods Created an “Opportunity” for Redevelopment That Focused on Gentrification*, LSE US CENTRE BLOG (July 7, 2014), [blogs.lse.ac.uk/usappblog/2014/07/07/after-hurricane-katrina-devastated-black-neighborhoods-created-an-opportunity-for-redevelopment-that-focused-on-gentrification](https://blogs.lse.ac.uk/usappblog/2014/07/07/after-hurricane-katrina-devastated-black-neighborhoods-created-an-opportunity-for-redevelopment-that-focused-on-gentrification).

173. Derickson, *supra* note 167, at 893.

174. *Id.* at 892 (“Prior to Katrina, in Harrison County, which includes both Gulfport and Biloxi, 27% of the African American population lived in poverty, whereas only 10% of the white population were poor (U.S. Census Bureau 2000). Median household income for white families was \$38,353 in 2000, compared with \$29,394 for African American families (U.S. Census Bureau 2000). Data from the 2010 census show an even starker divide, with median household income for whites increasing at a rate of 33% since 2000 (to \$50,903), with African American household income increasing at a rate of just 3.6% (to \$31,013; U.S. Census Bureau 2010). Further, neighborhoods associated with low-income and poverty status are also the historic centers of African American life in the region.”).

175. Caray Grace, *Regional Convention and Visitors Bureau Aims to Promote Tourism Along the Coast*, WLOX NEWS (Aug. 25, 2015), <http://www.wlox.com/story/29879014/gulfport-cvb-aims-to-promote-tourism-along-the-coast>.

176. Jonathan Brannan, *Downtown Gulfport Seeing a Development Boom*, WLOX NEWS (Apr. 3, 2018), <http://www.wlox.com/story/37871346/downtown-gulfport-seeing-a-development-boom>.

177. *Redevelopment Master Plan Charrette Book, Gulfport, Mississippi*, *supra* note 158, at 3.

professionals from around the world” and resulted in “redevelopment plans for 11 distinct communities along the Mississippi Gulf Coast.”<sup>178</sup> However, the resulting code and developments demonstrate that low-income, long-term residents’ interests were not valued. Ultimately, the Governor of Mississippi diverted \$600 million of the grant money received from HUD intended to aid in the development of housing, particularly for low-income Mississippians, to redevelop the state port of Gulfport.<sup>179</sup> The Governor of Mississippi also received “a series of waivers for the low-income requirement attached to most funding from the HUD.”<sup>180</sup>

The SmartCode becomes operational in Gulfport at the option of a community where a Community Plan is developed and adopted and “may, by proper planning process, be made mandatory in certain districts of the City.”<sup>181</sup> In areas that have adopted form-based code, the Consolidated Review Committee (“CRC”) approves or denies applications for development after “a minimum evaluation from all applicable regulatory authorities within the City and consensus of “several members of the Committee, including the Community Representative, that the “application complies with the requirements of this Code and of the relevant Official Community Plans.”<sup>182</sup> The Gulfport CRC is unique in that it allows community members to sit on the CRC.<sup>183</sup> Residents in any of these opt-in areas may petition the mayor and city council for representation on the CRC.<sup>184</sup> If petitioned, “the Council member or members representing the ward or wards containing the Community Planning Area shall nominate a resident of the Community Planning Area to act as Community Representative for that Community Planning Area to the CRC, with approval by the Mayor and City Council.”<sup>185</sup> Additionally, “an accurate log of applications submitted for CRC review or hearing shall be made available for routine inspection by the public, and shall include the applicant, subject site, date, and type of review or hearing.”<sup>186</sup>

#### IV. Possible Legal Responses

Transitioning to form-based codes can have inequitable consequences on vulnerable communities. Municipalities, for the most part, are neither considering nor addressing social equity issues at the outset. For example, the Form-Based Codes Institute has provided “best practices of form-based

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178. *Id.*

179. Derickson, *supra* note 167, at 897.

180. *Id.*

181. CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D, § 1.3.3 (adopted Feb. 3, 2007).

182. *Id.* § 1.4.3.

183. *Id.* § 1.4.3 (b), (d).

184. *Id.*

185. *Id.* § 1.4.3(d)

186. *Id.* § 1.4.8.

coding” to determine if a development regulation is a well-crafted form-based code.<sup>187</sup> According to the Institute, the three main questions used to evaluate whether the form-based code fits within the “best practices” guidelines are: (1) “Is the code enforceable?”; (2) “Is the code easy to use?”; and (3) “Will the code produce functional and vital urbanism?”<sup>188</sup> Notably, ensuring social equity is not even tangentially mentioned as a best practice. Nor is the protection of vulnerable populations from adverse consequences caused by the implementation of the code.<sup>189</sup> This is not to say that a social equity analysis is performed in municipalities that follow traditional zoning. Unfortunately, this analysis is hardly ever carried out in zoning decisions.

Consequently, such policies must be challenged, or, at a minimum, protections must be implemented to ensure that these communities are not forced to bear the burden of the code, while the rest of society reaps the benefits. Importantly, although many similarities exist among the form-based codes adopted across the nation, each area has its own history with its own communities, demographics, needs, and desires. Accordingly, there is no one-size-fits-all solution, including in what are appropriate public notice and hearing procedures. Below we explore possible legal challenges and policy solutions are explored that, having been tailored to the unique context, can combat potential inequities brought about through the transition to form-based codes.

#### A. Possible Legal Challenges

The potential legal challenges that are often cited in scholarly articles discussing form-based codes focus on the enforceability of aspects of the code.<sup>190</sup> The four challenges typically addressed are (1) constitutional concerns regarding substantive due process, specifically design code being void for vagueness if it requires a subjective interpretation by the permitting authority;<sup>191</sup> (2) constitutional concerns regarding the potential violation of property owners’ First Amendment right to freedom of speech if the regulations are so detailed that they rise to the level of a restraint

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187. *Identifying & Evaluating Form-Based Codes*, FORM-BASED CODES INST., <https://formbasedcodes.org/identifying-evaluating> (last visited, Jan. 31. 2019).

188. *Id.*

189. *Id.*

190. Robert J. Sitkowski & Joel Russel, 8 NY ZONING L. & PRAC. REP. 7–8 (Nov./Dec. 2007), available at [https://law.pace.edu/sites/default/files/LULC/Conference\\_2013/Applying%20Form%20Based%20Codes%20in%20the%20Real%20World%20-%20Full.pdf](https://law.pace.edu/sites/default/files/LULC/Conference_2013/Applying%20Form%20Based%20Codes%20in%20the%20Real%20World%20-%20Full.pdf); Mark White, *Form Based Codes: Practice & Legal Considerations*, INST. ON PLANNING, ZONING & EMINENT DOMAIN (Nov. 18, 2009), [http://www.planningandlaw.com/uploads/SMW\\_Paper-Presentation.pdf](http://www.planningandlaw.com/uploads/SMW_Paper-Presentation.pdf); Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 J. LAND USE & ENVIRON. LAW 415–20 (2008).

191. This concern is often tied to the general statements that are included in the code regarding design, compatibility, and appearance.

on expression; (3) preemption by controlling state law, for example, some states prohibit aesthetics-based zoning, *viz.* zoning that is principally designed to promote aesthetics; and (4) equal protection and due process concerns regarding “spot zoning.”<sup>192</sup>

Notably, the legal challenges discussed in the literature regarding form-based codes do not address challenging the municipality for the potential discriminatory effects brought about by the code. The Fair Housing Act may provide an avenue for legal recourse regarding such discriminatory effects.<sup>193</sup> Under the Fair Housing Act,<sup>194</sup> affected parties may challenge a practice or policy that “has a discriminatory effect where it actually or predictably results in [1] a disparate impact on a group of persons [2] or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”<sup>195</sup>

Under the 2013 HUD regulation on disparate impact, a three-step burden-shifting analysis is used to determine liability under disparate-impact claims and segregative-effect claims.<sup>196</sup> The first step requires the plaintiff to establish a *prima facie* case that the challenged policy “caused or predictably will cause a discriminatory effect.”<sup>197</sup> To do so, a plaintiff must show that (1) the defendant used a “practice or policy” in making housing-related decisions; (2) a class of persons protected by the FHA was harmed by this policy more than others; and (3) this harm was actually caused by defendant’s policy. If the plaintiff satisfies the requirements of the first step, the burden then shifts to the defendant, who is given the opportunity to prove that its challenged policy is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.”<sup>198</sup> To be legally sufficient, the “justification must be supported by evidence and may not be hypothetical or speculative.”<sup>199</sup> Finally, if the defendant satisfies this burden, the

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192. See sources cited *supra* note 190. Some courts have held it to be problematic if the form-based code weaves a new use into single-use areas because certain tracts of land would be permitted for one use, but similarly situated parcels would not.

193. 24 C.F.R. § 100.500; see also Anthony V. Alfieri, *Black, Poor, and Gone: Civil Rights Law's Inner-City Crisis*, 54 HARV. C.R.-C.L. L. REV. (forthcoming 2019).

194. 24 C.F.R. § 100.500; see also Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 685 (2016); see also Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 709 (2017).

195. 24 C.F.R. § 100.500.

196. *Id.*; see Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, *supra* note 194, at 712.

197. Schwemm & Bradford, *Proving Disparate Impact in Fair Housing Cases*, *supra* note 194, at 693.

198. 24 C.F.R. § 100.500(b).

199. *Id.*

plaintiff may still prevail by proving that the defendant's interest "could be served by another practice with a less discriminatory effect."<sup>200</sup>

Discriminatory-effect claims are data-driven, and the type of claim depends on the facts relevant to the specific municipality regarding the harm suffered by protected classes. In the present case, a plaintiff could make a *prima facie* disparate-impact claim in three different ways. First, by comparing the various racial demographics of the people impacted by up-zoning (especially in the areas with the highest intensity and density) and their displacement (and, in some instances, being priced-out of the entire municipality). Second, such a claim could be shown by demonstrating that evictions or demolitions (caused by up-zoning) have disproportionately affected certain protected classes. Third, a segregative effect claim could be supported by data demonstrating that people from somewhat integrated neighborhoods (for example, a neighborhood that is 70% Black, 25% White, and 5% other), and are being displaced and forced to live in areas with higher rates of segregation (for example, a neighborhood that is 95% Black, 3% White, 2% other).

If the court found that the plaintiff had met its burden in proving a *prima facie* disparate impact case, the municipality could try to demonstrate that the adopted form-based code is necessary "to achieve one or more substantial, legitimate, nondiscriminatory interests."<sup>201</sup> The analysis to determine whether a challenged policy is necessary to achieve such an interest is "very fact intensive" and "must be determined on a case by case basis."<sup>202</sup> That said, ensuring the safety of residents<sup>203</sup> and implementing occupancy limits, whether to preserve property values<sup>204</sup> or a business necessity,<sup>205</sup> have been held to be legitimate interests. However, a business justification of preventing damage to the apartments, reducing ongoing maintenance, and preserving the eventual resale costs for a two-person occupancy limit (which had a disproportionate effect on families with children), was not held to be a legitimate, non-discriminatory policy.<sup>206</sup>

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200. 24 C.F.R. § 100.500(c).

201. 24 C.F.R. § 100.500(c)(2).

202. Schwemm, *Proving Disparate Impact in Fair Housing Cases*, *supra* note 194, at 696 n.49 (citing Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,470–11,471).

203. See *United States v. Hillhaven Corp.*, 960 F. Supp. 259, 263 (D. Utah 1997).

204. See *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739 (9th Cir. 1996).

205. See *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243 (10th Cir. 1995); see also *United States v. Weiss*, 847 F. Supp. 819 (D. Nev. 1994).

206. *Fair Hous. Council of Orange Cty., Inc. v. Ayres*, 855 F. Supp. 315, 319–20 (C.D. Cal. 1994). Another example of a business justification not rebutting a *prima facie* disparate impact case was a housing authority's justifications for vacating and demolishing a low-income housing apartment complex. The housing authority justified its actions because of "a need for low income housing density reduction, a need to eliminate a housing design that contributed to a concentration of criminal activity and drug use, and a lack of



If the municipality meets its burden, then the plaintiff has the opportunity to prove that the municipality could have adopted policies that served its stated legitimate interests but that cause less discriminatory effects on the protected classes.<sup>207</sup> Such examples could include implementing legislation that increases the likelihood of meaningful community participation by, for example, requiring large projects or developments in certain neighborhoods be approved by community boards or requiring developers to adopt community benefits agreements for projects in certain areas. Additionally, policies can be adopted to decrease the likelihood of displacement of protected classes, by, for example, implementing mandatory inclusionary zoning, adopting just-cause eviction regulations, or requiring developers to assess and mitigate the potential displacement risk of their development (such a tool would be similar to an environmental impact assessment, but would be applied to displacement and designed to ensure compliance with the Fair Housing Act instead of mitigating the harm to the environment and ensuring compliance with the relevant environmental statutes).

If the municipalities have not adopted policies to mitigate the potential disparate impact or segregative effect on minority communities, it is possible that they will not be able to demonstrate they could not achieve their purpose in a less discriminatory way. Thus, municipalities that have enacted form-based codes with disproportionate adverse effects on minorities may be found to be in violation of the Fair Housing Act.

### *B. Potential Policy Solutions*

Several legislative initiatives could provide tools to increase the likelihood of meaningful community participation and to decrease the likelihood of displacement of low-income minority residents. Such initiatives include community involvement in the approval process for developments, mandated community benefits agreements, mandatory inclusionary zoning, just cause evictions, moratoriums on development, and the requirement to assess and mitigate the potential displacement risk of new developments.

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funding to make improvements, [which were found to be] pretextual because they were unsupported by evidence" and thus not legitimate, non-discriminatory policy objectives. *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 741 (8th Cir. 2005).

207. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (holding disparate impact liability available under the Fair Housing Act). Prior to *Inclusive Communities* and the 2013 HUD regulation on disparate impact, some courts placed the burden on the defendant, instead of the plaintiff. For example, the Court in *Ayres* noted that, even if the defendant had shown evidence to support their proposed justification, the defendant would have to show "the occupancy restriction is the least restrictive means to achieve defendant's purpose." *Fair Hous. Council*, 855 F. Supp. at 320.



### i. Meaningful Community Participation

As discussed, the opportunity for community input prior to the enactment of the form-based code (e.g., through charrettes), is not sufficient to safeguard meaningful community participation in the decision-making process, especially participation of low-income communities of color. For example, charrettes address a variety of issues from up-zoning to reviewing and providing feedback on design options. Regardless of how thorough and inclusive those processes are, the anticipated and unanticipated consequences of changing the character of entire neighborhoods with a single legislative action need to be checked both in the short term, to ensure the immediate concerns from communities are addressed, and the long term, to ensure the changing needs of communities are being addressed by the code, even years after it has been adopted.

Along the lines of the Gulfport case study, one of the options to ensure meaningful community participation is to add a provision that approval of a community board is necessary for developments of a certain size or scale city-wide in minority neighborhoods, low-income minority neighborhoods, or former Jim Crow neighborhoods. This type of arrangement would allow the community to be in a position to participate in the analysis to determine that a proposal complies with applicable planning and zoning requirements, to propose changes to a development proposal that would reduce negative impacts on the community, and/or to negotiate a community benefits agreement with a developer.

A second option to ensure meaningful community participation is through an ordinance requiring community benefits agreements.<sup>208</sup> These agreements can be tailored to the community's needs and include provisions for, among other things, affordable housing, local hiring preferences, community centers, green spaces, health services, relocation assistance, job training, living wage programs, and, after-school care programs. It is unlikely for these types of agreements to develop organically in areas with form-based codes because of the removal of the community's leverage to negotiate with the developers when they build as a matter of right due to the administrative approval process after the initial up-zoning is imbedded in the code. By passing an ordinance mandating the use of community benefits agreements, the municipality can give this leverage back and enable the community to avoid or mitigate negative impacts.

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208. A community benefits agreement is a binding agreement entered into between the developer of a land project and either the municipality or community organizations, or both, with the goal of providing benefits tailored to the community's needs. For general information on community benefits agreements, see *Community Benefits* 101, *supra* note 86.

In November 2016, Detroit, Michigan,<sup>209</sup> became the first city to pass a city-wide community benefits ordinance.<sup>210</sup> Under this ordinance, all development projects are required to involve community representation and negotiation in the development process.<sup>211</sup> Although a municipal-wide ordinance would safeguard more vulnerable residents, a requirement for community benefits agreements could also be limited to a smaller area, such as census tracts with a certain percentage of minority residents, census tracts with a certain percentage of low-income residents, census tracts that are on high ground (especially relevant in areas that are likely to be severely affected by sea-level rise), or former Jim Crow neighborhoods.

## ii. Anti-Displacement Initiatives

As explained in Part II, transitioning to form-based code practically requires mass up-zoning, which facilitates rapid development since many development projects only require administrative approvals. Rapid development in low-income areas often results in residents being priced out and displaced, otherwise known as gentrification. Anti-displacement initiatives are one way that municipalities can counteract the increased risk of displacement, particularly for vulnerable low-income minority communities.<sup>212</sup>

When designing these policies, it is important to note that although both low-income homeowners and low-income renters are at increased risk of displacement, the strategies necessary to protect these two types of residents differ. Low-income homeowners located in form-based locations that

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209. Although Detroit has not adopted form-based code citywide, the city is in the process of adopting a form-based code for Brush Park. See *Detroit Brush Park Plan and Form-Based Code*, UTILE DESIGN (Jan. 2018), <https://www.utiledesign.com/work/detroit-brush-park-form-based-code>; see also *Development Guidelines*, BRUSH PARK COMMUNITY DEV'T CORP., <http://www.brushparkcdc.org/guidelines> (last visited Jan. 31, 2019). Further, form-based codes may be considered for other areas as well, since the city is in the process of updating the zoning ordinance to "[p]repare a form-based code overlay district or chapter" and "[e]xplore new zoning concepts . . . including allowing a greater mix of compatible land uses, expanding missing housing types, etc." See *City of Detroit Seeks Zoning Ordinance Update*, FORM-BASED CODES INST. (Mar. 21, 2018), <https://formbasedcodes.org/rfps/city-detroit-seeks-zoning-ordinance-update>.

210. Christine Ferretti, *Prop B Wins, Prop A Fails in Detroit Community Benefits*, DETROIT NEWS (Nov. 9, 2016), <https://www.detroitnews.com/story/news/politics/elections/2016/11/08/detroit-community-benefits-results/93507310>.

211. *Id.*

212. For anti-displacement strategies and policy tools, see *All-In Policies Toolkit*, POLICYLINK, <http://allincities.org/toolkit> (last visited Mar. 14, 2019); see also Kalima Rose & Teddy K  -Nam Miller, *Healthy Communities of Opportunity: An Equity Blueprint to Address America's Housing Challenges*, POLICYLINK (2016), [https://www.policylink.org/sites/default/files/HCO\\_Web\\_Only.pdf](https://www.policylink.org/sites/default/files/HCO_Web_Only.pdf). For additional anti-displacement policies, see NAT'L COALITION FOR ASIAN PACIFIC AMERICAN COMMUNITY DEVELOPMENT & COUNCIL FOR NATIVE HAWAIIAN ADVANCEMENT, *ASIAN AMERICAN & PACIFIC ISLANDER ANTI-DISPLACEMENT STRATEGIES* (Aug. 2017), [http://www.nationalcapacd.org/wp-content/uploads/2017/08/anti\\_displacement\\_strategies\\_report.pdf](http://www.nationalcapacd.org/wp-content/uploads/2017/08/anti_displacement_strategies_report.pdf).

have been up-zoned may find themselves at risk of losing their homes. Such homeowners are subject to over-enforcement of the housing code due to over-reporting of violations by speculators/developers or by new residents that have moved into the area.<sup>213</sup> When a residence is found to be in violation of the housing code, the municipality fines the property owner. This fine typically accrues daily and can reach large amounts in a relatively short period of time, at which point the city may place a lien on the property until the fine is paid. Since low-income homeowners are often unable to pay these fines, they are forced to sell their home and, in fact, may not recover a fair value of the house because of the liens placed on the property. To avoid this possibility, a municipality can allocate funds for qualifying homeowners to help repair their homes so that they are in compliance with the housing code. Additionally, the municipality may adopt a mitigation policy to assist with the reduction or elimination of liens for low-income homeowners.

Low-income tenants face different issues. They tend to be the first to get displaced because they have limited protections; they can be evicted, their landlord could decide to not renew their lease agreement, or the landlord can let the residence fall into disrepair and eventually the residence will be condemned, forcing all the tenants to leave.<sup>214</sup>

As a “city of foreign buyers, absentee landlords, and speculative real estate transactions,”<sup>215</sup> many landlords may not prioritize keeping the community together over meeting their profit targets. The West Grove is an example where “the land is mostly owned by absentee landlords, who

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213. For example, low-income homeowners in the West Grove have expressed such concerns to the University of Miami’s School of Law Environmental Justice Clinic during Coconut Grove Ministerial Alliance meetings in mid-2018. (These documents are on file with authors.)

214. Such was the case with South Winds, an apartment complex located in the West Grove with affordable housing units. The landlord allowed the building to fall into disrepair, and the tenants were evicted when the building was condemned and later demolished. Community Meeting of Tenants and the University of Miami Environmental Justice Clinic at South Winds (Sept. 29, 2016) (notes on file with the authors).

215. *A New Path to Affordable Housing Is Coming to Miami*, NEW TROPIC (May 10, 2016), <https://thenewtropic.com/community-land-trust/> (“When [community land trusts] work[], units stay affordable pretty much forever because they can only be sold to other low-income qualifying home buyers at a rate set before the property values start spiraling. Rates of gentrification slow because residents have a place they can afford long-term. Struggling neighborhoods stabilize because they have residents with a sense of ownership that prompts them to invest in the community. In [the City of Miami] of foreign buyers, absentee landlords, and speculative real estate transactions, that’s an unusual degree of longevity—the kind of longevity that created culturally rich neighborhoods like Little Havana and Little Haiti, which are struggling to hold together today.”).

have done little to improve properties.”<sup>216</sup> Increased density and intensity provide more incentive for owners to sell the land to someone who would redevelop or demolish the current structure and build a more profitable development. Given that the majority of municipalities do not have mandatory inclusionary zoning or a requirement for developers to build affordable housing units, tenants are likely to be priced-out of the area and forced to move, often to areas that are further away from their community and municipal resources, including job markets and public transit.

Mandatory inclusionary zoning and just-cause eviction ordinances are two policy initiatives that may help protect low-income renters. Mandatory inclusionary zoning requires that a certain percentage of units in new developments be affordable.<sup>217</sup> Similar to the options for community benefits agreements, mandatory inclusionary zoning can be adopted across a municipality or in targeted areas that most need affordable housing. Mandatory inclusionary zoning may also be expanded to the commercial side, requiring developers to retain a certain percentage or amount of locally owned businesses. Under just cause eviction ordinances, renters can only be evicted for causes that are stipulated in the ordinance, and, thus, renters are protected from landlords unfairly evicting tenants simply because they want to make a profit while the housing market rises.<sup>218</sup>

In addition to advancing policies that are specifically designed to slow displacement, municipalities can also adopt interim controls to slow development while the municipality examines the potential impacts and decides on the best course of action.<sup>219</sup> For example, in 2008, the San Francisco Planning Department adopted measures to specifically address high-risk neighborhoods.<sup>220</sup> One of those neighborhoods was the Mission District, a Hispanic-majority neighborhood where a rise in medium-to-large scale

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216. Jenny Staletovich & Patricia Borns, *West Grove: The Miami Neighborhood That Time Forgot*, MIAAMI HERALD (Feb. 26, 2014), <https://www.miamiherald.com/news/local/in-depth/article1948901.html> (last visited Mar. 14, 2019).

217. See *Inclusionary Zoning*, All-In Cities Policy Toolkit, POLICYLINK, <http://allincities.org/toolkit> (last visited Jan. 31, 2019) (follow “Housing/anti-displacement,” then select “Inclusionary Zoning” under policy tools).

218. See *Just Cause*, All-In Cities Policy Toolkit, POLICYLINK, <http://allincities.org/toolkit> (last visited Jan. 31, 2019) (follow “Housing/anti-displacement,” then select “Just cause” under policy tools).

219. JULIAN CONRAD JUERGENSEMEYER ET AL., *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 9.6, Moratoria and Interim Controls (3d ed. West 2018).

220. *Interim Controls*, CITY & COUNTY OF SAN FRANCISCO PLANNING DEP’T, <http://sf-planning.org/interim-controls> (last visited Jan. 31, 2019); see also *Mission 2015 Interim Controls*, SAN FRANCISCO PLANNING DEP’T (July 9, 2015), [http://default.sfplanning.org/Citywide/Mission2020/mission2020\\_Mission2015\\_InterimControls-070915\\_FINAL.pdf](http://default.sfplanning.org/Citywide/Mission2020/mission2020_Mission2015_InterimControls-070915_FINAL.pdf) (last visited Mar. 14, 2019).

development had driven up the costs of living for residents.<sup>221</sup> San Francisco adopted an interim policy resolution in 2015 specific to the Mission District. Although it did not halt development, it introduced a higher level of scrutiny to approve developments.<sup>222</sup> These efforts culminated in the Mission Action Plan 2020, which was approved by the San Francisco Planning Department in March 2017.<sup>223</sup> In addition to the inclusion of a social impact evaluation requirement, the plan made permanent the development restrictions that the interim controls had placed in effect temporarily.<sup>224</sup>

Instead of interim controls, cities can adopt temporary moratoriums to halt development, while the municipality assesses the impacts of development.<sup>225</sup> For example, in 2007, the city council in Providence, Rhode Island, approved a twelve-month moratorium for their Fox Point neighborhood.<sup>226</sup> The relocation of I-95 had opened up an area of desirable waterfront property in an otherwise historically low-income area. Recognizing that this neighborhood had already experienced substantial displacement due to the construction of the I-95, the city deemed the twelve-month halt on all construction would be an essential time to “step back and look at what we’re doing.”<sup>227</sup>

Municipalities can also expand policies that require developers to mitigate the harm caused by their developments through displacement assessments. Although this policy proposal has not been implemented,<sup>228</sup> it could operate like the requirements of an environmental impact assess-

221. Laura Wenus, *Planning Puts Brakes on SF Mission Development*, MISSION LOCAL (Jan. 15, 2016), <https://missionlocal.org/2016/01/planning-puts-brakes-on-sf-mission-development>.

222. *Executive Summary Mission 2015 Interim Controls*, S.F. PLANNING DEP’T (Aug. 6, 2015), [http://commissions.sfplanning.org/cpcpackets/2015-000988CWP\\_08-06-15.pdf](http://commissions.sfplanning.org/cpcpackets/2015-000988CWP_08-06-15.pdf). Under the interim controls, the larger the project, the higher the requirement for affordable housing units; however, projects that contained 100% affordable housing units and projects that met the targets for the production of low-income housing were exempt from the interim controls. *Id.*

223. *Mission Action Plan 2020, Annual Status Report*, S.F. PLANNING DEP’T (Oct. 2018), [http://default.sfplanning.org/Citywide/Mission2020/MAP2020\\_Status\\_Report\\_2018.pdf](http://default.sfplanning.org/Citywide/Mission2020/MAP2020_Status_Report_2018.pdf).

224. J. K. Dineen, *The Bar May Be Raised Even Higher for New Housing in the Mission*, S.F. CHRON. (Jan. 14, 2016), <https://www.sfchronicle.com/bayarea/article/The-bar-may-be-raised-even-higher-for-new-housing-6757376.php>.

225. See JUERGENSMEYER ET AL., *supra* note 219.

226. Sara Molinaro, *City Council Approves Yearlong Development Moratorium in Fox Point*, BROWN DAILY HERALD (July 16, 2007), <http://www.browndailyherald.com/2007/07/16/city-council-approves-yearlong-development-moratorium-in-fox-point>.

227. *Id.*

228. The City of Portland’s Bureau of Planning and Sustainability has developed a Vulnerability Risk Assessment tool to “identify census tracts within the City of Portland that have higher-than-citywide average populations with characteristics that make resisting displacement more difficult: they are renters rather than homeowners, belong to communities of color, lack college degrees, and have lower incomes.” 2012

ment<sup>229</sup> or a social impact assessment.<sup>230</sup> Accordingly, a displacement assessment<sup>231</sup> would require the developer to undertake a study to identify who is likely to be displaced by the proposed development. This analysis should include whether those that are likely to be displaced belong to a protected class and, if so, whether they are being disproportionately adversely impacted in comparison to non-protected classes. Additionally, developers should analyze whether those that are at risk of displacement are likely to move to a more segregated area (by, for example, being priced out of less segregated areas), if displaced. Then, for the development to be approved, the developer would be required to provide a mitigation plan to minimize the displacement impact and the potential fair-housing concerns. This displacement assessment could be required of all developments in a municipality or could be limited to census tracts, with higher percentages of minority residents, low-income residents, or low-income minority residents on high ground that may be subject to climate gentrification.

## V. Conclusion

Zoning laws were forged in an effort to enhance the well-being of society. When determining a policy's impact, it is good practice to consider its effect on the most vulnerable members of the population that the policy will affect. As part of this analysis, when evaluating zoning policies, it is important to ensure that the goal is not merely to benefit a particular geographic area, but to enhance the well-being of the community that lives there, as well as society-at-large. Benefiting the area and the people may sound like the same goal, but ensuring each objective is met requires a different analysis. Unfortunately, the betterment of a geographic space has often been achieved by sacrificing the welfare of the people that live there by displacing them.

Form-based zoning may be the solution that city planners have been looking for to address urban sprawl and environmental concerns and to promote walkability and beautiful streetscapes. However, the implementation of this livable city should benefit all and not come at the expense of the most at-risk members of society. Urban renewal can and should be implemented to increase the well-being of all of society, which includes

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*Vulnerability Analysis of Gentrification and Displacement Study*, CITY OF PORTLAND'S BUREAU OF PLANNING & SUSTAINABILITY, <https://www.portlandoregon.gov/bps/66107>.

229. U.S. EPA, ENVIRONMENTAL IMPACT ASSESSMENT, <http://www.epa.ie/monitoring/assessment/assessment/eia> (last visited Jan. 9, 2018).

230. Ana Maria Esteves & Frank Vanclay, *Social Impact Assessment*, INTERNATIONAL ASSOCIATION FOR IMPACT ASSESSMENT, <http://www.iaia.org/wiki-details.php?ID=23> (last visited Jan. 9, 2019).

231. Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation*, 82 OR. L. REV. 433 (2003) (laying out the framework for a housing impact assessment regime that is prepared by local government).

the communities that have been historically discriminated against and that have limited political clout—in short, vulnerable communities.

While transitioning to form-based code, we must ensure that we listen to the concerns of the communities that are directly affected by zoning changes and act on them to make sure principles of equality and inclusion are furthered. The exclusion of vulnerable communities from the decision-making process and the lack of understanding regarding public notice requirements for developments in form-based code are evidenced by resident Phillip Murray in the Goulds UCD. He voiced concerns over the administrative approval of Karis Village, an eighty-eight-unit, low-income housing development that primarily serves homeless veterans.<sup>232</sup> The Goulds UCD was adopted in 2006, and Karis Village's site plan was approved in 2016.<sup>233</sup> In 2017, Murray questioned: "[H]ow can an apartment complex (Karis Village) be constructed with little or no community input? . . . [H]ow does Goulds benefit from this project?"<sup>234</sup> If municipalities transitioning to form-based codes incorporate more robust and continuous participation mechanisms and proactively address displacement impacts, these questions may no longer arise.

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232. Phillip Murray, Jr., *Letters to the Editor, Low-Cost Housing*, MIAMI HERALD (Apr. 16, 2017), <https://www.miamiherald.com/opinion/letters-to-the-editor/article144950014.html>. Note that Karis Village was completed in 2018. *Karis Village—Miami, Florida*, GREEN MILLS GROUP, <https://www.greenmillsgroup.com/project/karis-village-miami-dade-county-florida> (last visited Mar. 30, 2019).

233. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES, ch. 33, art. XXXIII(L); Letter from Nathan Kogon, Assistant Director of Dev. Serv. Div., Dep't of Regulatory & Econ. Research, to Jorge Navarro, Karis Village site plan development applicant regarding Approval of Administrative Site Plan Review for Karis Village (Sept. 2, 2016), [http://p2image.miamidade.gov/images/new\\_documents/A2016000015/DAL.pdf](http://p2image.miamidade.gov/images/new_documents/A2016000015/DAL.pdf).

234. See Murray, Jr., *supra* note 232.